

INTRODUCTORY NOTE TO INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT  
DISPUTES (ICSID): SALINI COSTRUTTORI S.P.A. AND ITALSTRADE S.P.A. V.  
THE HASHEMITE KINGDOM OF JORDAN, DECISION ON JURISDICTION, BY DAVID J. A. CAIRNS\*  
(ICSID Case N°. ARB/02/13)  
+Cite as 44 ILM 569 (2005)+

This Decision on Jurisdiction (dated November 29, 2004) is noteworthy for two distinct reasons. Firstly, it is a further statement on the topical issue in investment arbitration of the extent to which an investor might utilise a widely drafted dispute resolution clause in a bilateral investment treaty to pursue contractual claims against the Host State. Secondly, it provides the clearest statement to date of the threshold standard to be applied to determine whether an arbitral tribunal has jurisdiction over treaty claims.

**Facts and Issues:**

The arbitration arose from the Karameh Dam Project in Jordan. The Claimants, two Italian parties forming an unincorporated joint venture, were awarded the construction contract for the Karameh Dam Project. The Contract was signed on 4 November 1999 between the joint venture and 'The Ministry of Water and Irrigation-Jordan Valley Authority'.

The Tribunal found that the Contract was concluded by the Claimants with an entity of the Kingdom of Jordan, but not directly with the Kingdom of Jordan (paragraphs 85-92). The Jordan Valley Authority was an autonomous corporate body, distinct legally and financially from the State of Jordan (paragraph 84).

The work pursuant to the Contract was completed in October 1999. On April 22, 1999 the Claimants submitted to the Engineers a draft final statement setting out the total amount due to them of approximately \$US 28 million. The Engineer rejected all but a very small part of this claim.

There were a series of meetings, including a meeting on February 20, 2000 between the Italian Prime Minister and Minister of Foreign Trade, and the Jordanian Prime Minister and Minister of Water and Irrigation, where it was alleged that the Jordanian Prime Minister agreed that the matter would be referred to arbitration if an amicable settlement were not possible.

On September 12, 2000 the Respondent informed the Claimants that it was not prepared to make any further payments in excess of the amount determined by the Engineer. The Claimants alleged that at this time a dispute arose as to the amount of the credits payable from the Respondent to the Claimants, and of the investment loss by the failure to repay those credits.

The Request for Arbitration relied upon the 'Agreement between the Government of the Italian Republic and the Government of the Hashemite Kingdom of Jordan on the Promotion and Protection of Investments' of July 21, 1999 (entering into force on January 17, 2000, hereafter "*Italy-Jordan BIT*"). The dispute resolution provision (Article 9) of the Italy-Jordan BIT provided as follows:

*"Article 9 – Settlement of Disputes between Investors and Contracting Parties*

- 1. Any disputes which may arise between one of the Contracting Parties and the investors of the other Contracting Party on investments, including disputes relating to the amount of compensation, shall be settled amicably, as far as possible.*
- 2. In case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment Agreement shall apply.*
- 3. In the event that such dispute cannot be settled amicably within six months from the date of the written application for settlement, the investor in question may submit at his choice the dispute for settlement to:*

\* David J. A. Cairns specializes in international commercial and investment arbitration with B. Cremades y Asociados in Madrid, and is an Adjunct Professor with University Carlos III of Madrid.

- (a) *The Contracting Party's court having territorial jurisdiction;*  
 (b) *To the International Center for the Settlement of Investment Disputes (the Center);*

As regards Article 9(2), it is important to note that Clause 67.3 of the Contract provided that disputes arising from determinations of the Engineer "shall be finally settled by reference to the competent court of law in the Kingdom, unless both parties shall agree that the dispute be referred to arbitration."

The Claimants alleged that in failing to honour its commitments under the Contract the Respondent State has breached various obligations under the Italy-Jordan BIT including the obligation to ensure that the investment was not subject to unjustified or discriminatory measures, received 'just and fair treatment', and "continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed in regard to each specific investor" (Article 2(4)) as well as obligations not to limit ownership, possession or control of or to expropriate the investment. The Claimants also relied on the most-favoured-nation clause (Article 3(1)) and clauses establishing an obligation to respect undertakings to investors (particularly Article 2(4), referred to above) – the so-called 'umbrella clauses' – to establish jurisdiction over contractual claims.

The Arbitral Tribunal (paragraph 69) identified six legal issues for determination in its jurisdictional award: (i) whether the phrase 'a dispute concerning an investment' in Article 9(1) encompasses claims of a contractual character, (ii) the effect of the forum selection clause in the Contract; (iii) the effect of the umbrella clauses, (iv) the effect of the most-favoured-nation clause; (v) whether an arbitral tribunal at the jurisdictional phase can dismiss treaty claims 'as not having been properly argued', and (vi) whether the Tribunal had jurisdiction *ratione temporis*.

#### Contractual Claims:

Contractual claims, the effect of contractual forum selection clauses, and umbrella clauses raise a cluster of significant issues. These issues were considered in the recent (and in important respects inconsistent) awards in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (Decision on Jurisdiction) 42 I.L.M. 1285 (2003), and *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case N° Arb/02/6) (on these awards see Stanimir A. Alexandrov 'Breaches of Contract and Breaches of Treaty – The Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS v Pakistan* and *SGS v Philippines*' 5. J. of World Investment and Trade 555-577 (2004)).

The Arbitral Tribunal in the present case was spared the need to resolve the contested issues raised by these cases by its factual finding that a state entity (the Jordan Valley Authority) and not the State of Jordan itself was a party to the Contract with the investor. This distinguished the present case from both *SGS v Pakistan* and *SGS v Philippines* (where the investor had contracted directly with the Host State and not with a state entity). The Tribunal went on to indicate that "one may doubt whether [the dispute resolution provisions of the Italy-Jordan BIT] also cover breaches of a contract concluded in name between an investor and an entity other than a State Party" (paragraph 100, referring to *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Kingdom of Morocco* 42 I.L.M. 606-624 (2003) (English translation, with introductory note by E. Gaillard and Y. Banifatemi), and *Consortium RFCC v Kingdom of Morocco* (ICSID Case N° ARB 00/06, Award of December 22, 2003), but did not need to decide this issue because the Article 9(2) of the Italy-Jordan BIT "makes it obligatory to refer such disputes to the dispute settlement mechanism provided for in the [Contract]" (paragraph 101). The mandatory wording of Article 9(2) and the finding that the Contract was entered into with 'an entity of the Contracting Parties' and not the Kingdom of Jordan, meant that contract claims had to be decided in accordance with Article 67 of the Contract.

The Arbitral Tribunal dealt with the umbrella clause issue by distinguishing the clause of the Italy-Jordan BIT from the clauses considered in *SGS v Pakistan* and *SGS v Philippines*. Under the Italy-Jordan BIT the State Parties "did not commit itself to 'observe' any 'obligation' it had previously assumed with regard to specific investments of investors of the other contracting Party as did the Philippines. It did not even guarantee the observation of commitments it had entered into with respect to the investments of the other Contracting Parties as did Pakistan. It only committed itself to create and maintain a legal framework apt to guarantee the compliance of all undertakings assumed with regard to each specific investor." (paragraph 126). In effect, therefore, the Arbitral Tribunal decided that, properly interpreted, there was no umbrella clause.

The decisions in respect of the forum selection and the umbrella clauses serve as a warning of the dangers of generalisation or statements of principle on these issues; in each case the wording and proper interpretation of the treaty will be the decisive factors. However, in respect of contractual claims, this Decision on Jurisdiction suggests a sharp distinction is emerging between cases where the investor relies on a contract with the Host State itself and where the contract is with a state entity. In respect of the second category, it now seems clear that contractual claims against a state entity cannot be pursued against the Host State directly pursuant to an investment treaty.

#### Most-Favoured-Nation Clause and Jurisdiction *Ratione Temporis*:

The Claimant also sought to rely on the most-favoured-nation clause in the Italy-Jordan BIT in order to take advantage of the dispute resolution provisions of the Jordan-United Kingdom BIT and Jordan-United States BIT, which (it was alleged) entitled an investor to refer to ICSID arbitration disputes arising from construction contracts. The Arbitral Tribunal rejected the application of the most-favoured-nation clause to dispute resolution on the basis that there was no evidence that it was the common intention of the State Parties that the most-favoured-nation clause would apply to dispute resolution, and in fact Article 9(2) of the Italy-Jordan BIT indicated an intention to exclude contractual disputes between an investor and an entity of a State Party from ICSID arbitration (paragraph 118). In doing so the Arbitral Tribunal indicated it "shares the concerns that have been expressed in numerous quarters regarding the application of the most-favoured clause to dispute resolution in *Maffezini v Spain*" (paragraph 115, referring to *Emilio Agustín Maffezini v The Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction dated January 25, 2000). The Decision on Jurisdiction therefore favours a prudent approach to the application of most-favoured-nation clauses based on the examination of the common intention of the State Parties, and should dampen the expectations of investors seeking to take advantage of the dispute resolution provisions of BITs entered into by the Host State with countries other than their own.

The *ratione temporis* issue was simplified by the rejection of the contractual claims, and certain of the treaty claims. The remaining treaty claims related to alleged breaches occurring after the Italy-Jordan BIT entered into force (paragraphs 167-178).

#### Treaty Claims:

This Decision on Jurisdiction is novel and significant in its treatment of the Treaty claims (paragraphs 131-166). The Respondent submitted, and the Arbitral Tribunal accepted (in respect of some treaty claims), that the Claimants' request to arbitrate disclosed no arguable case of violation of the Italy-Jordan BIT.

The Arbitral Tribunal applied jurisprudence of the International Court of Justice (particularly *Oil Platforms (Islamic Republic of Iran v United States of America)*, I.C.J. Reports 1996, II, p. 810, paragraphs 16-17), which had already been referred to in certain ICSID awards (most notably *SGS v Philippines*). On the basis of this jurisprudence, the Tribunal posed itself the question of "whether the facts alleged by the Claimants in this case, if established, are capable of coming within those provisions of the BIT which have been invoked." (paragraph 151).

The Claimants had alleged that the breaches of contract also constituted a breach of Article 2(3) of the Italy-Jordan BIT guaranteeing 'just and fair treatment' and protection from 'unjustified or discriminatory measures'. The Decision on Jurisdiction emphasises that the Claimants "explain no where how the alleged facts could constitute not only a breach of the contract, but also a breach of Article 2(3) of the BIT. They only quote that article and assert that it has been violated. They present no argument, and no evidence whatsoever, to sustain their treaty claim, and they do not show that the alleged facts are capable of falling within the provisions of Article 2(3). The Tribunal, therefore, has no jurisdiction to consider this first treaty claim." (paragraph 163). Accordingly, only the remaining treaty claims were permitted to proceed to a hearing on the merits.

The approach to treaty claims in this Decision on Jurisdiction requires two comments. Firstly, the threshold standard applied in this Decision for jurisdiction over treaty claims is firmly rooted in public international law and the interpretation of treaties. In international commercial arbitration between private parties it is not the practice of arbitral tribunals as a question of jurisdiction to rule whether the claimant's allegations, if proved, would amount to breach of contract. Questions of breach of contract are invariably considered as belonging to the merits, as they inevitably lead the tribunal into contested factual questions. The mixed nature of investment arbitration, with the role of public international law, means that a different standard will be applied to questions of jurisdiction than in international commercial arbitration.

This leads to the second comment. The Claimants (perhaps influenced by established practice in international commercial arbitration between private parties) took the position that they were "not required, at the jurisdictional stage, to provide further evidence of the soundness of those claims" (paragraph 135). This position made the task of applying the public international law threshold test for jurisdiction relatively straightforward. However, claimants in future cases are likely to respond to the possible application of this threshold test at the jurisdictional phase by taking care to particularise the factual basis of their treaty claims and the alleged breaches. In such circumstances, the threshold test derived from public international law might prove difficult to apply without a willingness to enter further into the merits and contested factual questions than has previously been accepted at the jurisdictional phase.

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID):  
SALINI COSTRUTTORI S.P.A. AND ITALSTRADE S.P.A. V. THE HASHEMITE KINGDOM OF  
JORDAN, ICSID CASE NO. ARB 02/13, DECISION ON JURISDICTION\*

[November 29, 2004]

+Cite as 44 ILM 573 (2005)+

INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES  
WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

Salini Costruttori S.p.A. and Italstrade S.p.A.  
(CLAIMANTS)

and

The Hashemite Kingdom of Jordan  
(RESPONDENT)

(ICSID Case No. ARB/02/13)

DECISION ON JURISDICTION

*Members of the Tribunal*  
H.E. Judge Gilbert Guillaume  
Mr. Bernardo Cremades  
Sir Ian Sinclair

*Secretary of the Tribunal*  
Mr. Ucheora Onwuamaegbu

*Representing the Claimants*  
Professor Antonio Crivellaro  
Mr. Andrea Carlevaris  
Mr. Lorenzo Melchionda  
Mr. Claudio Lautizi

*Representing the Respondent*  
Mr. Aiman Odeh  
Professor Philippe Sands  
Ms. Nadine Khamis

I. PROCEDURAL BACKGROUND

1. On 12 August 2002, the International Center for Settlement of Investment Disputes ("ICSID" or "the Center") received from Salini Costruttori S.P.A. and Italstrade S.P.A., both companies incorporated under the laws of Italy (the "Claimants") a request for arbitration, dated 8 August 2002, against the Hashemite Kingdom of Jordan ("Jordan" or the "Respondent"). On 15 August 2002, the Center, in accordance with Rule 5 of the ICSID Rules of procedure for the institution of conciliation and arbitration proceedings ("the Institution Rules") acknowledged receipt of the request and on the same day transmitted a copy to the Hashemite Kingdom of Jordan and to its Embassy in Washington, D.C.

\* This document was reproduced and reformatted from the text appearing at the ICSID's website (visited April 29, 2005)  
<http://www.worldbank.org/icsid/case/salini-decision.pdf>

2. On 30 September 2002, the Claimants filed a further submission concerning the Center's jurisdiction over the dispute. The request was further supplemented by a letter of the Claimants dated 28 October 2002 responding to a letter from the Center of 24 October 2002. The Center also received several letters from the Secretary General of the Jordan Valley Authority, Ministry of Water and Irrigation, Jordan, urging that the request for arbitration not be registered for jurisdictional reasons. The Claimants also wrote to the Center in response to those letters.
3. The request, as supplemented by the Claimants' letters of 30 September 2002, 28 October 2002 and 4 November 2002, was registered by the Center on 7 November 2002, pursuant to Article 36(3) of the ICSID Convention. On the same day, the Secretary General of ICSID, in accordance with Rule 7 of the Institution Rules, notified the Parties of the registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.
4. Following that registration and that invitation, the Respondent accepted a proposal by the Claimants that the Arbitral Tribunal be composed of three arbitrators, one appointed by each Party, and the third appointed by the two Party-appointed arbitrators.
5. The Claimants, by a letter of 20 January 2003, appointed Mr. Bernardo Cremades, a Spanish national, as arbitrator and the Respondent appointed Mr. Eric Schwartz, a national of the United States of America, as arbitrator. Counsel for the Claimants objected to the appointment of Mr. Schwartz, citing as a reason other cases involving one of the Claimants in which Mr. Schwartz had acted as opposing Counsel and noting that the appointment will be challenged if Mr. Schwartz were to accept. Both Mr. Cremades and Mr. Schwartz accepted their appointments.
6. Both Party-appointed arbitrators having failed to appoint a presiding arbitrator by the 14 February 2003 deadline agreed by the parties and more than 90 days having elapsed since the registration of the request for arbitration, the Claimants, by letter of 19 February 2003, requested the Chairman of the ICSID Administrative Council to appoint the presiding arbitrator, pursuant to Article 38 of the ICSID Convention.
7. On 10 March 2003, the Acting Chairman of the ICSID Administrative Council, in consultation with the Parties, appointed H.E. Judge Gilbert Guillaume of France as the presiding arbitrator and Judge Guillaume accepted his appointment.
8. All three arbitrators having accepted their appointments, the Center, by a letter of 18 March 2003, informed the Parties of the constitution of the Tribunal, consisting of H.E. Judge Gilbert Guillaume, Mr. Bernardo Cremades and Mr. Eric Schwartz, and that the proceeding was deemed to have commenced on that day, pursuant to Rule 6(1) of the ICSID Arbitration Rules.
9. The first session of the Tribunal was scheduled to be held on 12 May 2003, but, on 8 April 2003, the Claimants filed a proposal for the disqualification of Mr. Eric Schwartz as an arbitrator pursuant to Article 57 of the ICSID Convention. The remainder of the proceeding was, therefore, pursuant to ICSID Arbitration Rule 9(6), suspended pending a decision on the proposal. Mr. Schwartz subsequently resigned his appointment and, on 28 May 2003, the Respondent appointed Sir Ian Sinclair, a national of the United Kingdom, to fill the vacancy created by the resignation of Mr. Schwartz. Upon the acceptance of the appointment by Sir Ian on 3 June 2003, the Tribunal was reconstituted and the proceeding was deemed to have recommenced on that date pursuant to ICSID Arbitration Rule 12.
10. The reconstituted Tribunal was presented with, and adopted, the agreement reached by the Parties on several issues of procedure at an informal meeting held in Paris on 12 May 2003. The Parties had agreed that the issue of jurisdiction should be determined first. The schedule for the submission of written pleadings had also been agreed by the Parties.
11. The written submissions of the Parties were filed in a timely manner as agreed by the Parties. The Respondent's Memorial on jurisdiction was followed by the Claimants' Counter Memorial on Jurisdiction, followed by the respondent's Reply and then the Claimants' Rejoinder.
12. In accordance with a schedule agreed after several exchanges of correspondence between the Tribunal and the Parties, and in consultation with the Centre, the hearing on jurisdiction was held at the offices of the World Bank in Paris, on 1 and 2 April 2004. The Parties were represented by their respective counsel who made presentations to the Tribunal. Present at the hearing were Members of the Tribunal: H.E. Judge Gilbert Guillaume,

President, Mr. Bernardo Cremades and Sir Ian Sinclair, QC; Secretary to the Tribunal: Mr. Ucheora O. Onwuamaegbu of the ICSID Secretariat; Representatives of the Claimants: Professor Antonio Crivellaro (Counsel), Mr. Andrea Carlevaris (Counsel), Mr. Lorenzo Melchionda (Counsel), and Mr. Claudio Lautizi (Engineer, Salini Costruttori S.p.A.); and Representatives of the Respondent: Mr. Aiman Odeh (Counsel), Professor Philippe Sands, QC (Counsel), Ms. Nadine Khamis (Counsel) and an official of the Jordanian Embassy in Paris.

13. Following the hearing, Members of the Tribunal deliberated by various means of communication, including a meeting for deliberations in Paris on 24 May 2004.

## II. SUBMISSIONS AND ARGUMENTS OF THE PARTIES

14. In their request for arbitration dated 8 August 2002, Salini Costruttori S.p.A (Italy) and Italstrade S.p.A. (Italy) state that in 1992, the Government of Jordan issued an international invitation to submit tenders for the award of a public works contract called "Construction of the Karameh Dam Project". The companies submitted their best offer in May 1993, and were awarded the Contract which was signed on 4 November 1993 between the Joint Venture, made up of the two companies, (as Contractor) and the Ministry of Water and Irrigation-Jordan Valley Authority (as Employer). The work was completed in October 1997, as certified by the Engineer appointed by the Respondent.

15. On 22 April 1999, the Claimants submitted to the Engineer and to the Respondent a draft final statement setting out the total outstanding amount claimed to be due to them, equivalent to approximately US\$ 28 million, net of interest and financing charges. On 25 May 1999, the Engineer informed the Contractor that, according to its evaluations, it was only entitled to 33,759.54 Jordanian Dinars (US\$49,140).

16. The Claimants subsequently attempted to demonstrate the correctness of their evaluations in a series of meetings and exchanges of correspondence. In particular, on 20 February 2000, "a meeting took place in Amman between the Italian Prime Minister and Minister for Foreign Trade, on the one side, and the Jordanian Prime Minister and Minister of Water and Irrigation on the other side". According to the Claimants, on that occasion "the Jordanian Prime Minister expressly agreed (i) to endeavour to reach agreement with the Claimants on the determination of the amount still owing to them; and (ii) failing such agreement, to refer any outstanding matter for final settlement to arbitration" as contemplated by clause 67.3 of the General Conditions of the Contract.

17. However, on 12 September 2000, the Claimants received a letter from the Secretary General of the Ministry of Water and Irrigation stating, *inter alia*, that "the Respondent was not prepared to make any payment in excess of the amount of 33,759.54 Jordanian Dinars (JD) determined by the Engineer". The Claimants state that, as a consequence of this denial and of the impossibility of reaching any agreement, "a dispute has arisen between 2000 and 2001 as to the amount of the credits payable from the Respondent to the Claimants and of the investment loss by the failure to repay those credits". In view of such dispute the Claimants, by letter of 12 December 2001, advised the Respondent that it was in breach of the Bilateral Investment Treaty (BIT) concluded between Italy and Jordan and that "if no amicable settlement was reached, they would submit the dispute to ICSID for final settlement, pursuant to Article 9(3)(b) of the BIT".

18. As regards the issue of ICSID jurisdiction in the present dispute, the Claimants note that, under Article 25(1) of the ICSID Convention, the prerequisites for such jurisdiction are that:

- "(i) the dispute is of a legal nature;
- (ii) the dispute arises directly out of an investment;
- (iii) the parties to the dispute are a Contracting State and a national or nationals of another Contracting State;
- (iv) the Parties have expressed in writing their consent to submit the dispute to ICSID".

19. They contend that all those conditions are fulfilled. With respect to point (iv) in particular, they recall that, on 21 July 1999, Italy and Jordan signed a bilateral investment treaty (BIT) which entered into force on 17 January 2000. They stress that paragraph 3 of Article 9 of that treaty "grants Italian investors in Jordan the right at their choice, to submit any investment dispute with the Kingdom of Jordan either to the Jordan courts or to ICSID".

They submit that "clause 67.3 of the Contract is superseded by Article 9 of the BIT... The right of choice attributed to the investor under Article 9(3) of the BIT applies regardless of any dispute settlement clause agreed in the investment agreement. This conclusion is not impaired by Article 9(2) of the BIT", which "only relates to procedures for amicable settlement of disputes".

20. Moreover, according to the Claimants, "even if the dispute settlement mechanism under the Contract remained applicable and prevailing upon the BIT option, it could resolve no more than contractual claims. Here, however, the Claimants also claim that the Respondent has breached Claimants' rights under the BIT". "The dispute arises out of a series of acts and omissions of the Government of Jordan", both before and after the entry into force of the BIT which must be considered as a whole.

21. In the alternative, the Claimants submit that they have, in any event, the right to submit the dispute to ICSID pursuant to:

- (i) Article 3 of the BIT, which contains the most-favoured nation clause and by virtue thereof,
- (ii) Article IX of the Jordan - United States of America Bilateral Investment Treaty which gives to US investors in Jordan "the right to submit investment disputes with the host State to ICSID regardless of any clause in the investment agreement providing for a different dispute settlement mechanism."

22. On these bases of jurisdiction, the Claimants contend that the Respondent has failed to honour its commitments under the Contract. It adds that the acts and omissions of the Respondent constitute a violation of several provisions of the BIT including the following:

- "(a) Respondent is in breach of its obligation under Article 2(3) to "ensure that the management, use, enjoyment of the investment [...] shall in no way be subject to unjustified or discriminatory measures".
- (b) Respondent is in breach of its obligation under Article 2(3) "to ensure just and fair treatment of the investments of investors of the other Contracting Party".
- (c) Respondent is in breach of its obligation under Article 2(4) "to guarantee to investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor".
- (d) Respondent's acts and omissions constitute "measure(s) which might limit the right of ownership, possession, control or enjoyment of the investment" of the Claimants in Jordan, measures that are prohibited by Article 5(1) of the BIT.
- (e) Respondent's acts and omissions constitute measures that have an effect equivalent to expropriation under Article 5(2). Respondent's failure to honour the Contract has destroyed the value of the Claimants' investment. The Contract is the principal asset of the Claimants. The serious failure to observe its terms continuing after the entry into force of the BIT since January 2000 onwards, is tantamount to an expropriation of the Claimants' investment under Article 5(2) of the BIT for which compensation is due."

In conclusion, the Claimants seek an arbitral award:

- "1. declaring that the Respondent has breached the BIT and the investment Contract in the respects, *inter alia*, referred to above;
2. ordering the Respondent to pay to the Claimants US\$ 28,000,000.00, or the more precise amount to be determined during the proceedings, plus interest and financing damages in an amount to be quantified;
3. ordering the Respondent to bear all costs of the present arbitration and to reimburse the Claimants of all legal and arbitration expenses incurred and to be incurred for the conduct of the present proceedings."

\*

23. On 8 September 2003, Jordan filed its objections to jurisdiction. It stressed that "the essential basis of the Claimants' Request concerns a contractual dispute". It contends that "Jordan and Italy agreed in their bilateral

investment treaty that such contractual claims were governed by the dispute settlement provisions of the Contract, which did not provide for ICSID arbitration". It adds that "the Claimants cannot avail themselves of more advantageous dispute settlement provisions in other bilateral investment treaties, and have disclosed no arguable case as to the violation of any provisions of the Bilateral Treaty". As a consequence, "the tribunal should declare that it does not have jurisdiction".

24. More specifically, Jordan recalls that, under the Contract, the Employer was required to make to the Claimants an advance payment equal to 10% of the Contract sum. Under clause 60 of the General Conditions, the Claimants were then to submit to the Engineer a monthly statement indicating the amount which they considered themselves to be entitled to for the works executed by them each preceding month. The function of the Engineer was to verify these statements and to certify to the Employer the amount of the payment which was due. The Engineer, according to Jordan, issued a total of 47 interim certificates for the payment of 51 monthly statements for a total amount of 52,465,395.778 JD.

25. Between 1995 and 1999, the Claimants submitted to the Engineer a number of claims for additional payments. The great majority of those claims were rejected. In its memorial, Jordan identifies 20 claims of that type. It adds that, in November 1998, one year after the date of the substantial completion of the project, the Claimants submitted further claims which were also rejected. In total, according to Jordan, the Engineer rejected claims which amounted to 11,721,865.007 JD (approximately US\$17 million).

26. On 22 April, 1999, the Claimants submitted the draft Final Statement provided for in clause 60.6 of the General Conditions. In this statement, the Claimants calculated the total value of their claims at the time of their submission to the Engineer as amounting to approximately 11,4 million JD (US\$ 17 million). But they added to this figure a financing cost for the period between the date of submission of each claim until 22 April, 1999. They also increased their claims no 13(b) and 13(c). As a consequence, the claims rose to 20,855,424.823 JD (approximately US\$ 28 million).

27. From 1997, the Claimants, according to Jordan, initiated a series of contacts with various Jordanian officials alleging that they were entitled to certain additional amounts from the Employer and requesting that their claims be submitted to arbitration as contemplated by clause 67.3 of the General Conditions of the Contract. On 20 February 2000, a meeting took place in Jordan between the Jordanian Prime Minister and the Minister of Water and Irrigation on the one side, and the Italian Prime Minister and the Minister of Foreign Trade on the other. Jordan states that, contrary to what the Claimants assert, there was during this meeting no agreement to refer the matter to arbitration in case it would not be possible to reach an amicable settlement. The question was only to be submitted to the Council of Ministers which, according to Jordan, finally decided that the Jordanian Courts should continue to be the competent authority to hear any dispute between the Parties.

28. Jordan stresses that the essential basis of the claim rests on two factual allegations relating to the performance of the Contract:

- (a) that Jordan wrongfully refused to pay the Claimants the amount of 20,855,424.823JD (approximately US\$28 million);
- (b) that Jordan refused to honour the Jordanian Prime Minister's undertaking to conciliate or arbitrate the dispute between the Parties.

29. With respect to jurisdiction, Jordan accordingly submits that:

- "(i) the essential basis of the dispute brought by the Claimants to this ICSID Arbitral Tribunal are alleged breaches of the Contract by the Engineer and/or the Employer...
- (ii) those alleged breaches of the Contract give rise to a dispute 'between the Employer and the Contractor in connection with, or arising out of, the Contract' within the meaning of Clause 67 of the General Conditions of the Contract;
- (iii) assuming that the Claimants' rights under the contract are an "investment" then the contract is an "investment agreement" within the meaning of Articles 1(8) and 9(2) of the Bilateral Treaty;

- (iv) Article 9(2) of the Bilateral Treaty is applicable and is not limited to procedures for the amicable settlement of disputes;
- (v) Article 9(2) of the Bilateral Treaty requires that the dispute be settled in accordance with the procedure foreseen by Clause 67 of the General Conditions of the Contract;
- (vi) accordingly the Claimants cannot rely on Article 9(3)(b) of Bilateral Treaty as the basis for ICSID's jurisdiction;
- (vii) the Claimants cannot rely on Article 3(1) of the Bilateral Treaty ("Most Favoured Nation" clause) to avail themselves of more advantageous dispute settlement provisions in bilateral investment treaties between Jordan and third states; and
- (viii) the Claimants' Request discloses no arguable case that there has been any conduct by Jordan which could give rise to any violation of the Bilateral Treaty."

30. Further, or in the alternative, Jordan contends that, if the Arbitral Tribunal finds that the Claimants' rights under the Contract are not an "investment" within the meaning of Article 1(1) of the Bilateral Treaty, then (a) the Contract is not an "investment agreement" within the meaning of Article 1(8) of the Bilateral Treaty, and (b) the dispute does not arise "directly out of an investment", and (c) the Tribunal has no jurisdiction under Article 25(1) of the ICSID Convention.

31. Accordingly, on the basis of the evidence and the legal arguments presented in its Memorial, Jordan requests the Tribunal to adjudge and declare that:

- (i) Jordan has not given its "consent in writing" to submit the present dispute to ICSID, either under Article 9 of the Bilateral Treaty or under any other written instrument, and that the Tribunal does not have jurisdiction to entertain the claim; and/or
- (ii) further or alternatively, that the Claimants have shown no *prima facie* conduct of or attributable to Jordan which could give rise to a violation of the Bilateral Treaty and that accordingly the Tribunal is without jurisdiction; and
- (iii) the Request by the Claimants be dismissed; and
- (iv) the Claimants be required to pay Jordan's costs in this matter and the costs of the Arbitral Tribunal.

\*

32. On 10 December 2003, the Claimants presented their first submission on jurisdiction. They quote the provisions of Article 25, paragraph 1, of the Washington Convention and again stress that the four jurisdictional requirements set forth in that Article are met in the present case. First, according to the Claimants, it is not disputed that the dispute is a legal one. Second, this dispute arose directly out of the investment made by the Claimants under the Construction Contract. Third, the dispute arose between a Contracting State, Jordan, and nationals of another contracting State, Italy. In fact, this Contract was directly concluded with the Ministry of Water and Irrigation. "Neither the Ministry nor its subdivision, the Jordan Valley Authority, can be defined as "entities"; "agencies" or "instrumentalities" of the Kingdom of Jordan". They are "organs of the Government". Consequently, "the party to the Contract and to the present arbitration as proper Respondent is the Kingdom of Jordan".

33. Moreover, the Claimants submit that the fourth requirement set forth in Article 25 of the Convention — i.e., the Parties' written consent to submit the dispute to ICSID — is also met. In this respect, they stress that the forum selection clause in the Contract does not prevent the Claimants from referring the dispute to ICSID arbitration under the BIT. They rely in this respect on a legal opinion prepared by Professor C. M. Schreuer, which they attach to their submission.

34. The Claimants submit that Article 9(2) of the BIT does not constitute an obstacle to refer the present dispute to ICSID arbitration. They reaffirm that this Article applies only to procedures of amicable settlement. They consider that it only covers disputes arising from investment agreements entered into with an "entity" of the State and not with the State itself. They contend that "the only effect that one could infer from Article 9(2) would be to preclude the exclusivity of the dispute settlement mechanism of Article 9(3), but not its applicability". Moreover,

"even if Article 9(2) was regarded as a limit to ICSID jurisdiction, the limit would only concern claims based under the Contract and not claims based on the BIT".

35. The Claimants add that it is up to them and not to the Respondent "to identify and characterise the claims for the purpose of jurisdiction". In fact, "although the first head of the Claimants' claims is represented by the Respondent's failure to honour its obligations under the Contract, the Claimants have also unequivocally alleged the existence of several violations of specific provisions of the BIT". These claims have been described "with a more than sufficient degree of completeness for the purposes of establishing jurisdiction". It is only at the merits stage of the dispute that the Tribunal will have to decide whether the Claimants' characterisation of their claims is correct.

36. On a subsidiary basis, the Claimants stress that Article 3 of the BIT entitles Italian investors in Jordan to a treatment no less favourable than the treatment accorded to investors of any third State. It adds that procedural provisions of a BIT are an essential part of the protection of the rights of the investors. As a consequence, the Claimants have the right to submit their disputes to ICSID, if they so wish, in the same way as British and American investors may do under Article 6 of the Jordan-United Kingdom BIT and Article IX of the Jordan-United States BIT. In this respect, the Claimants invoke an ICSID precedent of 25 January 2000, *Maffezini v. Spain* (ICSID Case No. Arb/97/7). They reject the arguments drawn by the Respondent from the date of entry into force of the Jordan-United States BIT and from Article 9, paragraph 2, of the Jordan-Italy BIT and they underline that ICSID arbitration does not conflict with any public policy consideration for Jordan.

37. The Claimants also submit that the Respondent's consent to ICSID jurisdiction extends to Claimants' contractual claims. According to Article 9, paragraph 3, of the BIT, the Tribunal has jurisdiction to settle any dispute "on investments". Moreover, under Articles 2(4), 2(5) and 11(2) of the BIT, Jordan is under an obligation to guarantee compliance with investment contracts within the framework of the Treaty. Under such umbrella clauses, "a violation of the contract becomes a violation of the BIT".

38. According to the Claimants, the fact that the BIT entered into force on 17 January 2000 is not an obstacle to ICSID's jurisdiction over the present claims. In fact, there is no temporal limitation in the applicability of Article 9 of the BIT. Moreover, the Respondent's violation of its obligations under the BIT occurred after its entry into force. In any event, "the Respondent's breaches of its obligations are continuing and/or complex breaches that continue to date". Finally, Jordan's acts prior to the entry into force of the BIT defeated the object and purpose of the BIT.

39. The Claimants conclude that written consent was given by the Parties to submit the dispute to ICSID, in so far as:

- (a) the Respondent's consent was irrevocably offered in the BIT [Article 9(3)], and the Claimants have accepted the offer when that consent was in force;
- (b) Article 9(2) of the BIT is here inapplicable and therefore does not exclude or diminish the validity of that mutual consent; alternatively, that mutual consent can be established by operation of the MFN clause contained in Article 3 of the BIT.
- (c) by virtue of the broad language of Article 9 of the BIT and by operation of the umbrella clauses contained in the BIT, the Respondent's consent, as accepted by the Claimants, includes both the disputes or claims based upon violations of the BIT and the disputes or claims based upon violations of the Contract."

\*

40. On 26 January 2004, Jordan filed its Reply in which it "maintains in entirety the arguments put forward in its Memorial" and "notes that the Claimants have purposely avoided addressing the factual aspects of this case". It considers that the opinion prepared by Professor Schreuer should be treated as part of the Claimants' legal Submission. It recalls that "Jordan has not objected to the jurisdiction of the Tribunal on the grounds that the dispute is not "legal" or that it does not involve a contracting State and a national of another contracting State. Similarly Jordan has not objected to jurisdiction on the grounds that the dispute does not arise out of an investment (although it has reserved its position on the matter)".

41. However, the Respondent stresses that "Article 9(3) does not provide for ICSID jurisdiction over contractual disputes under the Bilateral Treaty". It adds that "Articles 2(4), 2(5) and 11(2) of the BIT do not create an umbrella clause" which brings contractual claims within ICSID dispute settlement.

42. The Respondent submits that Article 9(3) cannot be construed to mean that any contractual dispute is subject to ICSID dispute settlement. It maintains that "the language and plain meaning of Article 9(2), as well as its location in the scheme established by Article 9, did not limit its application to the amicable settlement procedure foreseen in Article 9(1)". Article 9(2) applies to all investment agreements between an investor and any entity of the Contracting Party. "The term 'entity' according to Jordan, includes the Contracting Party itself, any unit thereof and an 'Agency or instrumentality of the Contracting Party'". Therefore, the Tribunal is not required "to determine whether the Contract was entered into by an Agency or Instrumentality of Jordan as a Contracting Party or by the Contracting Party itself". Moreover, the Contract was in fact entered into by the Jordan Valley Authority, which is an autonomous corporate body distinct from the Ministry of Water and Irrigation, and Article 9(2) is accordingly applicable in any event.

43. The Respondent submits that "Article 3 of the Bilateral Treaty does not provide a basis for an ICSID Tribunal's jurisdiction over a contractual dispute". It maintains that the most-favoured nation (MFN) clause cannot apply to procedural obligations and cannot override the clear intent of the Parties to a BIT. Moreover, the Jordan-US and Jordan-UK Treaty as drafted do not assist the Claimants.

44. The Respondent "maintains that the submission to jurisdiction of ICSID in Article 9(3) of the BIT applies only to disputes that arise after the entry into force of the Bilateral Treaty and that this dispute arose in its entirety before its entry into force". In the alternative, Jordan submits that, in the present case, "any violation of the Bilateral Treaty can only be founded upon acts and omissions of Jordan after the date of entry into force" and it denies that any such violation has been committed. As a consequence, the Tribunal has no jurisdiction *ratione temporis*.

45. Finally, the Respondent states that "the Claimants' Request discloses no arguable case that there has been any violation of the Bilateral Treaty". It is for the Claimants "to provide some explanation as to how the provisions of the BIT upon which they rely could — assuming the facts to be established — give rise to a violation of international law". This has not been done and the claims "must be rejected in [their] entirety at this jurisdictional phase".

46. After having reiterated its objections as stated in its Memorial (see para. 29 above):

- "(a) Jordan rejects the Claimants' argument that the Bilateral Treaty contains an 'umbrella clause' which could bring contractual disputes under the Contract within the jurisdiction of ICSID dispute settlement;
- (b) Jordan rejects the Claimants' argument that Article 9(2) does not prevent contractual claims from being subject to ICSID dispute settlement;
- (c) Jordan rejects the Claimants' argument that this Tribunal can have jurisdiction over contractual claims by virtue of Article 3 of the Bilateral Treaty, the most-favoured nation clause;
- (d) Jordan rejects the Claimants' argument on the scope of jurisdiction *ratione temporis*; and
- (e) Jordan maintains its fundamental objection that the Claimants have presented no arguable case that there has been any violation of the substantive standards of the Bilateral Treaty by Jordan and submits that the Tribunal can and should, at this jurisdictional stage, uphold Jordan's jurisdictional objections in their entirety and not proceed to a merits phase during which the Claimants' arguments are bound to fail."

47. Accordingly, on the basis of the evidence and the legal arguments presented in its Reply, Jordan requests the Tribunal to adjudge and declare that:

- "(a) Jordan has not given its 'consent in writing' to submit the present dispute to ICSID, either under Article 9 of the Bilateral Treaty or under any other written instrument, and that the Tribunal does not have jurisdiction to entertain the claim; and/or

- (b) further or alternatively, that the Claimants have shown no prima facie conduct of or attributable to Jordan which could give rise to a violation of the Bilateral Treaty and that accordingly the Tribunal is without jurisdiction; and
- (c) the Request by the Claimants be dismissed; and
- (d) the Claimants be required to pay Jordan's costs in this matter and the costs of the Arbitral Tribunal.

\*

48. On 11 March 2004, the Claimants filed their Rejoinder on jurisdiction. They maintain that "the only reasonable and possible interpretation" of Article 2(4) of the BIT "is that the Contracting Parties, besides stipulating substantive specific obligations, undertake to respect contractual obligations they have entered into with investors who are nationals of the other Party". In this respect, they draw the attention of the Tribunal to the Energy Charter Treaty under which the jurisdictional effects of an "umbrella clause" can be avoided by an express reservation. They stress that the Decision on jurisdiction in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) (*SGS v. Pakistan*) mentioned by the Respondent has been "reversed by another ICSID Tribunal," in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6) (*SGS v. Philippines*). They add that the "umbrella clause" is located in the present case amongst the specific substantive obligations set out in Article 2 of the BIT. They submit that the statement by Mr. Taleb Al-Rifai produced as Exhibit R126 by the Respondent is both inadmissible and irrelevant.

49. The Claimants maintain that Articles 9(1) and 9(3) of the BIT fully encompass the present dispute. By way of contrast they contend that Article 9(2) "is not applicable". It does not cover agreements concluded with contracting Parties, but only agreements signed with entities distinct from those Parties. In the present case, the Claimants stipulated that the contract was with the Jordanian Government, and the Jordanian Valley Authority (JVA) was only a "designated Employer upon delegation of the Government". In any event, the JVA cannot be characterized as an "independent entity". It is part of the structure of the Government and the fact that "the JVA might have 'legal personality' under Jordanian law with respect to domestic matters does not entail that the same holds good on the different plane of international trade.

50. The Claimants also maintain their arguments with respect to the applicability of the most favoured nation clause. They refer again to the award rendered in the *Maffezini* Case and contend that the public international law case law relied upon by Jordan does not assist it. They recall however that they invoke the MFN clause only as a subsidiary or alternative ground for ICSID jurisdiction.

51. The Claimants contend that the "inter-temporal issue is not an obstacle to the admissibility of the Claimants claim, nor to the Tribunal's jurisdiction". In this respect, they stress *inter alia* that their dispute with Jordan "was not even evoked (sic) by any Party before December 2001" and that they are complaining of a "continuing breach" of the Contract.

52. The Claimants finally maintain that they are required, at the jurisdictional stage, "not to provide evidence of the soundness" of their claims, but rather "to assert facts that, if established, would constitute violation of the BIT".

53. In consideration of the above, the Claimants request the Arbitral Tribunal:

- (i) to reject all Respondent's objections to the jurisdiction of the Tribunal;
- (ii) to accept the Claimants' conclusions as formulated in their Submission dated 10 December 2003, p. 68;
- (iii) to retain jurisdiction over this case for the reasons stated by the Claimants in their above mentioned Submission of 10 December 2003, in the present Submission and in the expert opinions of Professor Schreuer;
- (iv) to order the Respondent to bear the costs of the present jurisdictional phase.

\*

54. At the oral hearing, on 1 April 2004, Jordan reiterated and developed its objections to the jurisdiction of the Tribunal, as formulated in its Memorial of 8 September 2004 and in its Rejoinder of 11 March 2004.

55. It recalled that a contract was concluded between the Claimants and the JVA-Ministry of Water and Irrigation for the construction of the Kadameh Dám. It stressed that JVA was a legal instrumentality distinct from the State of Jordan and that JVA was the Employer under the Contract. It described the role of the Engineer and the mechanism provided in the Contract for the settlement of disputes and summarized Salini Costruttori and Italstrade's claims which, according to Jordan, are purely contractual.

56. The Respondent adds that the claims are based on two factual allegations: the refusal by Jordan to pay US \$28 millions under the Contract and the refusal to honour an alleged undertaking by the Prime Minister of Jordan to submit the dispute to ICSID arbitration. The Respondent submits that the first refusal was the result not of a decision of Jordan or the JVA, but of the Engineer acting in full independence. It contends that there is no evidence to support the Claimant's statement relating to the alleged decision of the Prime Minister. Thus the facts relied upon by the Claimants are not plausibly capable of being regarded as breaches of Articles 2(3) and 2(4) of the BIT. They are not even arguable. These alleged breaches do not fall within the provisions of the BIT and the Tribunal should dispose of them at the jurisdictional stage.

57. According to the Respondent, the contractual claims are also wholly excluded from the jurisdiction of the Tribunal for several reasons. First, Jordan is not a Party to the Contract and Articles 9(1) and 9(3) of the BIT do not give jurisdiction to the Tribunal to examine those claims. In any event, this article only covers disputes related to treaty obligations, not contractual obligations. The latter should be settled according to the procedure provided for in the Contract, i.e., in the present case, by the Jordanian Courts. Second, Article 2(4) of the BIT cannot be regarded as an "umbrella clause" bringing the Contract within the Tribunal's jurisdiction. Third, Article 9(2) of the BIT makes it absolutely clear that contractual claims are outside the jurisdiction of ICSID. Fourth, Article 3 of the BIT (the most favoured-nation clause) combined with the Bilateral Investment Treaties concluded with the United Kingdom and the United States, do not give jurisdiction to the Tribunal. Finally, the dispute arose after the entry into force of the BIT between Italy and Jordan and, consequently, cannot enter within ICSID jurisdiction.

58. Accordingly, Jordan urges the Tribunal to dispose of the case now on jurisdictional grounds, or alternatively to move on to the merits, but not to follow the approach of suspending the case as was done by another ICSID Tribunal in the case *SGS v. Philippines*.

\*

59. At the oral hearings, on 2 April 2004, the Claimants reiterated and developed the arguments formulated in their Application of 12 August 2002, their submission on jurisdiction of 10 December 2003 and their Rejoinder on jurisdiction of 11 March 2004.

60. They submitted that the Karameh Dam project qualified as an investment within the meaning of the ICSID Convention and the Italy-Jordan BIT. They maintained that JVA was part of the Government of Jordan and that the Contract had anyhow been concluded by the Claimants with the State of Jordan. Thus, Article 9(2) of the BIT, covering "entities" of that State, was not applicable. They submitted that Article 9(3) of the BIT had made available to the Claimants an alternative forum which did not override or displace the contractual forum, but created a case of concurrent jurisdiction. They contended that Article 2(4) of the BIT was an "umbrella clause" under which Jordan committed itself to complying with its contractual obligations, thus transforming those obligations into treaty obligations. They stressed that they had plausible and arguable treaty claims. In this respect, they confirmed that they had abandoned their expropriation claim. But they maintained their claims based on Article 2(4) (contractual claims transformed into treaty claims through the "umbrella clause") as well as Article 2(2) and Article 2(3) (in particular due to the "refusal to concede contractual arbitration to claimants whilst it was conceded to other investors in similar cases, which amounted to discrimination"). They also invoked a "breach of a specific promise made by the Government to arbitrate the dispute if not settled in a short time". They finally maintained their submission relating to Article 11(2) of the BIT (the most favoured-nation clause) and the applicability of the BIT to the present dispute *ratione temporis*.

61. In response, the Respondent stressed, in particular, that it objected to any new claim based upon "any improper behaviour on the part of Jordan in relation to violating the independence of the Engineer". Such a claim would be inadmissible. The Respondent also maintained that no evidence whatsoever had been advanced by the Claimant in support of the allegation of discrimination. Consequently, this allegation must be rejected at the jurisdictional stage.

### The relevant treaty provisions

62. The jurisdiction of the Tribunal to consider the present case must be established under the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID Convention). Article 25 (1) of the Convention sets out the criteria to be met in order for ICSID to have jurisdiction over a specific dispute. It provides that:

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

63. The Parties discussed the interpretation to be given to this text in the case of a dispute between an investor and a constituent subdivision or agency of a Contracting State. In this respect, the Tribunal notes that ICSID jurisdiction may extend to such disputes by agreement of the Parties. However, in cases involving a constituent subdivision or agency of a Contracting State, ICSID jurisdiction is made subject to two further conditions: firstly, the constituent subdivision or agency must have been designated to the Center by the State to that effect; secondly, under Article 25(3), "Consent by a Constituent Subdivision or Agency of a Contracting State shall require the approval of that State unless that State notifies the Center that no such approval is required."

64. The Tribunal observes that, in the present case, the Claimants' submissions are directed only against Jordan as Contracting State to the Washington Convention and, consequently, the provisions of Article 25 concerning ICSID jurisdiction over constituent subdivisions or agency are not applicable. The Tribunal will not have to consider those provisions.

65. The Tribunal further notes that, in order to establish ICSID jurisdiction, the Claimants do not invoke a provision of the contract they have concluded for the construction of the Karameh Dam. They rely exclusively upon the Agreement between the Government of the Italian Republic and the Government of the Hashemite Kingdom of Jordan on the Promotion and Protection of Investments of 21 July 1999 (the BIT), combined with their own consent contained in the Request for Arbitration. Following a well established practice, the Tribunal considers that the combination of these two forms of consent can constitute "consent in writing" within the meaning of Article 25(1), provided that the dispute falls within the scope of the BIT.

66. The relevant provisions of the BIT are as follows:

#### "Article 1 – Definitions

For the purpose of this Agreement:

1. The term "investment" shall be construed to mean any kind of property invested before or after the entry into force of this Agreement, by a natural or legal person of a Contracting Party in the territory of the other Contracting Party in conformity with the laws and regulations of that Party, irrespective of the legal form chosen, as well as of the legal framework. Any modification in the form of the investment does not imply a change in the nature thereof in accordance with the laws and regulations of the Contracting Party on whose territory the investment has taken place.
2. The term "investor" shall be construed to mean any natural or legal person of one Contracting Party investing in the territory of the other Contracting Party as well as the foreign subsidiaries, affiliates and branches having headquarters in the territory of one of the Contracting Parties and controlled in any way by the above natural and legal persons.
3. "Investment agreement" means an agreement between a Contracting Party (or its Agencies or Instrumentalities) and an investor of the other Contracting Party concerning an investment.
4. "Investment agreement" means an agreement between a Contracting Party (or its Agencies or Instrumentalities) and an investor of the other Contracting Party concerning an investment.
5. "Investment agreement" means an agreement between a Contracting Party (or its Agencies or Instrumentalities) and an investor of the other Contracting Party concerning an investment.
6. "Investment agreement" means an agreement between a Contracting Party (or its Agencies or Instrumentalities) and an investor of the other Contracting Party concerning an investment.
7. "Investment agreement" means an agreement between a Contracting Party (or its Agencies or Instrumentalities) and an investor of the other Contracting Party concerning an investment.
8. "Investment agreement" means an agreement between a Contracting Party (or its Agencies or Instrumentalities) and an investor of the other Contracting Party concerning an investment.
9. "Non-discriminatory treatment" means treatment that is at least as favourable as the better of national treatment or most-favoured-nation treatment.



Article 2 – Promotion and protection of investments

1. Both Contracting Parties shall encourage investors of the other Contracting Party to invest in their territory.
2. Investors of one of the Contracting Parties shall have the right of access to the investment activities in the territory of the other Contracting Party at conditions that are not less favourable than that enjoyed by investors of third states.
3. Both Contracting Parties shall at all times ensure just and fair treatment of the investments of investors of the other Contracting Party. Both Contracting Parties shall ensure that the management, maintenance, use, transformation, enjoyment or assignment of the investments effected in their territory by investors of the other Contracting Party, as well as companies and enterprises in which these investments have been effected, shall in no way be subject to unjustified or discriminatory measures.
4. Each Contracting Party shall create and maintain in its territory a legal framework apt to guarantee the investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor.
5. Each Contracting Party or its designated Agency may stipulate with an investor of the other Contracting Party an investment agreement which will govern the specific legal relationship related to the investment of the investor concerned.

Article 3 – National Treatment and Most Favoured Nation Clause

1. Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States.

Article 7 - Subrogation

In the event that one Contracting Party or an institution thereof has provided a guarantee in respect of non-commercial risks for the investment effected by one of its investors in the territory of the other Contracting Party, and has effected payment to said investor on the basis of that guarantee, the other Contracting Party shall recognize the assignment of the rights of the investor to the first-named Contracting Party. Such assignment should be subject to prior written consent of the first Contracting Party.

Article 9 – Settlement of Disputes between Investors and Contracting Parties

1. Any disputes which may arise between one of the Contracting Parties and the investors of the other Contracting Party on investments, including disputes relating to the amount of compensation, shall be settled amicably, as far as possible.
2. In case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment Agreement shall apply.
3. In the event that such dispute cannot be settled amicably within six months from the date of the written application for settlement, the investor in question may submit at his choice the dispute for settlement to:
  - (a) the Contracting Party's court having territorial jurisdiction;
  - (b) to the International Center for the Settlement of Investment Disputes (the Center);
4. Both Contracting Parties shall refrain from negotiating through diplomatic channels any matter relating to an arbitration procedure or judicial procedure underway until these procedures have been concluded, and one of the Contracting Parties has failed to comply with the ruling of the Center or the Court of Law within the period envisaged by the ruling, or else within

the period which can be determined on the basis of the international or domestic law provisions which can be applied to the case.

Article 10 – Settlement of Disputes between the Contracting Parties

1. Any disputes, which may arise between the Contracting Parties relating to the interpretation and application of this Agreement, shall, as far as possible, be settled amicably through diplomatic channels.
2. In the event that the dispute cannot be settled within six months from the date on which one of the contracting Parties notifies, in writing, the other Contracting Party, the dispute shall, at the request of one of the contracting Parties, be laid before an "ad hoc Arbitration Tribunal as provided in this Article."

\*

\* \*

67. The Tribunal notes that Jordan has not objected to its jurisdiction on the ground that the dispute is not legal or that it does not involve a Contracting State and a national of another Contracting State. Similarly, Jordan has not objected to jurisdiction on the ground that the dispute does not arise out of an investment (although it has reserved its position on the matter). The Tribunal will not deal with those undisputed matters.

68. The Tribunal observes that the Claimants submit claims based on the violation by Jordan of both the Contract of 4 November 1993 and the BIT of 21 July 1999. The Claimants contend that the Tribunal has jurisdiction over both those contractual and those treaty claims.

69. In the Tribunal's view those claims raise six main issues:

- (a) whether Article 9(2) of the BIT excludes the jurisdiction of the Tribunal, wholly or partly;
- (b) whether the general description of "a dispute concerning an investment" (Article 9(1) of the BIT) encompasses claims of a contractual character;
- (c) whether Articles 5 (2), 5(3) and 11(2) of the BIT (so called "umbrella clauses") give the Tribunal jurisdiction over contractual claims against the Respondent State ;
- (d) whether Article 3(1) of the BIT (most favoured nation clause) gives jurisdiction to the Tribunal, in particular with respect to contractual claims;
- (e) whether the Tribunal can, at the present stage of the proceedings, dismiss the claims not having contractual character as not having been properly argued;
- (f) whether the Tribunal has jurisdiction *ratione temporis*.

Article 9(2)

70. The Tribunal notes that under Article 9(2) of the BIT, "[i]n case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment agreement shall apply".

71. The investment agreement concluded in the present case for the construction of the Karameh Dam contains in its General Conditions a clause 67 which reads as follows:

“(67.1) Engineer's Decision:

- (a) If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first

place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause.

No later than the eighty-fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that it is made pursuant to this Clause.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence and the contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or a settlement by litigation or arbitration.

- (b) If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or if the Engineer fails to give notice of his decision on or before the eighty-fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be, give notice to the other party, with a copy for information to the Engineer, of his intention to commence litigation or arbitration, as hereinafter provided as to the matter in dispute.

Such notice shall establish the entitlement of the party giving the same to commence litigation or arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 67.4 no litigation or arbitration in respect thereof may be commenced unless such notice is given.

If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notification of intention to commence litigation or arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.

(67.2) Amicable Settlement:

Where notice of intention to commence litigation or arbitration as to a dispute has been given in accordance with Sub-Clause 67.1, litigation or arbitration of such dispute shall not be commenced unless an attempt has first been made by the parties to settle such dispute amicably. Provided that, unless the parties otherwise agree, litigation or arbitration may be commenced on or after the fifty-sixth day after the day on which notice of intention to commence litigation or arbitration of such dispute was given, whether or not any attempt at amicable settlement thereof has been made.

(67.3) Litigation or arbitration:

Any dispute in respect of which:

- (a) the decision, if any, of the Engineer has not become final and binding pursuant to Sub-clause 67.1, and
- (b) amicable settlement has not been reached within the period stated in Sub-Clause 67.2

shall be finally settled by reference to the competent court of law in the Kingdom, unless both parties shall agree that the dispute be referred to arbitration.

If the First Party, being a government, department or public corporation or local authority, shall consider settlement of the dispute by arbitration; then, and in such case, the said party shall obtain the prior approval of the Council of Ministers of the Kingdom to proceed with the aforesaid settlement accordingly.

- (c) Upon reference of any dispute to arbitration, the arbitrator(s) shall have power to open, revise and review any decision, certification or evaluation of the Engineer, provided that nothing

of the foregoing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter relevant to the dispute referred to the arbitrator(s).

- (d) No reference to litigation or arbitration may be commenced before the completion of the works and the issue of the Taking-Over certificate.

(67.4) Failure to comply with Engineer's decision:

Where neither the Employer nor the Contractor has given notice of intention to commence litigation or arbitration of a dispute within the period stated in Sub-Clause 67.1 and the related decision has become final and binding, either party may, if the other party fails to comply with such decision and without prejudice to any other rights it may have refer the failure to litigation or arbitration in accordance with Sub-Clause 67.3. The provisions of Sub-Clause 67.1 and 67.2 shall not apply to any such reference."

72. Jordan submits that this Contract has been concluded between the Claimants and an "entity of the contracting State" (whether it be the Ministry of Water and Irrigation or the Jordanian Valley Authority). As a consequence, and in implementation of Article 9(2) of the BIT, the procedure foreseen in clause 67 must apply. According to that clause, the dispute must be "settled by reference to the competent court of law in the Kingdom [of Jordan], unless both Parties shall agree that the dispute be referred to arbitration". In the absence of such an agreement, the dispute was to be referred to the Jordanian courts. The Tribunal has no jurisdiction.

73. The Claimants challenge this interpretation. They submit that Article 9(2) only applies to procedures of amicable settlement of disputes dealt with in Article 9(1) of the BIT and not to procedures for the final and binding settlement dealt with in Article 9(3). They further contend that Article 9(2) only applies to contracts concluded with an entity of the Kingdom of Jordan, and not with the State itself and submits that, in the present case, the contract has been concluded with the State of Jordan. They stress that Article 9(2) does not state that the procedure provided for in the BIT shall not apply, but only that the procedure foreseen by the contract shall apply; as a consequence, the only effect that one could infer from Article 9(2) would be to preclude the exclusivity of the dispute settlement mechanism of Article 9(3), but not its applicability. In any event, Article 9(2) could only be applied to claims based on the Contract and not to claims based on the BIT.

74. The Respondent disagrees with those Claimants' arguments. It submits that Article 9(2) applies to all phases of all disputes that are subject to clause 67 of the Contract and does not cover only the proceedings for amicable settlement of disputes. It again contends that the contract has been concluded with "an entity" of Jordan and that Article 9(2) and clause 67 are applicable. It adds that the present dispute finds its origin in the Engineer's decisions to reject payment of approximately US\$28 million under the Contract. Thus the Tribunal has no jurisdiction.

75. The Parties are first in disagreement over the application of Article 9(2) of the BIT in the present case. The Tribunal shall proceed to the interpretation of this Article in conformity with Articles 31 to 33 of the Vienna Convention on the Law of Treaties which reflect customary international law

76. The Tribunal cannot agree with the Claimants' argument according to which Article 9(2), would apply only to procedures for the amicable settlement of disputes. This paragraph is incorporated into an article relating to "settlement of disputes between investors and contracting Parties" in general. It covers "the procedure foreseen in the Investment Agreement stipulated between an investor and an entity of a Contracting State". This type of procedure generally comprises several steps, closely interconnected, the last one being recourse to courts or to arbitration and, indeed, clause 67 organises such steps: referral of the dispute to the Engineer; decision taken by the Engineer; note to commence litigation or arbitration; attempt to settle the dispute amicably within a certain time limit; and, eventually, initiation of the litigation or arbitration. Article 9(2), which is worded in general terms, covers all these procedures.

77. In this respect, the arguments drawn by the Claimants from the context cannot prevail over the text itself. It is true, as stressed by the Claimants, that the exception provided for in Article 9(2) has been incorporated between Article 9(1) on amicable settlement, and Article 9(3) on settlement by courts or arbitration. However, it is difficult to draw any consequences from this placement: one could indeed, as the Claimants do, argue that Article 9(2) has the same scope as Article 9(1) which it follows. One could also argue that it has the same scope

as Article 9(3) which it precedes. One may finally consider that it concerns both amicable settlement and settlement by courts or arbitration.

78. Moreover, the fact that Article 9(3) covers "the event that such dispute cannot be settled amicably" does not imply that the word "dispute" in that text is a dispute under Article 9(2), all the more so that the word "dispute" is not used in that provision.

79. In fact, Articles 9(1) and (3) correspond to standard clauses of settlement of disputes and Article 9(2) has been incorporated into the text to make a general exception to those standard provisions. The common intention of the Parties is reflected in this clear text that the Tribunal has to apply.

80. The Tribunal will now consider the status of the Jordan Valley Authority in order to determine whether this Authority can be considered an "entity" of the Kingdom of Jordan within the meaning of Article 9(2).

81. The Jordan Valley Authority (JVA) was established under Jordan law no 19 of 1998 entitled "Jordan Valley Development Law". Under Article 3 of that law, the JVA "shall undertake inter alia the development of the water resources of the valley and utilizing them". It will also carry out "all the works related to the development, utilization, protection and conservation of these resources", including "the planning, design, construction, operation and maintenance of irrigation projects and related structures and works of all types and purposes, including dams".

82. Under Article 13 of the law, "the Authority shall be considered an autonomous corporate body". "It may conclude contracts". In conformity with Article 17(b), "all Authority funds shall be deposited in a special account or accounts at the Central Bank". The Authority has "its own cadre of Employees". The classified Employees are subject to the Civil Service Law. The others are under a specific status.

83. Under Article 8, the Authority is composed of the Minister of Water and Irrigation, the Board of Directors, the Secretary General and the Staff. The Board of Directors is chaired by the Minister. The Secretary General of the JVA is Vice-Chairman. The Board comprises representatives of various Ministries and one Member "with expertise and specialization" appointed by the Cabinet.

84. In conclusion, it appears that, although the Government exercises a strict control over the JVA, this Authority is an autonomous corporate body, distinct legally and financially from the State of Jordan. It must thus be considered as an "entity" of the Kingdom of Jordan within the meaning of Article 9(2).

85. It remains to be seen whether the investment contract for the Karameh Dam project was concluded with the Kingdom of Jordan or with the JVA.

86. In this respect, the Tribunal will first observe that the agreement was made on 4 November 1993 "between the Ministry of Water and Irrigation — Jordan Valley Authority of PO Box 2769, Amman, Jordan (hereinafter called the Employer) of the one part and MS/Joint Venture Salini Costruttori SPA Italstrade SPA Rome Italy (hereinafter called "the Contractor") of the other part". The contract is signed "Employer — Minister of Water and Irrigation — Bassam E. KAKISH". "In the presence of Dr. eng. Abdul Aziz al-Weshah — Secretary General" with those two signatures. The stamp put on the Contract reads: "The Hashemite Kingdom of Jordan — Ministry of Water and Irrigation — Jordan Valley Authority — Tenders and Procurement".

87. Clause (1) — 1 — 1 (a) of the General Conditions defines the "Employer" as "The Party named in the contract as the "First Party" who will enter into contract with the Contractor for the execution of the Works covered by the Contract or any other Party authorized by the Employer to exercise the powers and obligations of the First Party, provided that the Contractor, will be informed accordingly in writing".

88. Clause (1.1.) of the Special Conditions specifies that "the Employer is the Ministry of Water and Irrigation, Jordan Valley Authority, Amman, Jordan, herein represented by the Secretary General thereof or any other Government Authority to which the Jordan Valley Authority may delegate whole or part of its authority".

89. It is apparent from those various provisions, and in particular from clause (1-1) of the Special Conditions, that the JVA is the "First Party" to the Contract and the "Employer" within the meaning of the Contract. All payments to the Contractor were to be made and in fact were made by the JVA under clause 60 of the Special Conditions. The Contract with the Engineer for the supervision of the construction of the works was signed by the Secretary General of the JVA, on behalf of the JVA, Ministry of Water and Irrigation. The final Certificate

was to be issued by the Engineer to the Employer under clause 60.8. Clause 60.9 specified the conditions of the cessation of the liability of the Employer.

90. During the course of the implementation of the Contract, the Contractor submitted various claims to the Engineer. In most of the cases in which those claims were rejected, the Claimants informed the Secretary General of the JVA of their "intention to proceed to litigation or arbitration as foreseen by clause 67 of the General Conditions of the Contract" (see for instance the letters dated 12 February 1996, 4 September 1998 and 10 June 1999). Similarly, it is the Secretary General of the JVA who, on 5 June 1998, notifies to the Claimants the dissatisfaction of the Employer with a decision of the Engineer. The final administrative decisions relating to the last payment to be made to the Claimants were taken by the Secretary General of the JVA.

91. In conclusion, and notwithstanding the fact that the tenders were issued by the Ministry of Public Works and Housing — Government Tenders Directorate, and were decided upon by a central committee for tenders, it appears that the Contract was signed by the Minister and the Secretary-General of the JVA, both acting on behalf of the JVA. It was implemented as a JVA Contract.

92. The Tribunal concludes from the foregoing that an investment Contract was concluded between the Jordanian Valley Authority, an entity of the Jordanian State, with the Claimants. Therefore Article 9 (2) does not deprive the Tribunal of the jurisdiction it may have under other provisions of the BIT to entertain such treaty claims. The procedure foreseen in the investment Agreement accordingly applies.

\*

93. However, the Parties differ on the consequences to be drawn from such a conclusion. For the Respondent, Article 9(2) must be construed as excluding from the jurisdiction of the Tribunal all contractual claims which are to be settled in conformity with clause 67 of the Contract. For the Claimants, Article 9(2) does not exclude such jurisdiction. Contractual claims could be settled as provided for in clause 67. They could also be settled as treaty claims under Article 9(3) of the BIT.

94. The Tribunal observes that, under Article 9(2), when an investment agreement has been concluded between an investor and an entity of a Contracting State, the procedure foreseen in such an agreement "shall" apply. By using the word "shall," the authors of this text agreed to make it obligatory in such cases to seek redress under the procedure provided for in the contract and thereby excluded recourse to any other procedure.

95. The Tribunal further notes that, according to the interpretation of the Claimants, the sole aim of Article 9(2) is to permit the submission of contractual claims to the dispute settlement mechanism provided for in the Contract. However, even if there were no such provision, such recourse would remain possible. One is therefore hard pressed to see the usefulness of Article 9(2) as interpreted by the Claimants. Such an interpretation runs counter to the general principle of effectiveness ("*effet utile*") and for that reason also ought to be set aside.

96. Lastly, the Tribunal will note that the dispute settlement procedures provided for in the Contract could only cover claims based on breaches of the Contract. Those procedures cannot cover claims based on breaches of the BIT (including breaches of those provisions of the BIT guaranteeing fulfillment of contracts signed with foreign investors). Therefore Article 9(2) does not deprive the Tribunal of such jurisdiction, as it may have, to entertain treaty claims of this nature under other provisions of the BIT.

\*

\* \*

#### Articles 9(1) and 9(3)

97. Under Article 9(1) of the BIT quoted above, disputes which "may arise between one of the contracting Parties and the investors of the other contracting Party on investments including disputes relating to the amount of compensation, shall be settled amicably". Under Article 9(3); "in the event such dispute cannot be settled amicably within six months from the date of the written application by settlement, the investor in question may submit the dispute for settlement" either to the contracting Party's Court having territorial jurisdiction" or to ICSID (this last option having been chosen in the present case).

98. The Claimants contend that Article 9(1) is drafted in such general terms that it covers not only disputes relating to alleged violations of a provision of the BIT, but any dispute which may arise between a State Party and an investor of the other Party, including disputes concerning alleged violations of the Contract. They observe that Article 9(1) refers to any disputes which may arise "on investments". They add that no distinction is made in this text as to the source of the claim. As a consequence, Article 9(3) should cover all disputes on investments for alleged violations both of the substantive provisions of the BIT and of an investment agreement. The Claimants recall that, by contrast, Article 10 of the BIT concerning interstate disputes only covers disputes relating to the interpretation and application of the Treaty. They also invoke several ICSID awards and decisions, including the one rendered on 29 January 2004 in *SGS v. Philippines*.

99. The Respondent, for its part, contends that Article 9(3) does not provide for ICSID jurisdiction over contractual disputes, but only for such a jurisdiction in case of violation of the BIT. It also invokes ICSID awards and decisions in support of this position and, in particular, the one rendered on 6 August 2003, in *SGS v. Pakistan*. It observes that "if the Tribunal adopts the views espoused by the Claimants, the effect will be to open ICSID jurisdiction to pure contractual claims" with far reaching consequences.

100. The Tribunal recalls that there is no question as to the application of the dispute settlement mechanism provided for in Articles 9(1) and 9(3) in the event that there is an alleged breach of a provision of the BIT. The point at issue in the present case is whether the mechanism is equally applicable to contractual disputes. The Tribunal notes that ICSID Tribunals have taken divergent positions on this matter in cases of alleged breaches of contracts entered into between a foreign investor and a State Party to a BIT. But such is not the case in this instance. Indeed, the contract at issue was entered into between the Claimants and the Jordan Valley Authority, which under the laws of Jordan governing the contract, has a legal personality distinct from that of the Jordanian State (see *para. 84* above). Now, one may doubt whether Articles 9(1) and 9(3) also cover breaches of a contract concluded in name between an investor and an entity other than a State Party, and the Tribunal observes that several ICSID tribunals have already handed down decisions against such extensions of jurisdiction (see *Salini Costruttori and Italstrade v. Kingdom of Morocco*, case No. ARB/00/06, decision of 23 July 2001 on jurisdiction, paras. 60 to 62; *Consortium RFCC v. Kingdom of Morocco*, case No. ARB/00/06, Decision of 22 December 2003 on jurisdiction, paras. 67 to 69).

101. However, the Tribunal will not be required to decide on whether Articles 9(1) and 9(3), taken in isolation, could cover the contractual disputes at issue in this instance. In fact, Article 9(2) of the BIT makes it obligatory to refer such disputes to the dispute settlement mechanisms provided for in the contracts and, where such disputes are concerned, excludes recourse to the procedure set forth in Article 9(3) for such disputes (see *para. 60* above).

### Article 3

102. The Claimants however invoke Article 3 of the BIT as establishing a subsidiary or alternative ground for ICSID jurisdiction over contractual claims. They submit that Article 3 entitles Italian investors in Jordan (and vice versa) to be accorded a treatment that is no less favourable than that accorded to investors of any third State. They contend that this most favoured-nation clause extends to and includes procedural rights, as decided by an ICSID Tribunal in *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7). They state that Article IX of the Jordan-USA BIT of 2 July 1997 and Article 6 of the Jordan-United Kingdom BIT of 10 October 1979 make available to USA and UK investors "a dispute resolution clause which is more favourable than that contained in Article 9 of the Jordan-Italy BIT". They add that, under those clauses, USA and UK investors are "entitled to refer to ICSID any dispute arising from their construction contracts". They conclude that, notwithstanding Article 9(2) of the BIT, Italian investors have the same right.

103. The Respondent submits that the most favoured-nation clause invoked cannot apply to procedural obligations; it refers in this respect to judgments rendered by the International Court of Justice and explains that the decision taken in the *Maffezini* case does not bind the Tribunal and should not be followed; it adds that "even assuming that the most favoured-nation clause could, in theory, apply to dispute settlement provisions, it is subject to overriding public policy considerations" recognized by the ICSID Tribunal itself in the *Maffezini* case; it states that, in particular, a most favoured-nation clause cannot override the clear intent of the Parties with respect to jurisdiction as expressed in the present case in Article 9(2); moreover, it contends that the Jordan-USA BIT and

the Jordan-UK BIT do not allow the investors to submit contractual disputes to ICSID jurisdiction and that the Jordan-USA Treaty is not applicable *ratione temporis*; thus, they could not assist the Claimants.

104. Articles 3(1) and (2) of the BIT read as follows:

"1. Both Contracting Parties, within the bounds of their own territory, shall grant investments effected by, and the income accruing to, investors of the other Contracting Party, no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States.

2. In case, from the legislation of one of the Contracting Parties, or from the international obligations in force or that may come into force in the future for one of the Contracting Parties, should come out a legal framework according to which the investors of the other Contracting Party would be granted a more favourable treatment than the one foreseen in this Agreement, the treatment granted to the investors of such other Parties will apply also for outstanding relationships."

105. The parties debated at length the question whether the most-favored-nation clause can be invoked for dispute settlement purposes.

106. In this connection, they first cite jurisprudence of the International Court of Justice in the cases involving *the Anglo-Iranian Oil Co.* (Judgment of 22 July, 1952, *I.C.J. Reports 1952* p. 93), *Rights of Nationals of the United States of America in Morocco*, (Judgment of 27 August, 1952, *I.C.J. Reports 1952*, p. 176) and *Ambatielos* (Judgment on the Merits of 19 May, 1963, *I.C.J. Reports 1953*, p. 10). The first two judgments mentioned do not address the issue thus posed. In the third case, the Government of Greece submitted *that*, under the most-favored-nation clause in a treaty of commerce and navigation which it had concluded with the Government of the United Kingdom in 1886, it was allowed to invoke provisions on the administration of justice inserted in peace and trade treaties concluded between the United Kingdom and various other States. In its judgment of 19 May 1953, the Court did not decide on the merits of this line of argument, confining itself instead to finding that the dispute between the Parties arose from the interpretation of the treaty of 1886 and that the United Kingdom was accordingly under the obligation to submit that dispute to arbitration. Nevertheless, some of the judges dissenting from the solution adopted took positions on the submissions of Greece based on the most-favored-nation clause as incorporated in the 1886 Treaty. Their view was that the clause "cannot be extended to matters other than those in respect of which it has been stipulated". They added that "having regard to its terms", this clause "promises most-favoured-nation treatment only in matters of commerce and navigation" and that, consequently, it cannot be applied to "the administration of justice" (*I.C.J. Reports 1953*, p. 34).

107. The International Arbitration Commission that was eventually constituted in pursuance of the judgment of the Court to hear the dispute, also took the view, in its award of 6 March 1956, that "the most favoured-nation clause can only attract matters belonging to the same category of subjects as that to which the clause itself relates".

108. It also adds "In the Treaty of 1886, the field of application of the most favoured-nation clause is defined as including "all matters relating to commerce and navigation". It would seem that this expression has not, in itself, a strictly defined meaning. The variety of provisions contained in Treaties of Commerce and Navigation proved that, in practice, the meaning given to it is fairly flexible. For example, it should be noted that most of these treaties contain provisions concerning the administration of justice. . . ."

109. The Commission went on to say: "It is true that the administration of justice, when viewed in isolation, is a subject matter other than commerce and navigation, but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by treaties of commerce and navigation."

110. "Therefore, it cannot be said" added the Commission "that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most favoured-nation clause, when the latter includes "all matters relating to commerce and navigation". This question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the treaty."

111. Then the award goes on in noting that it was the "intention of the Parties", as expressed in the Treaty, "that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the

most favoured-nation". It concluded from this wording that this MFN clause was applicable to "the administration of justice in so far as concerns the protection by the Courts of the rights of persons engaged in trade and navigation" (United Nations Reports of International Arbitral Awards, vol. XII, p. 83 to 153).

112. The Tribunal will observe that in this case, Greece invoked the most-favored-nation clause with a view to securing, for one of its nationals, not the application of a dispute settlement clause, but the application of substantive provisions in treaties between the United Kingdom and several other countries under which their nationals were to be treated "in accordance with 'justice', 'right' and 'equity'". The solution adopted by the Arbitration Commission cannot therefore be directly transposed in this specific instance.

113. In addition, the Claimants rely principally on the 25 January 2000 award issued by an ICSID Tribunal in the matter of *Maffezini v. Spain*. In that case, the Claimant invoked the most-favored-nation clause in a BIT concluded between Argentina and Spain with a view to securing enforcement of the dispute settlement provisions in a BIT concluded between Chile and Spain. Under the terms of the first treaty, cases could be referred to ICSID only if recourse had first been made to a domestic court, while no such precondition was included in the second treaty. The Arbitral Tribunal found that, by operation of the most-favored-nation clause, the claimant could avoid having first to exhaust domestic remedies.

114. In the words of the Claimants themselves in this case, the award "has given rise to some concern with regard to the possible expansive effects of the extension of a Most-Favoured nation clause to the investors' right to select different forums" (Rejoinder, para. 129). The Arbitral Tribunal in the *Maffezini* case was probably aware of the risks entailed by such an extension because the Tribunal itself stated clearly that the beneficiary of the Most-Favoured-Nation clause "should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement" (Award, para. 62). The Tribunal added that "a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand" (ibid., para. 63).

115. The current Tribunal shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case. Its fear is that the precautions taken by authors of the award may in practice prove difficult to apply, thereby adding more uncertainties to the risk of "treaty shopping".

116. The Tribunal also observes that bilateral investment treaties carry varying provisions that address this issue. Some of those treaties provide expressly that the most-favored-nation treatment extends to the provisions relating to settlement of disputes. This is the case with some investment treaties concluded by the United Kingdom.

117. In other treaties, the MFN clause does not contain such a provision, but refers to "all rights" contained in the agreement, or to "all matters" subject to the agreement. This was the situation in the *Ambatielos* and *Maffezini* cases. As a consequence, in *Ambatielos*, the Commission of Arbitration sought to ascertain the common intention of the Parties. It found that the intention was "that the trade and navigation of each country be placed, in all respects, by the other on the footing of the most-favoured-nation" (see para.70) and concluded for this finding that "the effect of the most-favoured-nation clause ... can be extended to the system of administration of justice". Similarly, in the *Maffezini* case, the Tribunal carefully examined the practice followed by Spain and Argentina and relying not only on the text of the BITS, but also on "the legal policy adopted by Spain with regard to the treatment of its own investors abroad", concluded that the Claimant had the right to submit the dispute to arbitration "without first accessing the Spanish courts" (Award, para. 64).

118. The Tribunal observes that the circumstances of this case are different. Indeed, Article 3 of the BIT between Italy and Jordan does not include any provision extending its scope of application to dispute settlement. It does not envisage "all rights or all matters covered by the agreement". Furthermore, the Claimants have submitted nothing from which it might be established that the common intention of the Parties was to have the most-favored-nation clause apply to dispute settlement. Quite on the contrary, the intention as expressed in Article 9(2) of the BIT was to exclude from ICSID jurisdiction contractual disputes between an investor and an entity of a State Party in order that such disputes might be settled in accordance with the procedures set forth in the investment agreements. Lastly, the Claimants have not cited any practice in Jordan or Italy in support of their claims.

119. From this, the Tribunal concludes that Article 3 of the BIT does not apply insofar as dispute settlement clauses are concerned. Therefore the disputes foreseen in Article 9(1) of the BIT concluded between Jordan and

Italy must be settled in accordance with the said Article. In the event that, as in this case, the dispute is between a foreign investor and an entity of the Jordanian State, the contractual disputes between them must, in accordance with Article 9(2), be settled under the procedure set forth in the investment agreement. The Tribunal has no jurisdiction to entertain them.

#### "Umbrella clause"

120. The Claimants argue that Article 2(4) of the BIT, taken together with Article 2(5) and Article 11(2) (*for the wording of these provisions, see paragraph 66 above*), obliges Jordan to guarantee the observance of specific investment agreements and that this provision amounts to what they call an "umbrella clause" which transforms contractual undertakings into international law obligations. On that basis, the Tribunal would in any event have jurisdiction to consider the claimants' contractual claims.

121. In support of this submission, the Claimants rely on the language of Article 2(4), on various international commentators and on the decision in *SGS v. Philippines*. They recall that provisions similar to Article 2(4) have been inserted in a number of BITS, as well as in the Energy Charter Treaty. They add that, in this treaty, a possibility has been open to exclude from ICSID jurisdiction any dispute arising from the alleged violation of such a provision. They observe that this has not been the case in the Jordan/Italy BIT and conclude that Jordan has accepted to submit disputes arising from the alleged violation of Article 2(4) to the dispute settlement mechanism of Article 9(3).

122. The Respondent submits that under Article 2(4), Jordan is simply obliged "to create and maintain a legal framework apt to guarantee to investors the continuity of legal treatment" and is not obliged to guarantee specific investments. It contends that this interpretation is supported by an arbitral award adopted on 2 July 2003 in a case relating to the interpretation of the Convention for the protection of the marine environment of the North-East Atlantic (COSPAR). It is also supported by the decision in *SGS v. Pakistan*.

123. Article 2(4) of the BIT reads as follows:

"Each Contracting Party shall create and maintain in its territory a legal framework apt to guarantee to investors the continuity of legal treatment, including the compliance, in good faith, of all undertakings assumed with regard to each specific investor."

124. In *SGS v. Philippines*, the BIT stipulated in its Article X(2): "Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party". The Arbitral Tribunal decided that this text "makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent or content of such obligations into an issue of international law" (para. 128).

125. In *SGS v. Pakistan*, Article 11 of the BIT stipulates that: "Each Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party". The Arbitral Tribunal decided that this provision could not be invoked to sustain a contention by an aggrieved investor that "breaches of a contract ... it has concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically "elevated" to the level of breaches of treaty, international law. Having regard to the distinction in principle between breaches of contract and breaches of treaty, contractual claims could only be brought under Article 11 "under exceptional circumstances" (para. 172).

126. The Tribunal notes that Article 2(4) of the BIT between Italy and Jordan is couched in terms that are appreciably different from the provisions applied in the arbitral decisions and awards cited by the Parties. Under Article 2(4), each contracting Party committed itself to create and maintain in its territory a "legal framework" favourable to investments. This legal framework must be apt to guarantee to investors the continuity of legal treatment. It must in particular be such as to ensure compliance of all undertakings assumed under relevant contracts with respect to each specific investor. But under Article 2(4), each Contracting Party did not commit itself to "observe" any "obligation" it had previously assumed with regard to specific investments of investors of the other contracting Party as did the Philippines. It did not even guarantee the observance of commitments it had

entered into with respect to the investments of the investors of the other Contracting Parties as did Pakistan. It only committed itself to create and maintain a legal framework apt to guarantee the compliance of all undertakings assumed with regard to each specific investor.

127. Of course, each State Party to the BIT between Italy and Jordan remains bound by its contractual obligations. However, this undertaking was not reiterated in the BIT. Therefore, these obligations remain purely contractual in nature and any disputes regarding the said obligations must be resolved in accordance with the dispute settlement procedures foreseen in the contract. Contrary to what the Claimants argue, this is not at all an absurd solution: the States Parties to the BIT are still bound by their treaty obligations as well as their contract obligations, but the dispute settlement procedures in each case are different.

128. Articles 2(5) and 11 of the BIT invoked by the Claimants could not lead to any other conclusion. The first of these two provisions merely stipulates that "Each Contracting Party or its designated Agency may stipulate with an investor of the other Contracting Party an investment agreement which will govern the specific legal relationship related to the investment of the investor concerned". The Tribunal finds it difficult to see how such a provision could lead to an interpretation of Article 2(4) that is different from the interpretation given in the previous paragraph.

129. Article 11 of the BIT entitled "Application of other provisions" covers in its paragraph 1 the case in which a matter is governed both by the agreement and other treaty or customary rules of international law. It considers in its paragraph 2 the case where the treatment accorded by one Contracting Party to the investors of the other Contracting Party according to its laws and regulations or other provisions or specific contract or investment authorizations or agreements is more favourable than that provided under the BIT. In both cases, the most favourable treatment applies. Under paragraph 2 of Article 11 "[i]n case the host Contracting Party has not applied such treatment . . . and the investors suffer a damage as a consequence thereof, the investors shall be entitled to a compensation of such damages".

130. This Article is, to take the terms of the decision in the *SGS v. Philippines case*, "a kind of without prejudice clause" (Decision on jurisdiction, para. 114, and notes 45 and 46) and in the opinion of the Tribunal, it could not have the effect of incorporating the commitments it mentions into the BIT (see *Young hi Oo Trading Pta v. Government of the Union of Myanmar* (ASEAN I.D. Case No. ARB/01/1 (2003) 42 – ILM 540, 556.7 (paras.79-82)).

### Treaty Claims

131. The Tribunal will now examine the objections to its jurisdiction presented by the Respondent against the Treaty claims submitted by the Claimants. In this respect, Jordan submits that:

- (a) the Claimants' request discloses no arguable case that there has been any violation of the BIT;
- (b) the essential basis of the Claimants' request concerns a contractual dispute which is to be determined under the disputes settlement provisions of the contract;

132. More specifically, according to Jordan, "there is no conceivable basis or authority for the argument that the Employer's refusal to accede to the Claimants' request to overturn the decisions adopted by the independent Engineer under the contract . . . could give rise to a claim for unjust or unfair treatment (Article 2(3) of the bilateral Treaty). For the same reasons, it cannot be said that the Employer's actions can amount to a failure on the part of Jordan to provide continuity of legal treatment (Article 2(4))."

133. Similarly Jordan asks the Tribunal to reject the argument that "refusal by the Jordanian Council of Ministers to accede to the Claimants' request to refer the dispute with the Engineer to arbitration pursuant to clause 67.3(b) of the Contract . . . could amount to a violation" of the same provisions.

134. As a consequence, the Tribunal would have no jurisdiction not only with respect to contractual claims, but also with respect to Treaty claims.

135. The Claimants submit that it is up to them to formulate their claims as they see fit. They are not required, at the jurisdictional stage, to provide evidence of the soundness of those claims, but rather "to assert facts that,

if established, would constitute violations of the BIT". They recall that their claims are based not only on the violation by Jordan of the "umbrella clause" (Article 2(4)), but also on the violation of the duty to ensure just and fair treatment of the investments and on the violation of the prohibition of discriminatory measures (Article 2(3)). They add that further proofs of these violations will be provided during the merits phase. They stress that "if the Claimants' claims were excluded from the jurisdictional protection of the BIT only because the investment was made on the basis of a contract", this, as indicated by Professor Schreuer in his comments, "would dramatically reduce the much needed protection for a very large segment of investment activities". They conclude that the Tribunal has jurisdiction to consider the treaty claims as formulated.

136. The Tribunal observes that the Claimants are free to present facts they rely upon and claims they advance in the way they think appropriate. It is up to the Claimants to characterize these claims as they see fit, and, in particular, to identify the contractual and/or Treaty provisions, which, according to them, have been violated.

137. When considering its jurisdiction to entertain those claims, the Tribunal must not address the merits of the claims, but it must satisfy itself that it has jurisdiction over the dispute, as presented. This has been recognized both by the International Court of Justice and by Arbitral Tribunals in many cases.

138. Thus, the International Court of Justice, in the *Ambatielos Case* in 1953, stated:

"In order to decide, in these proceedings, that the Hellenic Government's claim on behalf of Mr. Ambatielos is "based on" the Treaty of 1886 within the meaning of the Declaration of 1926, it is not necessary for the Court to find — and indeed the Court is without jurisdiction to do so — that the Hellenic Government's interpretation of the Treaty is the correct one. The Court must determine, however, whether the arguments advanced by the Hellenic Government in respect of the treaty provisions on which the Ambatielos claim is said to be based, are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty. It is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty of 1886." (*Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 18.)

139. More recently, the International Court of Justice, in comparable cases, did not refer to the "plausibility" of the claims, and used more objective criteria. In the *Oil Platforms (Islamic Republic of Iran v. United States of America)*, the Court stated that:

"the Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute "as to the interpretation or application of the Treaty of 1955. In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2.

17. The objection to jurisdiction raised by the United States comprises two facets. One concerns the applicability of the Treaty of 1955 in the event of the use of force; the other relates to the scope of various articles of that Treaty." (*I.C.J. Reports 1996, II*, p. 810, para. 16-17.)

140. In the cases concerning the Legality of Use of Force in Yugoslavia, the International Court of Justice adopted a similar approach. It stated that: "in order to determine, even prima facie, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; . . . [It] must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of the instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX" (see for instance *Legality of Use of Force (Yugoslavia v. Italy)*, *I.C.J. Reports 1999 - I*, p. 490, para. 25)

141. Arbitral tribunals have adopted a similar approach. Thus, in *SGS v. Philippines*, the ICSID Tribunal stated that:

"The Tribunal's jurisdiction, if it exists, must arise by virtue of the ICSID Convention associated with the BIT . . . It is not enough that the Claimant raises an issue under one or more

provisions of the BIT which Respondent disputes. To adopt the words of the International Court in the *Oil Platforms Case*, the Tribunal 'must ascertain whether the violations of the [BIT] pleaded by [SGS] do or do not fall within the' provisions of the Treaty and whether, as a consequence, the dispute is one which the [Tribunal] has jurisdiction *ratione materiae* to entertain" (para. 26).

142. In another passage of this Decision, the Arbitral Tribunal specified that: "In accordance with the basic principle formulated in the *Oil Platforms Case* (above, para. 26), it is not enough for the Claimant to assert the existence of a dispute as to fair treatment and expropriation". The test for jurisdiction is an objective one and its resolution may require the definitive interpretation of the treaty provision which is relied on. On the other hand, as the Tribunal in *SGS v. Pakistan* stressed:

"it is for the Claimant to formulate its case. Provided that the facts alleged by the Claimant and as appearing from the initial pleadings fairly raise questions of breach of one or more provisions of the BIT, the Tribunal has jurisdiction to determine the Claim".

143. Under this jurisprudence, the Court and individual Arbitral tribunals have arrived at decisions which vary from one case to another.

144. In the *Ambatielos Case*, the International Court of Justice, after having considered the possible interpretations of the Anglo-Greek commercial treaty of 1886 concluded that "the difference between the Parties is the kind of difference which, according to the Declaration of 1926, should be submitted to arbitration" (p. 22).

145. In the *Oil Platforms Case*, the Court determined the scope of various articles of the 1955 Treaty of Friendship and Commerce between Iran and the United States of America and decided that it had jurisdiction to entertain the Iranian claims only on the basis of Article XXI, paragraph 2, of the Treaty relating to freedom of commerce and navigation and not on the basis of the other provisions invoked by Iran.

146. In the cases concerning the Legality of Use of Force in Yugoslavia, the Court stated that "it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application 'indeed entail the element of intent' " which is necessary to characterize a genocide. As a consequence, the Court was "therefore not in a position to find, at [that] stage of the proceedings, that the acts imputed by Yugoslavia to the Respondent [were] capable of coming within the provisions of the Genocide Convention". It decided that, accordingly, it had no jurisdiction *prima facie*. (see for instance *Legality of Use of Force (Yugoslavia v. Italy)*, *I.C.J. Reports 1999-I*, p. 491, paras. 27 and 28).

147. In the *SGS v. Pakistan* case, the Arbitral tribunal concluded that: "if the facts asserted by the Claimants are capable of being regarded as alleged breaches of the BIT consistently with the practice of ICSID tribunals, the Claimant should be able to have them considered on their merits. . .". "We do not exclude the possibility that there may arise a situation where the Tribunal may find it necessary at the very beginning to look to the Claimant's factual claims but this is not such a case".

148. Similarly, in the *Wena Case*, the Arbitral Tribunal stated that:

"Wena raised allegations against Egypt . . . which if proven, clearly satisfy the requirements of a legal dispute under Article 25(1) of the ICSID Convention. In addition, Wena has presented at least some evidence that suggests Egypt's possible culpability".

The Tribunal concluded that it had jurisdiction and reserved its decision on the merits (*Wena Hotels Ltd v. Arab Republic of Egypt*; ICSID Case No. ARB/98/4, 25 May 1999).

149. The Arbitral Tribunal, in *SGS v. Philippines* arrived at a different conclusion. It stated:

... the present dispute is on its face a dispute about the amount of money owed under a contract. SGS accepts that the provision of services under the CISS Agreement came to an end by the effluxion of time. No question of a breach of the BIT independent of breach of contract is raised (as, arguably, in *SGS v. Pakistan*); there is no allegation of a conspiracy by local officials to frustrate the investment (as in *Vivendi*). As presented to the Tribunal by the Claimant, the unresolved issues between the Parties concern the determination of the amount still payable." (para. 159).

Then the Tribunal recalled that, in its request for arbitration, SGS had invoked Articles IV, VI and X(2) of the BIT. The Tribunal commented that "an unjustified refusal to pay sums admittedly payable under an award or a

contract at least raises arguable issues under Article IV" (fair and equitable treatment) (para. 162). However, it added that "on the material presented by the Claimant, no case of expropriation has been raised . . . A refusal to pay is not an expropriation when there is an unresolved dispute as to the amount payable" (para. 161). As a consequence, the Tribunal dismissed the claim "so far as it is based on Article VI of the BIT" (expropriation).

150. Similarly, in *UPS v. Canada*, the Arbitral Tribunal established under the NAFTA decided in its Decision on Jurisdiction that the customary rule of international law, on which the applicant based part of its claims, did not exist and, consequently, that the claim based on such a rule was not within the jurisdiction of the Tribunal.

151. The Tribunal is in full agreement with this jurisprudence. It reflects the balance to be struck between two opposing preoccupations: to ensure that courts and tribunals are not flooded with claims which have no chance of success and sometimes are even of an abusive nature; but to ensure equally that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate. In conformity with this jurisprudence, the Tribunal will accordingly seek to determine whether the facts alleged by the Claimants in this case, if established, are capable of coming within those provisions of the BIT which have been invoked.

152. In this regard, the Tribunal will first recall that "a particular investment dispute may at the same time involve issues of the interpretation and application of the BIT's standards and questions of contract" (*Compañía de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic* (decision on annulment, 3 July 2002, para. 60). "A State may breach a treaty without breaching a contract, and vice-versa" (*ibid.*, para. 95). "Whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law — in the case of the BIT, by international law, in the case of the Concession contract, by the proper law of the contract" (*ibid.*, para. 96).

153. Applying those criteria, the Annulment Committee, in the *Vivendi Case*, went on to state that the *Vivendi* claim "was not simply reducible to so many civil or administrative claims concerning so many individual acts alleged to violate the concession contract or the administrative law of Argentina. It was open to Claimants to claim, and they did claim that these acts taken together, or some of them, amounted to a breach of . . . the BIT" (*ibid.*, para. 112). The Committee added that "a Treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standards". Thus, in choosing to commence an ICSID arbitration, the Claimant takes "the risk of a Tribunal holding that the acts complained of neither individually nor collectively rose to the level of a breach of the BIT" (*ibid.*, para. 113).

154. Therefore, not any breach of an investment contract could be regarded as a breach of a BIT. In the words of the Arbitral Tribunal in *Consortium RFCC v. Kingdom of Morocco*, a breach of the substantive provisions of a bilateral investment treaty can certainly result from a breach of contract, without a possible breach of the contract constituting, *ipso jure* and by itself, a breach of the Treaty. (See para. 48 of the Award).

155. In fact, the State, or its emanation, may have behaved as ordinary cocontractants having a difference of approach, in fact or in law, with the investor. In order that the alleged breach of contract may constitute unfair or inequitable treatment within the meaning of the bilateral agreement, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State, in the exercise of its sovereign authority (*puissance publique*), and not as a contracting party, has assumed obligations under the bilateral agreement. (*ibid.*, para. 51). In other words, an investment protection treaty cannot be used to compensate an investor deceived by the financial results of the operation undertaken, unless he proves that his deception was a consequence of the behaviour of the receiving State acting in breach of the obligations which it had assumed under the treaty. (*ibid.*, para. 108)

156. Similarly in the case of *Joy Mining Machinery Limited v. Arab Republic of Egypt* (ICSID case No. ARB/03/11), an ICSID Arbitral Tribunal, in its Decision on jurisdiction of 6 August 2004, (paras. 72 and 82) stated that "a basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some forms of State interference with the operation of the contract involved". It concluded in the case that "the absence of a Treaty-based claim, and the evidence that, on the contrary, all claims are contractual, justifies the finding that the Tribunal lacks jurisdiction. Neither has it been credibly alleged that there was Egyptian State interference with the Company's Contract rights."

157. This solution is all the more apposite because the rules of attribution governing responsibility for the performance of contract obligations may differ from those governing responsibility for the performance of BIT

obligations. In this respect, the Tribunal, in the present case, has no intention of taking a position on such a substantive issue at this stage. It will note, however, that under Jordanian law, the legal personality of the JVA is distinct from that of the Jordanian State; accordingly, it cannot be ruled out that Jordan might not be held responsible for JVA's breaches of contract. Nevertheless, in public international law, a State may be held responsible for the acts of local public authorities or public institutions under its authority and it cannot be ruled out that the Jordanian State may be held responsible for the acts of the JVA. (see the *ad hoc* Committee's Annulment Decision in the above-mentioned *Vivendi* case (para. 96)).

158. When considering the conclusions with which it is presented, the Tribunal will first observe that the Claimants have abandoned the submissions they had originally presented on the basis of Article 5 of the BIT and no longer contend that Jordan has taken unlawful expropriation measures against them in this instance. The Tribunal will therefore not be called upon to decide whether it has jurisdiction to entertain such conclusions.

159. However, the Claimants do assert that Jordan failed to comply with the provisions of Article 2(3) of the BIT ensuring "at all times just and fair treatment of the investment of investors of the other Contracting Party" and protecting them against "unjustified or discriminatory measures". The Claimants' argument seems to be that all the contractual breaches for which they hold JVA responsible must be regarded as constituting an unjust and unfair treatment by Jordan within the meaning of Article 2(3).

160. As stated above, this Tribunal does not have jurisdiction in respect of the contractual breaches and could entertain them only if the alleged breaches were simultaneously to constitute breaches of the treaty. The Tribunal will observe that the Claimants have advanced little argument to that effect.

161. In their request for arbitration of 8 August 2002, they concluded that "the Respondent has breached the Claimants' rights under the Contract by causing delays to the performance of the project, varying its scope and increasing its quantities without fair and prompt compensation, causing additional costs without fair and prompt compensation as established in Contract". They recalled that, in implementation of the Contract they submitted to the Engineer and to the Respondent, a draft final statement setting out the total outstanding amount claimed to be due to them, equivalent to approximately US\$28,000,000, and they asked the Tribunal to order the payment of such a sum. Then, after having presented the contractual claim in detail, the Claimants quoted the articles of the BIT which, in their opinion, had been violated without giving any further explanation.

162. In their first submission on jurisdiction, dated 10 December 2003 and in their Rejoinder of 11 March 2004, the Claimants contended that "a Claimant is not required, at the jurisdictional stage, to provide evidence of the soundness of its claims, but rather to assert facts, which, if established, would constitute violations of the BIT" (para. 153). They did not give more indications with respect to the facts on which their treaty claims were based or to the interpretation to be given to the relevant provisions of the BIT. It was only at the hearing that the Representative of the Claimants stated that their treaty claims were "not for a simple correction of monetary determination" by the Engineer, but that they contested "the way Jordan made use of the Engineer" (without developing this assertion).

163. In fact, and leaving aside this vague and late allusion, the Claimants, on this point, base their treaty claims exclusively on the way in which the Contract was implemented by the Engineer and by JVA. But they explain no where how the alleged facts could constitute not only a breach of the contract, but also a breach of Article 2(3) of the BIT. They only quote that article and assert that it has been violated. They present no argument, and no evidence whatsoever, to sustain their treaty claim and they do not show that the alleged facts are capable of falling within the provisions of Article 2(3). The Tribunal, therefore, has no jurisdiction to consider this first treaty claim.

164. Moreover, the Claimants maintain that the Prime Minister of Jordan expressly agreed that, in the absence of any agreement between the Parties, any outstanding matter will be referred for final settlement to arbitration as contemplated by clause 67.3 of the General conditions of the Contract. They submit that this commitment has not been fulfilled. They contend that "during the same period of time, Jordan used to grant arbitration to foreign investors which were in the same position as the Claimants". Therefore, according to them, Jordan's conduct in this respect amounts not only to a violation of Article 2(4) of the BIT, but also to a violation of the provisions of Article 2(3) prohibiting discriminatory treatment.

165. In this regard, the Tribunal notes that pursuant to Article 67.2 of the General Conditions of the contract, "any dispute in respect of which amicable settlement has not been reached . . . shall be finally settled by reference

to the competent court of law in the Kingdom [of Jordan], unless both parties shall agree that the dispute be referred to arbitration". It is not disputed that the contract contained a binding arbitration clause and that resort to contractual arbitration accordingly required the consent of both Parties. The Claimants contend that Jordan gave such consent which Jordan denies. Thus the Claimants do not assert that there has been a breach of contract in this regard; rather, they claim that Jordan reneged on an undertaking it had given, although it was not contractually bound to give it.

166. The Tribunal observes that, here again, the file submitted by the Claimants is lacking, in terms of both the facts and the law (and notably the alleged practice of Jordan as regards resort to arbitration). The Tribunal, however, does not believe that it must rule out from the outset that the alleged facts, if established, may constitute breaches of Articles 2(3) and 2(4) of the BIT. The objection to jurisdiction submitted on this point by Jordan cannot be upheld.

\*

#### *Jurisdiction ratione temporis*

167. The Respondent raises a last objection relating to the jurisdiction of the Tribunal *ratione temporis*. It observes that the BIT between Italy and Jordan "was signed on 21 July 1996 and entered into force on 17 January 2000". As a consequence, "the submission to jurisdiction of ICSID in Article 9(3) of the BIT applies only to disputes that arise after the entry into force of the bilateral treaty". It adds that "the dispute arose in its entirety before this entry into force". In the alternative, Jordan maintains that any violation of the Treaty can only be founded upon acts and omissions of Jordan after 17 January 2000 and "it denies that any such violations have been committed".

168. By contrast, the Claimants contend that the language used in the BIT does not restrict the Tribunal's jurisdiction to alleged breaches of the BIT which occurred after "its entry into force". Moreover, they stress that their "Treaty claims are based on acts and omissions of Jordan that occurred after the entry into force of the BIT". They add that "Jordan's breaches are continuing, or alternatively, complex breaches, and are not limited to a precise point in time. They submit that even "on the assumption that the present dispute arose prior to the entry into force of the BIT, Jordan violated its obligation to refrain from acts that defeat the object and purpose of the BIT after the date of its signature". Jordan contests each of those points.

169. The Tribunal will first observe that it is not required to decide on its jurisdiction *ratione temporis* with respect to the contractual claims filed by the Claimants. It is no more required to decide on its jurisdiction *ratione temporis* with respect to the treaty claims based on Article 2(3) of the BIT dealt with in paras. 158 to 163 above. In fact, it results from the foregoing (see paras 119, 127 and 163) that the Tribunal has no jurisdiction to entertain those claims, regardless of the date when a dispute concerning them arose between the Parties. The Tribunal will therefore address the issue of its jurisdiction *ratione temporis* only with regard to the treaty claim relating to the alleged commitment of Jordan to submit the dispute to arbitration (see paras. 164 to 166 above).

170. In this respect, the Tribunal notes that Articles 9(1) and (3) of the BIT cover "any dispute which may arise between one of the contracting Parties and the investors of the other contracting Party on investments". Such language does not cover disputes which may have arisen before the entry into force of the BIT, but only disputes arising after 17 January 2000.

171. There is abundant jurisprudence on the definition of disputes in international law and on the date on which such disputes are considered to arise. But the Tribunal will not have to consider this jurisprudence in detail.

172. In the present case, the Claimants allege a number of contractual claims arising between 1995 and 1999. On 22 April 1998, they submitted a draft final statement evaluating those claims at approximately US\$28 million. From 1997, the Claimants initiated a series of contacts with various Jordanian officials requesting that their contractual claims be submitted to arbitration as contemplated by clause 67.3 of the General Conditions of Contract.

173. On 20 February 2000, a meeting took place between the Italian and Jordanian Prime Ministers. According to the Claimants, there was agreement during that meeting to refer the matter to contractual arbitration in case it would not be possible to reach an amicable settlement (a point which is denied by Jordan).



174. On 27 March 2000, the Prime Minister of Jordan informed the Claimants that, if they insisted on their claims, they could refer them to the Jordanian Courts. The Claimants requested again that the matter be submitted to contractual arbitration. This request was rejected on 28 August 2000. The Claimants wrote again on 12 December 2001 and received again a negative answer on 24 January 2002.

175. Thus the dispute relating to the alleged commitment of Jordan to submit the dispute to contractual arbitration arose well after the 17 January 2000, date of entry into force of the BIT between Jordan and Italy. The Tribunal has jurisdiction *ratione temporis* to hear the "Treaty claims" brought on this point by the Claimants.

176. However, the Tribunal observes that one must distinguish carefully between jurisdiction *ratione temporis* of an ICSID Tribunal and applicability *ratione temporis* of the substantive obligations contained in a BIT.

177. In this respect, the Tribunal notes that Article 1(1) of the BIT does not give the substantive provisions of the Treaty any retrospective effect. Thus, the normal principle stated in Article 28 of the Vienna Convention of Treaties applies and the provisions of the BIT "do not bind the Party in relation to any act or facts which took place or any situation which ceased to exist before the date of entry into force of the Treaty" (see *SGS v. Republic of the Philippines*, ICSID Case No. ARB/02/6, decision of the Tribunal on objections to jurisdiction, paras. 165 and 166; see also *Mondev International Ltd. v. United States of America* (2002)-6, ICSID Reports 192, p. 208-9 (paras. 68-70).

178. In the present case, the Claimants complain of breaches of the BIT occurring after 20 February 2000. The Treaty entered into force on 17 January 2000. In this respect also, the Tribunal has jurisdiction *ratione temporis* to hear the Treaty claims relating to the alleged commitment of Jordan to submit the dispute to arbitration.

179. For the foregoing reasons, the Tribunal unanimously:

- (a) Decides that this Tribunal has jurisdiction over the Claimants' claims that Jordan, by refusing to accede to the Claimants' request to refer the dispute to arbitration pursuant to Article 67(3) of the Contract, breached Articles 2(3) and Article 2(4) of the Bilateral Investment Treaty concluded between Jordan and Italy on 21 July 1996;
- (b) Decides that the Tribunal has no jurisdiction over the Claimants' other claims;
- (c) Makes the necessary order for the continuation of the procedure pursuant to Arbitration rule 41(4); and
- (d) Reserves all questions concerning the costs and expenses of the Tribunal and the costs of the Parties for subsequent determination.

..... SIGNED .....

H.E. JUDGE GILBERT GUILLAUME

DATE ... NOVEMBER 9, 2004 ...

..... SIGNED .....

MR. BERNARDO CREMADES

DATE ... NOVEMBER 12, 2004 ...

..... SIGNED .....

SIR IAN SINCLAIR

DATE ... NOVEMBER 15, 2004 ...