

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID): SALINI
 COSTRUTORRI S.P.A AND ITALSTRADE S.P.A V. KINGDOM OF MOROCCO
 (DECISION ON JURISDICTION)*
 [July 23, 2001]
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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**SALINI COSTRUTTORI S.P.A.
 AND
 ITALSTRADE S.P.A.
 Claimants**

v.

**KINGDOM OF MOROCCO
 Respondent**

Case No. ARB/00/4

DECISION ON JURISDICTION

Members of the Tribunal

Maitre Robert Briner, President
Maitre Bernardo Cremades, Arbitrator
Professor Ibrahim Fadlallah, Arbitrator

Secretary of the Tribunal

Gabriela Alvarez-Avila

For the Claimants

Professor Antonio Crivellaro
 Bonnelli Erede & Pappalardo

Professor Giorgio Sacerdoti

For the Respondent

Mr. Ahmed Zejjari
 Head of the Legal Department, Ministry of Infrastructure

Mr. *le Bâtonnier* Mohammed Naciri
 Casablanca

Maitre Aurélie Antonietti
Maitre Christian Camboulive
 Gide Loyrette & Nouel, Paris

FACTS:

1. A dispute has been referred to the Arbitral Tribunal between the following Italian companies:

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- Salini Costruttori S.p.A.
- Italstrade S.p.A.

and the Kingdom of Morocco.

2. The *Société Nationale des Autoroutes du Maroc* (hereinafter "ADM"), incorporated in 1989 as a limited liability company, builds, maintains and operates highways and various road-works, in accordance with the Concession Agreement concluded with the Minister of Infrastructure and Professional & Executive Training, acting on behalf of the State.

In August 1994, within the context of this Agreement, ADM issued an international invitation to tender for the construction of a highway joining Rabat to Fès. The above-mentioned Italian companies submitted a joint tender for the construction of section No. 2 Khémisset-Meknès Ouest (West Meknès), which is approximately 50 kilometres long. The construction of this section was awarded to the Italian companies for a price of MAD 280,702,166.84 and JPY 3,122,286,949.50.

The negotiations that followed the award of section No. 2 resulted in the signature of Contract 53/95 on October 17, 1995.

3. The two Claimants created the *Groupement d'Entreprises Salini-Italstrade* (hereinafter "the Group") for the performance of the contract giving rise to the present dispute. The Group is not a legal entity. As a result, the Italian companies take part in the present arbitration as joint Claimants.

4. A provisional Taking Over of the work took place on July 31, 1998.

The works were completed on October 14, 1998. The works therefore took 36 months to complete, 4 months longer than stipulated in the contract (32 months).

The final Taking Over took place on October 26, 1999.

5. A draft of the final account was sent to the Italian companies by ADM. They signed it on March 26, 1999 (with reservations).

On April 29, 1999, the Italian companies sent ADM's Head Engineer a memorandum setting out the reasons for the reservations put forward: technical reservations, exceptionally bad weather, project upheaval, modifications concerning the dimensions of the work, extension of contractual time limits, financial burdens, unforeseeable fluctuations of the value of the Yen. On September 14, 1999, following the rejection of all of their claims by ADM's Head Engineer, the Italian companies sent a memorandum relating to the final account to the Minister of Infrastructure, in accordance with Article 51 of the *Cahier des Clauses Administratives Générales* [Book of General Administrative Clauses]. No reply was received from either the Minister of Infrastructure or ADM.

PROCEDURE

6. On May 1, 2000, the Italian companies filed a Request for Arbitration against the Kingdom of Morocco with ICSID. The Secretary-General registered the Request on June 13, 2000.

The Italian companies claimed ITL 132'639'617'409, as compensation for damages suffered.

7. The Arbitral Tribunal was constituted in accordance with the Parties' wishes. The Italian companies appointed Maître Bernardo Cremades as arbitrator. The Kingdom of Morocco appointed Professor Ibrahim Fadlallah. These two arbitrators jointly appointed Maître Robert Briner as President of the Arbitral Tribunal. The Parties agreed that the arbitration would take place in Paris.

8. The Kingdom of Morocco raised an objection to jurisdiction in a letter sent to ICSID on July 17, 2000. A preliminary hearing took place on October 27, 2000 in Paris. The Respondent reiterated its objection to jurisdiction in its memorial of December 20, 2000, to which the Italian companies had to reply by February 2, 2001 at the latest. This time limit was extended, at the Claimants' request, until February 15 of the same year. Consequently, the President of the Arbitral Tribunal extended the deadlines for the submission of the Parties' reply and rejoinder. The Respondent submitted its reply on March 16, 2001 and the Claimants their rejoinder on April 16, 2001. A hearing dealing exclusively with the questions of the admissibility of the Request and the Arbitral Tribunal's jurisdiction was held in Paris on May 3, 2001.

LEGAL DISCUSSION

9. In their Request for Arbitration, the Italian companies base the jurisdiction of ICSID on Article 8 of the Treaty between the Government of the Kingdom of Morocco and the Government of the Republic of Italy for the reciprocal promotion and protection of investments, signed on July 18, 1990, which came into force on January 1, 1992 in favour of Italian investors, by way of letters exchanged between the Ministers of Foreign Affairs for both Governments, dated November 26, 1991. The Kingdom of Morocco no longer contests the coming into force of this Bilateral Investment Treaty for the protection of investments.

In fact, during the hearing on jurisdiction, held on May 3, 2001 in Paris, Counsel for the Kingdom of Morocco acknowledged that "*the Parties agree to consider that, in effect, the exchange of letters authorises the early implementation of the Treaty — not for prior investments (which the text does not say), but authorises an earlier coming into force of the Treaty in its totality*" (transcript of the hearing on jurisdiction of May 3, 2001, p. 2).

10. The Kingdom of Morocco has raised various objections to the referral of this matter to the Arbitral Tribunal. It maintains, on the basis of Article 8 of the aforementioned Treaty, that the Request is not admissible because it is premature (I), that the Tribunal has no jurisdiction *ratione personae* and *ratione materiae* (II) and that the Italian companies have waived all jurisdiction other than that of the administrative courts of Rabat (III).

I. THE INADMISSIBILITY OF THE REQUEST DUE TO ITS PREMATURE NATURE

A. The claims of the Parties

11. In its memorials on jurisdiction and its oral presentations, the Kingdom of Morocco states that the Claimants' Request was premature under Article 8.2 of the Bilateral Treaty. Essentially, it maintains that this provision required:

- that the grounds for complaint contained in the Request for Arbitration be presented in the form of a request for amicable settlement addressed to the Kingdom of Morocco at least six months before the Request for Arbitration was filed;
- that these grounds for complaint constitute violations of the Bilateral Treaty, the arbitration proceedings provided for under Article 8.2 being inseparable from the other provisions of the said Treaty.

12. This second argument concerns the question of the *ratione materiae* jurisdiction of the Tribunal. As a result, it will be assessed during the examination of this issue. With regard to the assertion that the Request is premature, the only pertinent point to ascertain is whether the Italian companies actually made the request for amicable settlement referred to in paragraphs 1 and 2 of Article 8.

13. Concerning the first argument, the Respondent alleges that the Italian companies' claims were sent to ADM's Chief Executive Officer (Head Engineer) and the Minister of Infrastructure, in his capacity as ADM's President and not that of Minister. Thus, these claims could not have been transmitted to the Kingdom of Morocco.

The Italian companies contend that such a request was made and produce the following documents in support of this assertion:

- memorandum setting out claims relating to the final account, presented to the Minister of Infrastructure and President of ADM, on September 14, 1999;
- letter sent to the Ambassador of Morocco in Rome, dated April 10, 1998;
- letter sent to the Prime Minister of Morocco, dated May 15, 1998.

B. Decision

14. In light of the documents exchanged between the Parties and their oral presentations, in order to rule on the premature nature of the Request for Arbitration, the Arbitral Tribunal must determine if:

- a) a request for amicable settlement of disputes arising from the contract at issue was submitted to the Kingdom of Morocco;
- b) the request for amicable settlement related to the claims formulated in the Request for Arbitration;
- c) a period of at least six months passed between the submission of the two requests.

a) Was a request for amicable settlement of the disputes arising in connection with the contract submitted to the Kingdom of Morocco?

15. Article 8 of the Bilateral Treaty provides that:

"1) *All disputes or differences, including disputes related to the amount of compensation due in the event of expropriation, nationalisation, or similar measures, between a Contracting Party and an investor of the other Contracting Party concerning an investment of the said investor on the territory of the first Contracting Party should, if possible, be resolved amicably.*

2) *If the disputes cannot be resolved in an amicable manner within six months of the date of the request, presented in writing, the investor in question may submit the dispute either:*

- a) *to the competent court of the Contracting Party concerned;*
- b) *to an ad hoc tribunal, in accordance with the Arbitration Rules of the UN Commission on International Trade Law;*

c) *to the International Centre for Settlement of Investment Disputes (ICSID), for the application of the arbitration procedures provided by the Washington Convention of March 18, 1965 on the settlement of investment disputes between States and nationals of other States.*

3) *The two Contracting Parties shall refrain from handling, through diplomatic channels, all questions pertaining to an arbitration or to pending legal proceedings, as long as these proceedings have not come to an end and that one of the said Parties has not complied with the judgment of the arbitral tribunal or the designated ordinary court, within the term for enforcement fixed by the judgment or to be otherwise established, on the basis of the rules of international or national law applicable in the case."*

16. The disputes addressed by these provisions are those in which the respective parties are necessarily an investor and a State. The compulsory attempt to come to an amicable settlement imposed by Article 8.2 applies to such parties. Therefore, the Italian companies, Italian investors, must have tried to reach an amicable settlement with the Kingdom of Morocco.

17. It is not disputed that the contract concluded between ADM and the Italian companies is a public procurement contract.

Article 2.2.1 of the CCAP provides:

"Moreover, the Contractor is subjected to the following general texts which are not contained in the Project File:

The Cahier des Clauses Administratives Générales (CCAG) to be applied to projects undertaken on behalf of the Ministry of Public Works and Communications approved by Royal Decree n° 209-65 of 23 Joumada II 1385 (October 19, 1965) made applicable to public authorities by Royal Decree n° 151-66 of 29 Safar 1386 (June 18, 1966), except for derogations expressly stipulated in the present Cahier des Clauses Administrative Particulières [CCAP]."

Article 18, paragraph 1 of the CCAP provides that:

"In case of disputes between the Owner and the Contractor, recourse shall be made to the procedure provided for by Articles 50 and 51 of the CCAG."

Article 18 does not create an exception to the CCAG provisions; on the contrary, it explicitly refers to them.

Under the title "Representation of the Owner", Article 23 of the CCAP provides that: *"In all the general texts mentioned in Article 2, the functions are attributed as follows:*

- Minister — President
- Head Engineer — Chief Executive Officer"

18. The Kingdom of Morocco rightly emphasises the fact that the CCAP, a *contractual* document whose purpose is to govern the relations between ADM and the Italian companies, cannot amount to the *attribution* of the function of President of ADM to the Minister. But, it cannot infer that the CCAP has removed the Contractor's claims from the Minister's control to place them under the distinct control of the President of ADM. The confusion surrounding the positions held by the Minister, which results from the organisation of structures of implementation put in place

by the Moroccan Authorities regarding highways, cannot be invoked to uphold the premise that what the Minister was aware of in one of his capacities, as can be implied from the reference to Article 51 CCAG, was unknown to him in another capacity.

19. The Tribunal notes that Article 8.2 of the Treaty does not set out any procedure to be followed in relation to reaching an amicable settlement of the dispute between the two Parties. This Article only fixes a term of six months during which the Parties should try to resolve their disputes amicably. The mission of this Tribunal is not to set strict rules that the Parties should have followed; the Tribunal is satisfied to determine if it is possible to deduce from the entirety of the Parties' actions whether, while respecting the term of six months, the Claimants actually took the necessary and appropriate steps to contact the relevant authorities in view of reaching a settlement, thereby putting an end to their dispute.

Therefore, the Tribunal concludes that the various above-mentioned documents constitute a written request aimed toward the amicable settlement of the dispute and satisfy the requirement set out in the Bilateral Treaty in relation to the addressee of the request.

b) Did the request try to put an amicable end to the disputes submitted to the Arbitral Tribunal?

20. The Tribunal considers that the attempt to reach an amicable settlement should essentially include the existence of grounds for complaint and the desire to resolve these matters out-of-court. It need not be complete or detailed.

21. The Tribunal considers that the above-mentioned condition is fulfilled in the present case: the various documents constitute a "written request aimed toward the amicable settlement of the dispute," referring to the grounds for complaint raised in the current proceedings; furthermore, these documents allowed or, at least, should have allowed the Kingdom of Morocco to become aware of the dispute and to take the necessary steps to enable the resolution of the dispute.

c) Was the six-month time limit respected?

22. The Request for Arbitration was submitted on May 4, 2000, 8 months after the transmission of the memorandum setting out the claims relating to the final account, presented to the Minister of Infrastructure and President of ADM on September 14, 1999. This last document is the most recent of those considered by this Tribunal as constituting an attempt to reach an amicable settlement prior to arbitration.

23. In conclusion, the Arbitral Tribunal considers that the ground for complaint alleging that the Request for Arbitration was premature is not founded in light of the requirements of Article 8.2 of the Bilateral Treaty.

II. OBJECTIONS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL

24. The Kingdom of Morocco raised objections as to the Arbitral Tribunal's jurisdiction, founded on the alleged waiver, from its point of view, by the Italian companies of the option of choosing the forum under Article 8 of the Bilateral Treaty (1), as well as a lack of jurisdiction *ratione personae* (2) and *ratione materiae* (3).

1) The waiver of the option of choosing the forum under Article 8 of the Bilateral Treaty.

25. The Kingdom of Morocco considers that the Italian companies are bound by Article 18 CCAP that refers to a procedure provided for by Articles 50 and 51 of the CCAG, which gives the courts of Rabat jurisdiction over disputes arising from the performance of the contract for services.

26. For their part, the Italian companies maintain that the consent given by the Kingdom of Morocco, and by themselves, to ICSID jurisdiction by way of the Bilateral Treaty should prevail over the contractual acceptance of another forum. Thus, submitting the matter to the courts of Rabat would not imply a waiver of ICSID jurisdiction, particularly since the above-mentioned referral to the administrative courts respects the requirements flowing from the public nature of the contract, which calls for the mandatory application of the provisions of the *Cahier des Clauses Administratives* and, consequently, of Article 52 of the CCAG.

27. Generally, ICSID jurisdiction arises from the consent of the Parties to the dispute; that is to say, a Contracting State and the national of another Contracting State.

Concerning the formal conditions required in order to have valid consent, Article 25.1 of the Washington Convention (hereinafter "the Convention") states only one condition: that the consent be given in writing. Regarding the moment at which consent must be expressed, one may deduce from the Convention that it must have been given prior to the filing of a request for conciliation or arbitration, since this request must, in order to be registered, state the date and the nature of the documents relating to the consent of the Parties (*G.R. Delaume, Le Centre International pour le règlement des Différends relatifs aux Investissements (CIRDI), in JDI 1982, p. 775 et seq.*).

The consent to which Article 25.1 of the Convention refers may have three sources: a clause contained in a contract concluded between the State and the investor; national law, usually a Code or an Act on investments; or international law, by way of a clause contained in a bilateral or multilateral agreement.

Article 8 of the Bilateral Treaty provides that:

"2) *If the disputes cannot be resolved in an amicable manner within six months of the date of the request, presented in writing, the investor in question may submit the dispute either:*

- a) *to the competent court of the Contracting Party concerned;*
- b) *to an ad hoc tribunal, in accordance with the Arbitration Rules of the UN Commission on International Trade Law;*
- c) *to the International Centre for Settlement of Investment Disputes (ICSID), for the application of the arbitration procedures provided by the Washington Convention of March 18, 1965 on the settlement of investment disputes between States and nationals of other States."*

The necessary and sufficient nature of the consent expressed by means of a forum-selection clause, such as the above-mentioned clause, was acknowledged in the *Asian Agricultural Products Ltd (AAPL) vs. Republic of Sri Lanka* award (*Yearbook Commercial Arbitration XVII (1992), p. 103*).

In summary, Article 8 paragraph 2(c) constitutes a State's unilateral engagement toward the national State of the investor to submit itself to ICSID jurisdiction as Respondent against the foreign investor who will have chosen to submit the case to the Centre.

In light of these considerations, the notification of a Request for Arbitration to ICSID by the Claimants constitutes valid proof of their consent to the Centre's jurisdiction, among those set forth by Article 8 of the Agreement.

As the jurisdiction of the administrative courts cannot be opted for, the consent to ICSID jurisdiction described above shall prevail over the contents of Article 52 of the CCAG, since this Article cannot be taken to be a clause truly

extending the scope of jurisdiction and covered by the principle of the Parties' autonomy. Thus, the reasoning proposed by the Kingdom of Morocco, as expressed in its observations of July 2, 2001, p. 2 *et seq.*, according to which the Claimants could no longer choose to submit the dispute to ICSID jurisdiction due to their participation in a dispute-settlement process in accordance with Articles 50 and 51 CCAG, cannot be sustained.

2) ***Ratione personae* jurisdiction**

A. **The claims of the Parties**

28. The Kingdom of Morocco alleges that the Arbitral Tribunal lacks *ratione personae* jurisdiction because the action was founded on acts attributed to ADM, which is not a State entity. ADM is a private legal entity, with its own assets. The fact that the State exercises its rights as shareholder and licensor should not have any effect on the legal autonomy of ADM. The nature of the public procurement contract, which automatically follows from any construction works contract within the public domain, should have no influence on ADM's nature, nor should the levying of a special tax, the benefit of which may be granted to public or private legal entities.

29. The Italian companies allege that ADM is a public legal entity, notwithstanding its incorporation as a limited liability company. The composition of its assets and its Board of Directors at the time of its creation and the direct involvement of the Minister of Infrastructure in all fundamental decision-making relating to the contract establish the active participation of the State. The said construction contract is governed by the CCAG, as are all the works carried out on behalf of the State, and falls under the jurisdiction of the administrative courts, which logically implies that it is a public procurement contract. ADM is directly or indirectly financed by the Moroccan State. The road network construction projects are accounted for by the State. Thus, being a public entity bound by a public procurement contract, all the conditions required to assimilate ADM to the State are satisfied.

B. **Decision**

30. Since the claims of the Italian companies are being directed against the State and are founded on the violation of the Bilateral Treaty, it is not necessary, in order to determine whether the Tribunal has jurisdiction, to know whether ADM is a State entity. However, as this issue has been discussed at length by the Parties and may possibly, as the case may be, have an influence on the merits of the case, the Tribunal considers that it is of use to rule on the matter in order to satisfy the legitimate expectations of the Parties.

31. Article 25.1 of the Convention provides that:

"The jurisdiction of the Centre shall extend to any legal dispute [. . .], 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"

Neither the Convention nor the Bilateral Treaty gives the slightest indication of what should be understood by "Contracting State". The reference made to "any constituent subdivision" or "agency of a Contracting State" is of no importance in this regard, because ADM does not fulfil the conditions required by the Washington Convention to be a party to these proceedings. Generally, any commercial company dominated or predominantly controlled by the State or by State institutions, whether it has a legal personality or not, is considered to be a State-owned company. (Various authors support this definition: *L.J. Bouchez, The Prospects for International Arbitration: Disputes Between States and Private Enterprises: 8 Journal of International Arbitration p. 81-115 (1, 1991)*. — *K.-H. Böckstiegel, Arbitration and State Enterprises: Survey on the National and International State of Law and Practice: Arbitration International, vol. 1, n° 2, 1985, p. 195-199*).

In order to determine the degree of control and participation of a State in a company, the Tribunal, referring to an ICSID award rendered in a case between Emilio Agustín Maffezini and the Kingdom of Spain (*ICSID Case No. ARB/97/7*), considers that it must take into account the international rules governing the liability of States. The assessment of the degree of State control and participation in a company is based on two criteria: the first, structural, in other words, related to the structure of the company and, in particular, to its shareholders; the other, functional, related to the objectives of the company in question.

32. From a structural point of view, the Tribunal considers that:

- ADM is a commercial company incorporated as a limited liability company, in accordance with the Act governing limited liability companies of June 2, 1989, registered with the Trade Register since August 3, 1989, thereby having its own legal personality.
- ADM's share capital is held in the following manner: the Treasury holds a participation of 77.79%; the participation of public establishments is 10.57%; that of banks and financial institutions is 5.17%; that of insurance companies is 3%; that of commercial and industrial companies is 2.67%; and lastly, that of research departments is 0.81%.

Thus, the Kingdom of Morocco, through the medium of the Treasury and various public entities, holds at least 89% of ADM.

- The functioning and management of ADM are governed by Article 20 of its Memorandum and Articles of Association:

"The company is managed by a Board made up of at least five members and at most twenty, appointed by the Ordinary General Meeting or co-opted by the Board."

Moreover, Article 35 of the Memorandum and Articles of Association states that:

"General Meetings are made up of all the shareholders, irrespective of the quantity of their shares, as long as amounts that are due have been fully paid up."

In virtue of what has been set out above, the majority stake of the Moroccan State in ADM's capital significantly determines the extent of its representation within the General Meeting, and also within the Board of Directors. Persuasive evidence of this can be found in reading the Minutes of the Board of Directors' Meeting of March 18, 1998 (*Exhibit M 43*), which lists its members. Among these are notably the Minister of Infrastructure, who is also President of the company at the same time, the Secretary General of the Ministry of Infrastructure, the Director of Highways and Road Traffic, the Head of the Moroccan Port Authorities, the President of the Board of the National Bank for Economic Development, the Director of the Budget, all of whom depend upon the Ministry of Economy and Finance, etc.

- The majority stake of the Moroccan State in the company's Board of Directors translates into control *de facto* of the latter since, in accordance with Article 27 of ADM's Memorandum and Articles of Association:

"The Board of Directors has widespread powers to act in the name of the Company and to authorise all acts or transactions in relation to its object, to the sole exclusion of acts expressly reserved for the General Meeting by the Memorandum and Articles of Association or by Law."

- Finally, two other facts reflect the obvious interest that the Moroccan State has in the functioning and management of ADM. First of all, the Minutes indicate that the post of President of the Board of Directors should be held by the natural person holding the title of Minister of Infrastructure at that time. In addition, the Tribunal recalls that in 1995 it was the Minister of Infrastructure and Professional & Executive Training who, in his capacity as ADM's President, put out the invitation to tender that gave rise to the signing of the contract at issue in the present arbitration. Secondly, the Tribunal draws attention to ADM's practice of forwarding a copy of the Minutes of its Board of Directors' meetings to the Prime Minister of the Kingdom of Morocco, as well as to the Secretariat of the Government (*Exhibit G 14*).

Consequently, from a structural point of view, one cannot deny that ADM is an entity controlled and managed by the Moroccan State through the medium of the Minister of Infrastructure and various public organs.

33. From a functional point of view; in other words, if one now looks to the role and the functions carried out by ADM:

- In accordance with its Memorandum and Articles of Association, "*ADM's main activity is the construction, maintenance and operation of the highways and communication routes of a large dimension, granted by the State.*"

Thus, it is clear that ADM's main object is to accomplish tasks that are under State control (building, managing and operating of assets falling under the province of the public utilities responding to the structural needs of the Kingdom of Morocco with regard to infrastructure and efficient communication networks).

34. The administrative nature of the contract and of the laws that govern it corroborate the view of the Tribunal. The provisions of the CCAG, applicable to public procurement contracts performed on behalf of the Ministry of Public Works and Communications and approved by two royal decrees, as well as the conditions and methods of concluding contracts, and also specific provisions related to their control and management, provided for by Royal Decree n° 2-98-482 of 11 Ramadan 1419, illustrate what has previously been said.

35. Lastly, the Tribunal notes that the fact that a State may act through the medium of a company having its own legal personality is no longer unusual if one considers the extraordinary expansion of public authority activity. In order to perform its obligations, and at the same time take into account the sometimes diverging interests that the private economy protects, the State uses a varied spectrum of modes of organisation, among which are in particular semi-public companies, similar to ADM, a company mostly held by the State which, considering the size of its participation (over 80%), directs and manages it. All these factors resolutely imprint a public nature on the said company.

Thus, since ADM is an entity, from a structural as well as a functional point of view, which is distinguishable from the State solely on account of its legal personality, the Tribunal, in spite of the observations of July 2, 2001 made by the Kingdom of Morocco, concludes that the Italian companies have shown that ADM is a State company, acting in the name of the Kingdom of Morocco.

3) *Ratione materiae* jurisdiction

A. The claims of the Parties

36. The Kingdom of Morocco submits that the *ratione materiae* jurisdiction of the Arbitral Tribunal is dependent on:

- a) the existence of an investment, both within the meaning of the Bilateral Treaty as well as that of the Washington Convention;
- b) the existence of claims founded on the violation of the Bilateral Treaty.

a) The notion of investment

37. With regard to the Bilateral Treaty, the Italian companies consider that the contract at issue is an investment within the meaning of Articles 1(c) and 1(e), which deal with "*rights to any contractual benefit having an economic value*" and "*any right of an economic nature conferred by law or by contract.*" The dispute arose out of the non-performance of the said contract. The contract gives the Claimants a right of an economic nature, the right to damages.

38. The Kingdom of Morocco alleges that, considered in isolation, these provisions dilute the notion of investment into a broader notion of economic rights. Articles 1(c) and 1(e) should, therefore, be read in conjunction with paragraph 1 of Article 1, which refers to the laws and regulations of the host State of the investment. Therefore, it is Moroccan law that should define the notion of investment.

According to Decree n° 2-98-482 of December 30, 1998, the transaction in question should be characterized as a contract for services and not as an investment contract.

The Italian companies characterize the said contract as an investment pursuant to the Bilateral Treaty.

They consider that the reference to the laws and regulations of the host State only relate to the means of realising the investment and not to its definition. The notion of investment should, therefore, not be limited by reference to the laws and regulations referred to in Article 1 paragraph 1, but by reference to Article 1(g). This provision requires that the rights referred to notably in Articles 1(c) and 1(e) should have been the object of contracts approved by the competent authorities. This condition would seem to be satisfied in the present case. The Kingdom of Morocco contests this.

39. With regard to the Washington Convention, the Kingdom of Morocco alleges that the contract in question does not constitute an investment within the meaning of the said Convention.

40. The Italian companies allege the applicability of the Convention at the same time as the characterization of the contract at issue as an investment in light of the said Convention.

b) The grounds for the claims

41. The Kingdom of Morocco considers that the grounds for complaint formulated by the Italian companies do not relate to violations of the Bilateral Treaty, but mere contractual breaches. Moreover, it considers that the jurisdiction of the Arbitral Tribunal could only arise from alleged violations of the Bilateral Treaty, its consent to ICSID arbitration only having been expressed in the said Treaty.

42. The Italian companies argue that contractual failures as well as violations of the Bilateral Treaty may be submitted to ICSID arbitration.

B. Decision

a) On the existence of an investment

1) Within the meaning of the Bilateral Treaty

43. The protection of investments is the basis for the option of choosing the forum stipulated in Article 8.2 of the Bilateral Treaty. This Article, therefore, seeks to define the investments that come under the protection of the Bilateral Treaty.

44. However, insofar as the option of jurisdiction has been exercised in favour of ICSID, the rights in dispute must also constitute an investment pursuant to Article 25 of the Washington Convention. The Arbitral Tribunal, therefore, is of the opinion that its jurisdiction depends upon the existence of an investment within the meaning of the Bilateral Treaty as well as that of the Convention, in accordance with the case law.

Various arbitral tribunals have ruled in this manner in rendering awards in cases in which the notion of investment was at issue (*cf.* Award of March 9, 1998 in the *Fedax N.V. vs. the Republic of Venezuela case: JDI 1999, p. 294 et seq.*).

45. Article 1 of the Bilateral Treaty provides that:

"Pursuant to the present Agreement,

1. the term "investment" designates all categories of assets invested, after the coming into force of the present agreement, by a natural or legal person, including the Government of a Contracting Party, on the territory of the other Contracting Party, in accordance with the laws and regulations of the aforementioned party. In particular, but in no way exclusively, the term "investment" includes:

- a) chattels and real estate, as well as any other property rights such as mortgages, privileges, pledges, usufructs, related to the investment;*
- b) shares, securities and bonds or other rights or interests and securities of the State or public entities;*
- c) capitalised debts, including reinvested income, as well as rights to any contractual benefit having an economic value;*
- d) copyright, trademark, patents, technical methods and other intellectual and industrial property rights, know-how, commercial secrets, commercial brands and goodwill;*
- e) any right of an economic nature conferred by law or by contract, and any licence or concession granted in compliance with the laws and regulations in force, including the right of prospecting, extraction and exploitation of natural resources;*
- f) capital and additional contributions of capital used for the maintenance and/or the accretion of the investment;*
- g) the elements mentioned in (c), (d) and (e) above must be the object of contracts approved by the competent authority."*

The Parties, therefore, agreed upon a number of non-exhaustive hypotheses that they considered to be investments.

45. The construction contract creates a right to a "*contractual benefit having an economic value*" for the Contractor, mentioned in Article 1(c). The Contractor also benefits from a "*right of an economic nature conferred . . . [. . .] . . . by contract*" dealt with by Article 1(e). Moreover, the Respondent does not deny that the rights of the Italian companies are of the same nature as those referred to in (c) and (e) of Article 1.

46. The Tribunal cannot follow the Kingdom of Morocco in its view that paragraph 1 of Article 1 refers to the law of the host State for the definition of "investment". In focusing on "*the categories of invested assets (. . .) in*

accordance with the laws and regulations of the aforementioned party," this provision refers to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.

Yet, in the present case, the Claimants took part in the tender process in conformity with the legal rules applicable to invitations to tender. At the end of this procedure, they also won the bid and concluded the corresponding contract for services in conformity with the laws in force at that time.

Thus, whether one looks to the pre-contractual stage or that corresponding to the performance of the contract for services, it has never been shown that the Italian companies infringed the laws and regulations of the Kingdom of Morocco.

47. To be considered as investments, the rights enumerated under letters (c) and (e) "*must be the object of contracts approved by the competent authority*" under the terms of Article 1(g).

The Bilateral Treaty does not indicate who the competent authority is, this being likely to vary according to the contract in question. The competent authority is determined according to the laws and regulations of the State on the territory of which the investments are made (*cf.* Article 1, paragraph 1).

48. The Tribunal considers that the contract in question was indeed the object of an authorisation from the competent authority for the following reasons:

- The allocation of the contract to the Italian companies occurred in accordance with the rules and procedure fixed by the President of ADM, acting in virtue of the powers conferred on him by the Board of Directors of this company. As previously mentioned, no infringement of the laws and regulations of the Kingdom of Morocco has been alleged with regard to this phase. The Tribunal points out, without having to determine if ADM was or was not a mere entity of the Moroccan State, that in its capacity of licensor, the Ministry of Infrastructure approved the conclusion of public procurement contracts by ADM in accordance with the mandatory procedure, which was not alleged to have been violated.
- The different stages leading to the signature of the construction contract involved various interventions by the authorities concerned. Thus, the invitation to tender was put out by the Minister of Infrastructure and Professional & Executive Training, President of ADM; the presentation of the bid was made to ADM's Chief Executive Officer; the evaluation and awarding of this bid were carried out by a commission chaired by ADM's Chief Executive Officer and composed of various public organs; and lastly, it was ADM's Chief Executive Officer, as Owner, who signed the construction contract for the project at issue.

49. As a result, the Tribunal considers that the condition of Article 1(g) is satisfied. The contract concluded between ADM and the Italian companies is an investment within the meaning of the Bilateral Treaty. The option of choosing the forum contained in Article 8.2 could, therefore, be exercised in favour of arbitral proceedings under the auspices of ICSID.

2) Within the meaning of the Washington Convention

50. ICSID jurisdiction is determined by Article 25 of the Washington Convention which stipulates that:

"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of relation to 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."

51. No definition of investment is given by the Convention. The two Parties recalled that such a definition had seemed unnecessary to the representatives of the States that negotiated it. Indeed, as indicated in the Report of the Executive Directors on the Convention:

"No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (art. 25(4))."

52. The Tribunal notes that there have been almost no cases where the notion of investment within the meaning of Article 25 of the Convention was raised. However, it would be inaccurate to consider that the requirement that a dispute be "*in direct relation to an investment*" is diluted by the consent of the Contracting Parties. To the contrary, ICSID case law and legal authors agree that the investment requirement must be respected as an objective condition of the jurisdiction of the Centre (*cf.* in particular, the commentary by *E. Gaillard*, in *JDI 1999*, p. 278 *et seq.*, who cites the award rendered in 1975 in the *Alcoa Minerals vs. Jamaica* case as well as several other authors).

The criteria to be used for the definition of an investment pursuant to the Convention would be easier to define if there were awards denying the Centre's jurisdiction on the basis of the transaction giving rise to the dispute. With the exception of a decision of the Secretary General of ICSID refusing to register a request for arbitration dealing with a dispute arising out of a simple sale (*I.F.I. Shihata and A.R. Parra*, *The Experience of the International Centre for Settlement of Investment Disputes: ICSID Review, Foreign Investment Law Journal*, vol. 14, n° 2, 1999, p. 308.), the awards at hand only very rarely turned on the notion of investment. Notably, the first decision only came in 1997 (*Fedax* case, cited above). The criteria for characterization are, therefore, derived from cases in which the transaction giving rise to the dispute was considered to be an investment without there ever being a real discussion of the issue in almost all the cases.

The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction (*cf. commentary by E. Gaillard, cited above, p. 292*). In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.

In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally even if, for the sake of reasoning, the Tribunal considers them individually here.

53. The contributions made by the Italian companies are set out and assessed in their written submissions. It is not disputed that they used their know-how, that they provided the necessary equipment and qualified personnel for the accomplishment of the works, that they set up the production tool on the building site, that they obtained loans enabling them to finance the purchases necessary to carry out the works and to pay the salaries of the workforce, and finally that they agreed to the issuing of bank guarantees, in the form of a provisional guarantee fixed at 1.5% of the total sum of the tender, then, at the end of the tender process, in the form of a definite guarantee fixed at 3% of the value of the contract in dispute. The Italian companies, therefore, made contributions in money, in kind, and in industry.

54. Although the total duration for the performance of the contract, in accordance with the CCAP, was fixed at 32 months, this was extended to 36 months. The transaction, therefore, complies with the minimal length of time

upheld by the doctrine, which is from 2 to 5 years (*D. Carreau, Th. Flory, P. Juillard, Droit International Economique: 3rd ed., Paris, LGDJ, 1990, p. 558-578. — C. Schreurer, Commentary on the ICSID Convention: ICSID Review-FILJ, vol. 11, 1996, 2, p. 318-493*).

55. With regard to the risks incurred by the Italian companies, these flow from the nature of the contract at issue. The Claimants, in their reply memorial on jurisdiction, gave an exhaustive list of the risks taken in the performance of the said contract. Notably, among others, the risk associated with the prerogatives of the Owner permitting him to prematurely put an end to the contract, to impose variations within certain limits without changing the manner of fixing prices; the risk consisting of the potential increase in the cost of labour in case of modification of Moroccan law; any accident or damage caused to property during the performance of the works; those risks relating to problems of co-ordination possibly arising from the simultaneous performance of other projects; any unforeseeable incident that could not be considered as *force majeure* and which, therefore, would not give rise to a right to compensation; and finally those risks related to the absence of any compensation in case of increase or decrease in volume of the work load not exceeding 20% of the total contract price.

56. It does not matter in this respect that these risks were freely taken. It also does not matter that the remuneration of the Contractor was not linked to the exploitation of the completed work. A construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor.

57. Lastly, the contribution of the contract to the economic development of the Moroccan State cannot seriously be questioned. In most countries, the construction of infrastructure falls under the tasks to be carried out by the State or by other public authorities. It cannot be seriously contested that the highway in question shall serve the public interest. Finally, the Italian companies were also able to provide the host State of the investment with know-how in relation to the work to be accomplished.

58. Consequently, the Tribunal considers that the contract concluded between ADM and the Italian companies constitutes an investment pursuant to Articles 1 and 8 of the Bilateral Treaty concluded between the Kingdom of Morocco and Italy on July 18, 1990 as well as Article 25 of the Washington Convention.

b) On the grounds for the claims

59. Article 8 of the Bilateral Treaty offers the option of choosing the forum with respect to:

"All disputes or differences, including disputes related to the amount of compensation due in the event of expropriation, nationalisation, or similar measures, between a Contracting Party and an investor of the other Contracting Party concerning an investment of the said investor on the territory of the first Contracting Party . . ."

The terms of Article 8 are very general. The reference to expropriation and nationalisation measures, which are matters coming under the unilateral will of a State, cannot be interpreted to exclude a claim based in contract from the scope of application of this Article.

60. However, the Tribunal considers that its scope of application regarding the nature of disputes is limited as to the persons concerned. In the case where the State has organised a sector of activity through a distinct legal entity, be it a State entity, it does not necessarily follow that the State has accepted *a priori* that the jurisdiction offer contained in Article 8 should bind it with respect to contractual breaches committed by this entity.

61. In other words, Article 8 compels the State to respect the jurisdiction offer in relation to violations of the Bilateral Treaty and any breach of a contract that binds the State directly. The jurisdiction offer contained in Article 8 does not, however, extend to breaches of a contract to which an entity other than the State is a named party.

62. But, this restriction of the Arbitral Tribunal's jurisdiction only applies to claims that are based solely on a breach of contract.

However, the Arbitral Tribunal retains jurisdiction in relation to breaches of contract that would constitute, at the same time, a violation of the Bilateral Treaty by the State.

The Italian companies have expressly specified in their Request for Arbitration that "the claims submitted to the present arbitration [. . .] also include claims addressed directly to the Government of Morocco and which relate to the infringement of the Contractor's rights as a foreign investor according to the international regulation of foreign investments (the so-called "treaty claims")."

63. The claims of the Italian companies, to the extent that they correspond to violations of the Bilateral Treaty, are included within the ambit of the Arbitral Tribunal's jurisdiction. It will be for the Claimants to establish the merits of these claims in the subsequent stages of the arbitral proceedings.

64. The Tribunal reserves the question of costs and arbitration fees.

FOR THE ABOVE REASONS

The Tribunal declares that it has jurisdiction over the Italian companies' claims, as they are formulated, but specifies that it does not have jurisdiction over mere breaches of the contract concluded between the Italian companies and ADM that do not simultaneously constitute a violation of the Bilateral Treaty.

July 16, 2001

Maître Robert Briner

Maître Bernardo Cremades

Professor Ibrahim Fadlallah