

# **International Centre for Settlement of Investment Disputes**

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**Jan de Nul N.V.**

**Dredging International N.V.**

CLAIMANTS

**v.**

**Arab Republic of Egypt**

RESPONDENT

**ICSID Case No. ARB/04/13**

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## **DECISION ON JURISDICTION**

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Rendered by an Arbitral Tribunal composed of

Professor Gabrielle Kaufmann-Kohler, President

Professor Pierre Mayer, Arbitrator

Professor Brigitte Stern, Arbitrator

## TABLE OF CONTENTS

TABLE OF ABBREVIATIONS .....	4
I. RELEVANT FACTS REGARDING JURISDICTION .....	5
A. THE PARTIES .....	5
a. The Claimants	5
b. The Respondent	5
B. FACTUAL BACKGROUND .....	6
a. The SCA and the calls for tenders	6
b. The Contract and its performance	6
c. The proceedings before the Egyptian administrative courts	7
d. The BITs	9
aa. The 1977 BIT	9
bb. The 2002 BIT	10
II. PROCEDURAL HISTORY .....	13
A. INITIAL PHASE .....	13
a. Registration of the Request for Arbitration	13
b. Constitution of the Arbitral Tribunal and commencement of the proceedings	14
B. THE WRITTEN PHASE ON JURISDICTION .....	17
C. THE HEARING ON JURISDICTION .....	18
III. PARTIES' POSITIONS .....	19
A. THE CLAIMANTS' POSITION .....	19
B. THE RESPONDENT'S POSITION .....	20
IV. DISCUSSION.....	21
A. INTRODUCTORY MATTERS .....	21
a. The relevance of previous ICSID decisions or awards	22
b. The law applicable to the Tribunal's jurisdiction	22
c. The applicable standard	22
B. THE REQUIREMENTS OF ARTICLE 25 OF THE ICSID CONVENTION (INCLUDING THE DEFINITION OF INVESTMENT UNDER THE BITs) .....	23
a. Is there a legal dispute with a Contracting Party?	24
aa. The distinction between treaty and contract claims	25
bb. The Claimants' (treaty) claims	25
cc. The status of the SCA under international law	26

b. Does the dispute arise out of an investment?	28
aa. An investment within the meaning of Article 25 ICSID?	28
bb. An investment within the meaning of the 1977 BIT	30
cc. An investment within the meaning of the 2002 BIT	32
c. Have the parties consented in writing to arbitrate the dispute?	32
C. THE APPLICABILITY <i>RATIONE TEMPORIS</i> OF THE 2002 BIT.....	33
a. A different dispute in terms of parties and applicable legal standards	34
b. The relevance of the Lucchetti award	36
c. The relevance of the contractual dispute settlement clause	38
d. Must the investment exist at the time of the entry into force of the BIT?	39
e. Conclusion	39
D. COSTS .....	40
DECISION ON JURISDICTION .....	40

## TABLE OF ABBREVIATIONS

For the sake of convenience, the Tribunal will use the following abbreviations:

1977 BIT	Agreement between the Belgo-Luxembourg Economic Union on the one hand, and the Arab Republic of Egypt on the other hand, on encouragement and reciprocal protection of investments of 28 February 1977
2002 BIT	Agreement between the Belgo-Luxembourg Economic Union on the one hand, and the Arab Republic of Egypt on the other hand, on encouragement and reciprocal protection of investments of 28 February 1999
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT(s)	Bilateral investment treaty(ies); specifically bilateral investment treaties between the Belgo-Luxembourg Economic Union and the Arab Republic of Egypt (respectively the “1977 BIT” and the “2002 BIT”, collectively the “BITS”)
CM. J.	Claimants’ Counter Memorial on jurisdiction of 15 September 2005
Contract	Contract of 29 July 1992 between the Claimants and SCA
Exh. [C-] [R-]	Exhibits [Claimants] [Respondent]
First Claimant	Dredging International N.V.
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
JTB	Jurisdictional Trial Bundle
Mem. J.	Respondent’s Memorial on jurisdiction of 15 June 2005
Rejoinder J.	Claimants’ Rejoinder on jurisdiction of 15 December 2005
Reply J.	Respondent’s Reply on jurisdiction of 31 October 2005
Respondent	The Arab Republic of Egypt (also referred to as “Egypt” or “R.A.E.”)
SCA	Suez Canal Authority
Second Claimant	Jan de Nul N.V.
SoC	Claimants’ Statement of Claim of 15 March 2005
Tr. J. [page:line]	Transcript of the hearing on jurisdiction

## **I. RELEVANT FACTS REGARDING JURISDICTION**

1. This chapter summarizes the factual background of this arbitration to the extent necessary to rule on the Respondent's objections to jurisdiction.

### **A. THE PARTIES**

#### **a. The Claimants**

2. The Claimants in these proceedings are (i) Dredging International N.V. (the "First Claimant") and (ii) Jan de Nul N.V. (the "Second Claimant") (collectively the "Claimants").
3. The First Claimant, Dredging International N.V., is a company incorporated under the laws of Belgium with its registered office at Scheldedijk 30, B-2070 Zwijndrecht, Belgium.
4. The Second Claimant, Jan de Nul N.V., is a company established under the laws of Belgium with its registered office at Tragel 60, B-9308 Hofstade-Aalst, Belgium.
5. The Claimants are among the leaders in the world dredging market. They are the two partners of the Joint Venture DI-JDN Suez, an unincorporated joint venture (the "Joint Venture"). The Joint Venture Agreement was entered into by the two partners for the purpose of jointly performing dredging operations in the Suez Canal under a contract awarded by the Suez Canal Authority (the "SCA"), an Egyptian State entity.
6. The Claimants are collectively represented in this arbitration by Professors Antonio Crivellaro and Luca Radicati di Brozolo, BONELLI EREDE PAPPALARDO, Via Barozzi 1, 20122 Milan, Italy.

#### **b. The Respondent**

7. The Respondent in this arbitration is the Arab Republic of Egypt ("Egypt").
8. The Respondent is represented in this arbitration by

- Dr. Iskandar Ghattas, Under Secretary, Ministry of Justice; Dr. Mostafa Abdel Ghaffar, Director of International Cooperation, Ministry of Justice; Mr. Hosam Abdel Azim, President of the Office of State Litigation; Mr. Osama Mahmoud, Office of State Litigation, and
- Messrs Robert Saint-Esteben and Louis Christophe Delanoy, BREDIN PRAT, 130, rue du Faubourg Saint-Honoré, 75008 Paris, France.

## **B. FACTUAL BACKGROUND**

9. The current dispute arises out of a contract which the Claimants entered into with the SCA for the widening and deepening of certain southern stretches of the Suez Canal (the “Contract”). In substance, on the Claimants’ case, the Respondent through SCA deliberately deceived them by intentionally misrepresenting the conditions under which the Contract was to be performed.

### **a. The SCA and the calls for tenders**

10. The SCA is a public agency, which was established by Law No. 30/1975 (Exh. C-9).

11. On 19 March 1991, the SCA invited the Claimants, together with 21 competing international dredging companies, to submit their prequalifications for the widening and deepening of “some southern regions of Suez Canal”.

12. The two first rounds of tendering having failed, the SCA called for a third offer limited to Lot (1’) – i.e., from km 150,000 to km 162,250 – and consisting of (i) widening by 45 m of the East slope and (ii) deepening by 4,5 m of the canal (from level – 20,50 m to level –25,00 m), with a volume of approximately 17,6 million m<sup>3</sup> to be dredged.

### **b. The Contract and its performance**

13. The Contract was awarded to the Claimants on 30 June 1992 after three calls for tenders and was executed on 29 July 1992. The representations which the parties, and in particular the Respondent, made during the tendering phase are disputed.

14. During the performance of the dredging work, the Claimants were under the impression that SCA concealed relevant information on the quantities to be dredged and the soil conditions. In particular, the Claimants rely on the following facts:
- (i) the SCA had pre-dredged the lot awarded to the Claimants and did not disclose this fundamental circumstance to the bidders;
  - (ii) the SCA guaranteed in writing on at least two occasions the existence of 100% of the volumes resulting from the tender documents, although it knew this to be inaccurate;
  - (iii) the Claimants were not put in the position to avail themselves of a bathymetric report;
  - (iv) the SCA was aware that at least 40% of the soil was composed of hard materials, but provided the bidders with misleading information indicating only 3%.
15. The SCA denied each of these allegations on the ground that it did not conceal any relevant information and did not give the guarantees upon which the Claimants rely.
16. The works were completed during the spring of 1994.

**c. The proceedings before the Egyptian administrative courts**

17. On 17 July 1993, the Claimants brought proceedings before the Administrative Court of Port Saïd pursuant to the dispute resolution clause contained in the Contract<sup>1</sup>. Relying on Articles 120 (error), 121 (significant error), and 125 (fraud) of the Egyptian Civil Code, the Claimants requested the Court (i) to declare the Contract null and void on account of the SCA's acts and omissions during the negotiation of the Contract and (ii) to award compensation for all expenses and losses incurred during the performance of the Works, plus lost profits (the total cost of the Works being assessed at US\$ 130 million).
18. On 9 December 1995, the Claimants filed a second action against the SCA before the Administrative Court of Ismaïlia (to which the Administrative Court of Port Saïd had

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<sup>1</sup> Article 22 of the Contract reads as follows: "Any dispute, difference or controversy, which may arise between the parties related to the interpretation, application, implementation or effect of this Contract which cannot be resolved amicably, will be settled by the Egyptian courts, according to Egyptian laws".

transferred the case filed in July 1993) seeking relief for a series of deductions by the SCA from the amounts to be paid under the Contract.

19. On 30 September 1998, the Claimants resorted to the Committee for Settling the Complaints of the Investors (established by the Prime Minister's Decree No. 64 of 1996). The proceedings before this Committee were abandoned in the spring of 1999.
20. In the meantime, on 24 December 1998, the Administrative Court of Ismaïlia decided to join the two proceedings.
21. On 22 May 2003, the Administrative Court of Ismaïlia rendered its decision. In substance, the Court rejected the claims for annulment of the Contract in their entirety (first action) and awarded approximately one third of the amounts sought for deductions applied by the SCA (second action).
22. On 20 July 2003, the Claimants filed an appeal against the judgment of the Administrative Court of Ismaïlia before the High Administrative Court of Egypt. The appeal proceedings, which are currently pending, were brought by the Claimants "without prejudice to the [Claimants]' right to submit the matters of the present case to the international arbitration administered by the International Centre for the Settlement of Investment Disputes – ICSID" and "to withdraw the present appeal once the ICSID Arbitral Tribunal shall have retained Jurisdiction to proceed to examining the merits of the case".
23. Considering that the judgment of the Administrative Court of Ismaïlia definitively eliminated all prospects that they could obtain redress from the Egyptian State, on 23 December 2003, the Claimants commenced the present proceedings. In substance, the Claimants assert that Egypt's conduct constitutes not only a breach of the Contract and of Egyptian law (as submitted before the Egyptian Courts) but also a breach of the rules of international law concerning the treatment of foreign investments, specifically of the provisions of the two successive bilateral investment treaties between the Belgo-Luxemburg Economic Union and the Arab Republic of Egypt (respectively the "1977 BIT" and the "2002 BIT"; collectively the "BITs")<sup>2</sup>.

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<sup>2</sup> As set forth in the Claimants' last brief, the violations invoked by the Claimants "consist of a long sequence of illegalities to the detriment of the Claimants, beginning with (i) the gross misrepresentations when the host State admitted the investment on its territory, which were aimed at inducing the Claimants to make the investment on disastrous financial terms and continuing with (ii) the systematic refusal of the administrative and judicial organs to redress the situation and to conceal all responsibility for the initial misdeeds, until (iii)



**d. The BITs**

24. The 1977 BIT was signed on 28 February 1977 (Exh. C-4) and remained in force until 23 May 2002 (the date on which it was replaced by the 2002 BIT). The 2002 BIT was signed on 28 February 1999 (Exh. C-1 [French version] and Exh. C-159 [English version]). It entered into force on 24 May 2002 and is still in force today.
25. Because they are referred to repeatedly in the parties' submissions and in this Decision, the texts of certain provisions of the BITs are set forth in the following paragraphs.

**aa. The 1977 BIT**

26. The Preamble to the 1977 BIT declared that the Contracting parties intended “*to create favourable conditions for the investments by nationals and legal persons*” of Belgium and that Egypt recognised “*that Protection of such investments is apt [...] to increase the economic prosperity of both Countries*”. Specifically, under the 1977 BIT the Respondent assumed the following obligations:

**Article I**

1. All investments, and goods, rights and interests in connection with such investments, belonging directly or indirectly to nationals or legal persons of one of the Contracting Parties shall enjoy fair and equitable treatment in the territory of the other Contracting Party.
  2. Such investments, goods, rights and interests shall also enjoy continuous protection and security, excluding all unjustified or discriminatory measures which could “*de jure*” or “*de facto*” hinder their management, maintenance, utilization, enjoyment or liquidation.
  3. The protection guaranteed by paragraphs 1 and 2 of this Article I shall [...] in no case be less favourable than that recognized by international law.
27. The 1977 BIT contained the following provision on the settlement of disputes between host State and investors:

**Article IX**

Each Contracting Party hereby irrevocably and anticipatory [sic] gives its consent to submit to conciliation and arbitration any dispute relating to a measure contrary to this Agreement, pursuant to the “Convention on the Settlement of Investment Disputes between States and Nationals of Other States” of 18 March 1965, at the initiative of a national or legal person of the other Contracting Party, who considers himself to have been affected by such a measure.

This consent implies renunciation of the requirement that the internal administrative or judicial resorts should be exhausted.

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the judgment of the Court of Ismaïlia, which definitively did away with any possibility for the Claimants to obtain the compensation owed to them.” (Rejoinder J, ¶ 11, p. 5).

28. With respect of its application *ratione materiae*, the 1977 BIT contained the following definitions:

**Article III**

For the purpose of this agreement:

1. The term "investments" shall comprise every direct or indirect contribution of capital or any other kind of assets invested or reinvested in enterprises in the field of agriculture, industry, mining, forestry, communications and tourism.

The following shall more particularly, though not exclusively [sic], be considered as investments within the meaning of the present Agreement:

- (a) Movable and immovable property as well as any other right "in rem" such as mortgages, pledges, usufructs and similar rights;
- (b) Shares and other kinds of interest in companies;
- (c) Debts and rights to any performance having economic value;
- (d) Copyrights, marks, patents, technical processes, trade names, trade marks and goodwill;
- (e) Business concessions under public law, including concessions to search for, extract or exploit natural resources.

29. With respect to its application *ratione temporis*, the 1977 BIT contained the following clause:

**Article XII**

In case of termination of the present Agreement the provisions thereof shall continue to be effective for a period of validity of contracts concluded between the Contracting Party and the investor of the other Contracting Party prior to the notification of termination of the present Agreement.

**bb. The 2002 BIT**

30. The 2002 BIT reaffirmed the intent of the Contracting States set out in the Preamble to the 1977 BIT and laid down substantially the same obligations concerning the protection of foreign investments, i.e.:

**Article 2 – Promotion of Investment**

- 1. Each Contracting Party shall promote investment on its territory by investors of the other Contracting Party and shall accept and encourage all investment in accordance with its legislation.
- 2. In particular, each Contracting Party shall authorise the conclusion and execution of licensing contracts and of contracts relating to commercial, administrative or technical assistance, as far as these activities are in connection with investments as mentioned in Paragraph 1.

**Article 3 – Treatment of Investment**

1. All investments belonging directly or indirectly to investors of one of the Contracting Parties shall enjoy fair and equitable treatment in the territory of the other Contracting State(s).
2. Such investment shall also enjoy continuous protection and security, excluding any unjustified or discriminatory measure which could hinder their management, maintenance, utilization, enjoyment or liquidation.
3. The treatment and protection guaranteed by paragraphs 1 and 2 of this Article shall at least be equal to that enjoyed by investors of any third State and will in no case be less favourable than that recognized under international law.
4. Nevertheless, the treatment and protection referred to in the preceding paragraphs, shall not be extended to privileges which either Contracting Party accords to the investors of a third State because of its participation or association with a free trade zone, customs union, common market or any other form of regional economic organization.

31. The 2002 BIT contained the following provision on the settlement of disputes between host State and investors:

**Article 8 – Disputes between a Contracting Party and an Investor**

1. Any dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other contracting State(s) shall, whenever possible, be settled amicably.
2. As far as possible, the Parties shall endeavor to settle the dispute through negotiations, if necessary by seeking expert advice from a third party, or by conciliation between the Contracting Parties through diplomatic channels.
3. If such a dispute between an investor of one Contracting Party and the other Contracting Party continues to exist after a period of six months, the investor shall be entitled to submit the case either to:
  - (a) international arbitration of the International Centre for Settlement of Investment Disputes established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington D.C. on 18 March 1965 (ICSID Convention ), or
  - (b) an arbitrator or international ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL ), or
  - (c) the Cairo Regional Center for International Commercial Arbitration, or
  - (d) arbitration Rules of the International Chamber of Commerce (ICC) in Paris.

32. With regard to its application *ratione materiae*, the 2002 BIT contains the following definitions:

**Article 1**

For the purpose of this agreement:

1. The term "investments" means any kind of assets and any direct or indirect contribution in cash, in kind or in services, invested or reinvested in any sector of economic activity in the territory of one Contracting Party in accordance with its laws and regulations by an investor of the other Contracting Party and includes in particular, though not exclusively:
  - (a) movable and immovable property as well as any other right such as mortgages, pledges, usufruct and similar rights;
  - (b) shares and other kinds of interest in companies or enterprises;
  - (c) bonds, claims to money and rights to any performance having economic value;
  - (d) copyrights, marks, patents, technical processes, trade-names, trademarks and goodwill;
  - (e) concessions, granted under public law, or under contract including concessions to search for, extract and exploit natural resources.

Changes in the legal form in which assets and capital have been invested or reinvested shall not affect their designation as "investments" for the purpose of this Agreement.

2. The term "investors" means with regard to each Contracting Party
  - (a) Any natural person having the nationality of the Kingdom of Belgium, of the Grand-Duchy of Luxembourg or of the Arab Republic of Egypt in accordance with its legislation;
  - (b) Any legal entity, including corporations, companies, firms, enterprises or associations constituted in the territory of one of the Contracting States in accordance with its legislation;
3. The term "returns" means:

The amount yielded by an investment for a defined period in particular though not exclusively: profits, dividends, royalties and interests.
4. The term "territory" shall apply to the territory of the Kingdom of Belgium, to the territory of the Grand-Duchy of Luxembourg and to the territory of the Arab Republic of Egypt as well as to the maritime areas i.e. the marine and underwater areas which extend beyond the territorial waters of the State concerned and upon which the latter exercise, in accordance with international law, their sovereign rights and their jurisdiction for the purpose of exploring, exploiting and preserving natural resources.

33. With regard to its application *ratione temporis*, the 2002 BIT provides the following rules:

#### **Article 12 – Application of the Agreement**

This agreement shall apply to all investments made by investors of a Contracting Party in the territory / territories of the other Contracting State(s) prior to or after its entry into force in accordance with the law and regulations of the other Contracting State. It shall, however, not be applicable to disputes having arisen prior to its entry into force.

#### **Article 13 – Entry into Force and Duration**

1. [...]

2. Upon entry into force of this Agreement, the Agreement between the Belgo-Luxembourg Economic Union and the Arabic Republic of Egypt signed in Cairo on February 28<sup>th</sup> 1977 shall be replaced by this Agreement.
3. Investments made prior to the date of termination of this agreement shall be covered by this Agreement for a period of ten years from the date of termination.

## **II. PROCEDURAL HISTORY**

### **A. INITIAL PHASE**

#### **a. Registration of the Request for Arbitration**

34. On 23 December 2003, the Claimants submitted a Request for Arbitration (the “RA” or the “Request”) to the International Centre for the Settlement of Investment Disputes (“ICSID” or the “Centre”), accompanied by nine exhibits (Exh. [C-]1 to 9). In the Request, the Claimants relied upon the provisions of the BITs and sought the following relief:

#### **CLAIMS FOR DECLARATORY DECISIONS IN THE PRINCIPLE**

1. The Claimants seek an Arbitral Award:
  - acknowledging that the Respondent induced the Claimants to make an investment in Egypt by negotiating in bad faith and by fraudulently misrepresenting facts of crucial relevance to the evaluation of the cost of the investment by the Claimants;
  - acknowledging that the Respondent has failed to promptly repair the resulting damages by adequate compensation and that all its organs have constantly disregarded the Claimants' rights to a just remedy;
  - therefore, declaring that the Respondent has breached its international obligations under the agreements between it and Belgium, and notably the obligation to ensure fair and equitable treatment and full protection and security to foreign investments.

#### **MONETARY CLAIMS**

1. In addition, the Claimants request that the Arbitral Tribunal award to them complete compensation for all the damages suffered as a result of Egypt's breaches of its international obligations.
2. These damages include in particular:
  - the difference between the fair value of the investment made by the Claimants and the much lower amount received in partial compensation therefore, amounting at least to US\$ 74 million;
  - the amount unduly retained and expropriated by SCA in relation to the subject-matter of the Second Case amounting at least to US\$ 2,890,370 (US\$ 1,148,816.61 plus EGP 5,244,659.82);

- the amount of the legal fees and other costs incurred by the Joint Venture during the unfair and futile judicial proceedings before the Egyptian domestic courts, amounting approximately to US\$ 4,500,000;
- the amount of the financial damages suffered by the Claimants to be calculated by applying to the total amount of damages indicated above a 9% compound interest running from June 30, 1993 (the central point of the performance period of the works) until actual payment by the Respondent. The rate of 9% is the proper rate already applied to an amount due by Egypt in a previous ICSID case;

The exact amount of the damages will be determined more precisely during the proceedings.

3. In addition, the Claimants request that the Respondent be ordered to reimburse them for all costs incurred and to be incurred by them in connection with the present arbitration, including legal fees.
35. On 14 January 2004, the Centre transmitted a copy of the Request to the Respondent and to the latter's Embassy in Washington, D.C, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "ICSID Institution Rules").
  36. Exchanges of correspondence ensued between the parties and the Acting Secretary-General of ICSID concerning the jurisdiction of ICSID over the Request and its registerability under Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention") and ICSID Institution Rules 6 and 7.
  37. On 27 May 2004, the Acting Secretary-General, in accordance with ICSID Institution Rule 7, notified the parties of the registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

**b. Constitution of the Arbitral Tribunal and commencement of the proceedings**

38. By letter of 17 June 2004, the Centre acknowledged that the parties agreed "that there shall be three arbitrators, one appointed by each party and the third, who shall be the president of the Tribunal, appointed by the two party-appointed arbitrators".
39. On 29 June 2004, the Claimants appointed Professor Pierre Mayer, a national of France, as arbitrator. On 18 July 2004, the Respondent appointed Professor Brigitte Stern, a national of France, as arbitrator. On 7 September 2004, the Centre informed the parties that the two party-appointed arbitrators had appointed Professor Gabrielle Kaufmann-Kohler, a national of Switzerland, as the President of the Tribunal.

40. On 14 September 2004, the Secretary-General of ICSID, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun on that date. The same letter informed the parties that Ms Aurélia Antonietti, Counsel, ICSID, would serve as Secretary of the Tribunal.
41. In accordance with ICSID Arbitration Rule 13(1), and after consulting with the parties and the Centre, the Tribunal scheduled a first session on 10 November 2004 in Paris. By letters of 28 and 29 October 2004, the parties communicated to the Tribunal the agreements they had reached on procedural matters identified in the provisional agenda for the first session, which had been sent to them by the Tribunal’s Secretary.
42. Consequently, the Arbitral Tribunal held its first session on 10 November 2004, at the offices of the World Bank in Paris. At the outset of the preliminary hearing, the parties expressed agreement that the Tribunal had been properly constituted (Arbitration Rule 6) and stated that they had no objections in this respect. The parties reiterated their agreement on the points communicated to the Tribunal in their letters of 28 and 29 October 2004, and the remainder of the procedural issues on the agenda for the session were discussed and agreed upon, including two different procedural calendars depending on whether the Respondent would raise objections to jurisdiction. An audio recording of the session was later distributed to the parties. Minutes were drafted, signed by the President and the Secretary of the Tribunal, and provided to the parties, as well as all Members of the Tribunal on 29 November 2004.
43. In accordance with Arbitration Rule 22, the parties in particular agreed on the following arrangements in respect of the procedural language:
- The Parties will file their written submissions and make their oral arguments either in English or in French without any translation needed.
  - Any communication, decision, order or award issued by the Tribunal will be rendered and the record of the proceeding will be kept in English. At hearings, the Tribunal will use the English language and might also use the French language when appropriate.
- [...] all instruments including without limitation supporting documentation, as well as witness statements and expert opinions, would be filed either in French or English without translation. Documents filed in Arabic shall be filed together with an English or a French translation.
- (Minutes of the First Session, at No. 7)

44. In accordance with the preliminary procedural calendar agreed upon during the first session, the Claimants submitted their Statement of Claim on 15 March 2005 (“SoC”), accompanied by 155 exhibits (Ex. C-10 to C-164), including two witness statements (Exh. C-18: witness statement by Mr. Jacques Albert; Exh. C-46: witness statement of Mr. Pierre Tison). In their SoC, the Claimants invoked the provisions of the BITs and sought the following relief:

[...] subject to later amendments during the proceedings, the Claimants seek an award:

- declaring that Egypt has violated its obligations under the First and 2002 BIT;
- ordering Egypt to compensate the damage caused to the Claimants; and therefore
- ordering Egypt to pay to the Claimants the amounts of US\$ 76.531.040 and € 3.307.008,47, plus interest starting from the dates and at the rate claimed in Section 12.3 above; and
- ordering Egypt to bear the entirety of the costs of the present proceedings.

45. By a letter dated 13 April 2005, Responded informed the Tribunal that it intended to raise objections to jurisdiction.

46. Consequently, on 18 April 2005, the Tribunal issued Procedural Order No. 1 (PO#1) setting the following procedural calendar:

- The Respondent shall file a memorial on its objections to jurisdiction by June 15, 2005;
- The Claimants shall file their counter-memorial to the objections to jurisdiction by September 15, 2005;
- The Respondent shall file its reply on jurisdiction by October 31, 2005;
- The Claimants shall file their rejoinder on jurisdiction by December 15, 2005;
- A pre-hearing telephone conference shall take place on December 22, 2005 at 4 pm, Paris time;
- A hearing for the examination of witnesses and/or experts, if any, or for oral arguments on jurisdiction will take place on January 30 and, if necessary, 31, 2006;
- If a witness and/or experts hearing takes place on January 30 and 31, 2006, the oral arguments on jurisdiction will take place on February 15, 2006.



## **B. THE WRITTEN PHASE ON JURISDICTION**

47. In accordance with the procedural calendar set in PO#1, by "*Mémoire du 15 juin 2005*", the Respondent submitted its Memorial on jurisdictional objections (Mem. J.). The Respondent did not append any documentary evidence.
48. In accordance with the procedural calendar set in PO#1, on 15 September 2005, the Claimants submitted their Counter-Memorial to the Objections to Jurisdiction (CM. J.) accompanied by six exhibits (Exh. C-165 to C-170), including a legal opinion (Exh. C-165: expert opinion of Professor Christoph Schreuer dated 5 August 2005) and a third witness statement (Exh. C-168: witness statement of Mr. Gideon Hein).
49. In accordance with the procedural calendar set in PO#1, by "*Mémoire du 31 octobre 2005*", the Respondent submitted its Reply on Jurisdiction (Reply J.) accompanied by one exhibit (Exh. R-1).
50. In accordance with the procedural calendar set in PO#1, on 15 December 2005, the Claimants submitted their Rejoinder to the Objections to Jurisdiction (Rejoinder J.).
51. In accordance with the procedural calendar set in PO#1, on 22 December 2005, the Tribunal held a telephone conference in preparation of the hearing on jurisdiction. During this conference, none of the parties expressed the intent to examine/cross-examine witnesses or experts at the forthcoming hearing. Hence, it was agreed that the hearing on jurisdiction would be limited to oral arguments and would take place on 30 January 2006 according to an agreed tentative schedule. It was further confirmed that (i) at the hearing, counsel for the Claimants would speak in English and counsel for the Respondent would speak in French, and (ii) verbatim transcripts would be made in the original language used. It was finally agreed that (i) there would be no need for interpreters, and that (ii) the parties would submit (a) by 20 January 2006 a common trial bundle with legal authorities, i.e. primarily ICSID cases on which they relied in their memorials, and (b) by 24 January 2006, a list of the exhibits on which they intended to rely in their oral arguments, being understood that these would exclusively be documents already on record.

## **C. THE HEARING ON JURISDICTION**

52. The Arbitral Tribunal held the hearing on jurisdiction on 30 January 2006 in Paris. In addition to the Members of the Tribunal, and the Secretary<sup>3</sup>, the following persons attended the jurisdictional hearing:

(i) On behalf of the Claimants:

- Prof. Antonio Crivellaro;
- Prof. Luca Radicati Di Brozolo;
- Mr. Lorenzo Melchionda, Bonelli Erede Pappalardo;
- Mr. Tom Lenearts, General Counsel for Dredging International; and
- Mr. Bart Ceenaeme, General Counsel for Jan de Nul.

(ii) On behalf of the Respondent:

- Mr. Robert Saint-Esteben;
- Mr. Louis-Christophe Delanoy;
- Ms. Anne Carole Crémadès, cabinet Bredin Prat;
- Mr. Mustapha Abdel Ghaffar, International cooperation, Egyptian Ministry of Justice;
- Mr. Hosam Abdel Azim, President of the Egyptian State Litigation Authority;
- Mr. Osama Mahmoud, Vice-president of the Egyptian State Litigation Authority;
- Mr. Fouad Hosni, SCA;
- Mr. Fouad Negm, SCA; and
- Mr. Mohamed Mokhtar, SCA.

53. During the jurisdictional hearing, Messrs Robert Saint-Esteben and Louis-Christophe Delanoy addressed the Tribunal on behalf of the Respondent and Professors Antonio Crivellaro and Luca Radicati Di Brozolo addressed the Tribunal on behalf of the Claimants.

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<sup>3</sup> With the agreement of the parties, Dr. Antonio Rigozzi, an attorney practising in the law firm of the President of the Tribunal, also attended the hearing.

54. An audio recording of the jurisdictional hearing was made as well as a *verbatim* transcript which were later distributed to the parties (Tr. J.).

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55. It was agreed at the end of the jurisdictional hearing that the Tribunal would issue a reasoned decision on jurisdiction. If the Tribunal declined jurisdiction, it would render an award terminating the arbitration; if the Tribunal upheld jurisdiction, it would render a decision asserting jurisdiction, and would issue an order with directions for the continuation of the proceedings pursuant to Arbitration Rule 41(4) (Tr. J., p. 120).

56. The Tribunal has deliberated and considered the parties' written submissions on the issue of jurisdiction and the oral arguments presented at the jurisdictional hearing. Before reaching a conclusion on jurisdiction, the present decision summarizes the parties' positions (III) and discusses the relevant issues (IV).

### **III. PARTIES' POSITIONS**

#### **A. THE CLAIMANTS' POSITION**

57. In their written and oral submissions, the Claimants advanced the following five main arguments:

- (i) In withholding essential information and consistently misrepresenting the true nature of the situation, the Respondent lured the Claimants into investing in Egypt under unacceptable conditions.
- (ii) The damage arising from this conduct was compounded by the subsequent behaviour of the other organs of the Egyptian State until the Court of Ismaïlia adopted the judgment which definitively eliminated all prospects that the Claimants could obtain redress from the Egyptian State, as they had naively believed possible until that moment.
- (iii) With respect to jurisdiction, the 2002 BIT is applicable, given that the dispute submitted to the Tribunal – which is different from the one submitted to the Administrative Court of Ismaïlia – arose after the judgment of that court and therefore after the entry into force of the 2002 BIT.

- (iv) In any event, the dispute would also be covered by the 1977 BIT, since its replacement by the 2002 BIT was meant to reinforce foreign investors' protection.
- (v) As regards the merits, the Claimants rely upon the 2002 BIT with respect to illegalities committed by the Respondent after the entry into force of the treaty and on the substantive provisions of the 1977 BIT for illegalities committed before that date.

58. On the basis of these contentions, the Claimants requested the Tribunal to “reject all the Respondent's objections and decide that it has jurisdiction” (CM. J, p. 53; reiterated in Rejoinder J. p. 20).

## **B. THE RESPONDENT’S POSITION**

59. In its written and oral submissions, Egypt put forward the following six main arguments:
- (i) The 2002 BIT is “[in]applicable to disputes having arisen prior to its entry into force” and cannot thus form the basis of the jurisdiction of this Tribunal over a dispute which arose more than ten years ago.
  - (ii) The Claimants’ contention that the dispute arose when the Administrative Court of Ismaïlia rendered its judgment of 22 May 2003 is artificial. The dispute before this Tribunal is the same dispute as that which was decided by the Court of Ismaïlia and is currently under appeal.
  - (iii) The 1977 BIT expired in its entirety on 24 May 2002.
  - (iv) When the present proceedings were initiated on 23 December 2003, the Respondent's consent to ICSID jurisdiction under the 1977 BIT had lapsed. Indeed, the entry into force of the 2002 BIT brought with it the expiration of the 1977 BIT.
  - (v) The Claimants cannot rely on any purported “continuity of protection by the two BITs” given that the dispute falls outside the scope *ratione materiae* of the 1977 BIT.

(vi) In any event, the present dispute is not between an investor and a State but rather between an investor and its contractual counterpart, which is a legal entity distinct from the State.

60. In reliance on these arguments, the Respondent invites the Tribunal to

- Decline jurisdiction to adjudicate all the claims raised against it by the Claimants.
- Order the Claimants to jointly and severally reimburse all the costs which it will have incurred to respond to their spurious action, including the legal costs and the amounts paid to ICSID in the present arbitration.

(Reply J., p. 42)<sup>4</sup>

\* \* \*

61. In support of their positions on jurisdiction, both parties have relied on rules of international law, decisions of courts and arbitral tribunals, and on opinions of learned authors. In the course of the following discussion, the Tribunal will review the law argued by the parties and its applicability to the facts of the present case. While Part III of this decision summarizes the main arguments of the parties, other arguments were made and will be referred to in Part IV to the extent the Tribunal considers them relevant.

## **IV. DISCUSSION**

### **A. INTRODUCTORY MATTERS**

62. Before turning to the main issues, the Tribunal wishes to address certain preliminary matters, i.e., (a) the relevance of previous ICSID decisions and (b) the law applicable to the Tribunal's jurisdiction, and (c) the standard applicable to the assessment of jurisdiction.

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<sup>4</sup> Free translation of the French original: “– *Se déclarer incompétent pour connaître de l'ensemble des prétentions élevées à son encontre par les Demanderesses; – Condamner solidairement les Demanderesses à lui rembourser l'intégralité des frais qu'elle aura exposés pour faire face à leur action malveillante et infondée, en ce compris les frais de conseil et les sommes versées au C.I.R.D.I. à l'occasion du présent arbitrage*”.

**a. The relevance of previous ICSID decisions or awards**

63. In support of their position, both parties relied extensively on previous ICSID decisions or awards, either to conclude that the same solution should be adopted in the present case or in an effort to explain why this Tribunal should depart from that solution.
64. The Tribunal considers that it is not bound by earlier decisions<sup>5</sup>, but will certainly carefully consider such decisions whenever appropriate.

**b. The law applicable to the Tribunal's jurisdiction**

65. As a preliminary matter, the Tribunal notes that there is no dispute as to the jurisdiction of this Tribunal to decide the jurisdictional challenges brought by Egypt (Article 41 of the ICSID Convention).
66. This Tribunal's jurisdiction is contingent upon the provisions of the BIT(s) and of the ICSID Convention.
67. The relevant provisions of the BITs (i.e., Articles I, IX and XII of the 1977 BIT and Articles 2,3,8,12 and 13 of the 2002 BIT) have already been quoted (see *supra* Nos. 26 *et seq.*).
68. The relevant provision of the ICSID Convention is Article 25(1) which reads as follows:

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.

**c. The applicable standard**

69. At the hearing, the parties agreed that for purposes of jurisdiction, the Claimants must establish a *prima facie* case on the merits (Tr. J., pp. 65, 98, 104-105). Hence, the Tribunal will apply the following test as it was stated in *Impregilo v. Pakistan*:

[T]he Tribunal has considered whether the facts as alleged by the Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked.<sup>6</sup>

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<sup>5</sup> *AES Corporation v. the Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction of 13 July 2005, ¶¶ 30-32; available at [http://www.investmentclaims.com/decisions/AES-Argentina\\_Jurisdiction.pdf](http://www.investmentclaims.com/decisions/AES-Argentina_Jurisdiction.pdf).

<sup>6</sup> *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction of 22 April 2005, ¶ 108; available at <http://www.worldbank.org/icsid/cases/impregilo-decision.pdf> [JTB at 19].

70. The tribunal in *Impregilo* articulated this test by reference to the separate opinion of Judge Higgins in *Oil Platforms*, who proposed the following approach:

The only way in which, in the present case, it can be determined whether the claims of [Claimant] are sufficiently plausibly based upon the 1955 Treaty is to accept pro tem<sup>7</sup> the facts as alleged by [Claimant] to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes, that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them.<sup>8</sup>

71. Or, in the words of the tribunal in *Bayindir v. Pakistan*, “the Tribunal should be satisfied that, if the facts or the contentions alleged by [the claimant] are ultimately proven true, they would be capable of constituting a violation of the BIT”<sup>9</sup>. And the *Bayindir* tribunal further specified the test as follows:

In performing this task, the Tribunal will apply a prima facie standard, both to the determination of the meaning and scope of the BIT provisions and to the assessment whether the facts alleged may constitute breaches. If the result is affirmative, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits.<sup>10</sup>

**B. THE REQUIREMENTS OF ARTICLE 25 OF THE ICSID CONVENTION (INCLUDING THE DEFINITION OF INVESTMENT UNDER THE BITs)**

72. The Tribunal will start by reviewing the requirements of Article 25 of the ICSID Convention ((a) to (c)). When dealing with the requirement of an investment (b), it will also address the notion of investment under the BITs for the sake of expediency. Thereafter, the Tribunal will review the remaining conditions under the BITs, which will eventually be limited to the applicability *ratione temporis* of the 2002 BIT (c).
73. It is undisputed that this Tribunal has jurisdiction only if the requirements set in Article 25 of the ICSID Convention are satisfied, i.e., if (a) the dispute is a legal dispute between a Contracting State of the ICSID Convention (in the present case Egypt) and investors of another Contracting State (in the present case Belgium), (b) the dispute arises from an investment, and (c) the Claimants and the State have

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<sup>7</sup> An abbreviation for *pro tempore*, i.e., in English, provisionally or for the time being.

<sup>8</sup> *Islamic Republic of Iran v. United States of America*, I.C.J. Reports 1996, II, p. 810, ¶ 32 of the separate opinion.

<sup>9</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction of 14 November 2005, ¶ 195 (references omitted), available at <http://www.worldbank.org/icsid/cases/ARB0329Decisionjurisdiction.pdf> [JTB 28].

<sup>10</sup> *Id.*, ¶ 197.

given their consent to ICSID jurisdiction (in the present case under one of the two BITs).

**a. Is there a legal dispute with a Contracting Party?**

74. The Respondent did not contest that the current dispute is a “legal dispute” within the meaning of Article 25(1) of the ICSID Convention and rightly so. Indeed, in the Tribunal’s opinion, the present dispute is clearly legal in nature as it deals with “the existence or scope of [Claimants’] legal rights” – to use the words of the Report of the Executive Directors of the World Bank on the Convention — and with the nature and extent of the relief to be granted to the Claimants as a result of the Respondent’s alleged violation of those legal rights<sup>11</sup>.
75. Whether the rights asserted by the Claimants are ultimately found to exist must await the proceedings on the merits. Subject to determining whether the Claimants made an investment within the meaning of Article 25 of the ICSID Convention, which will be discussed below, the Tribunal holds that the assertion of such rights has given rise to a *legal* dispute which is within the jurisdiction of the Centre as set forth in Article 25(1) of the ICSID Convention.
76. It is established that Egypt and Belgium are bound by the ICSID Convention and qualify as Contracting States within the meaning of Article 25.
77. In its objections to jurisdiction, the Respondent contended that the present dispute is not with the Respondent, since the dispute constitutes “in reality the continuation of the contractual dispute of domestic law that they [the Claimants] had with the SCA before the Administrative Court of Ismaïlia” (Mem. J., ¶ 204, pp. 81-82<sup>12</sup>).
78. In order to assess the merits of the Respondent’s argument, the Tribunal must refer to the well-established distinction between claims for breach of a treaty (treaty claims) and claims for breach of a contract (contract claims).

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<sup>11</sup> See Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States; International Bank for Reconstruction and Development, 18 March 1965, ¶ 26; available at <http://www.worldbank.org/icsid/basicdoc/partB-section05.htm#03>.

<sup>12</sup> Free translation from the French original.



**aa. The distinction between treaty and contract claims**

79. As a preliminary matter, the Tribunal notes that the Respondent does not ignore the distinction between treaty and contract claims and accepts that it is now well established in ICSID jurisprudence. Both parties have referred to the decision of the *ad hoc* committee in *Vivendi v. Argentina*, in which such distinction was circumscribed as follows:

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.<sup>13</sup>

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.<sup>14</sup>

80. Accordingly, the fact that a dispute involves contract rights and contract remedies does not in and of itself mean that it cannot also involve treaty breaches and treaty claims<sup>15</sup>.

**bb. The Claimants' (treaty) claims**

81. It is the Claimants' case that the Respondent's conduct amounts in substance to a violation of (i) the duty of fair and equitable treatment, (ii) the duty of continuous protection and security, and (iii) the duty to promote investments (SoC, Section 10.3, pp. 19 et seq.).

82. It is undoubtful that the BITs impose such duties on Egypt and confer correlative rights to the Claimants with respect to their investment. It follows that the dispute regarding the alleged violation of these duties and rights is a dispute with Egypt, as required by Article 25(1) of the ICSID Convention<sup>16</sup>.

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<sup>13</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, Decision on Annulment of 3 July 2002, ¶ 60, ICSID Review (2004), vol. 19, No. 1, 41 ILM 1135 (2002), also available at [http://www.worldbank.org/icsid/cases/vivendi\\_annul.pdf](http://www.worldbank.org/icsid/cases/vivendi_annul.pdf) [JTB 4].

<sup>14</sup> *Ibid.*, ¶ 96.

<sup>15</sup> See also *Bayindir v. Pakistan* [*supra* Fn. 9], ¶ 157.

<sup>16</sup> For the very same reason, the Tribunal cannot agree with Respondent's argument that this Tribunal's jurisdiction over the present dispute would transform the Tribunal in a "supranational appellate court" (free translation from the original French in Mem J., ¶ 147, p. 61) reviewing national administrative decisions. Likewise, the mere fact that the Claimants have filed a (parallel) appeal before the High Administrative Court of Egypt "without prejudice to the Appellants' right to submit the matters of the present case to the international arbitration administered by [...] ICSID" and have explicitly reserved "the right to withdraw the present appeal once the ICSID Arbitral Tribunal shall have retained Jurisdiction to proceed to examining the merits of the case" (Exh. C-8, at page 17) is irrelevant.

**cc. The status of the SCA under international law**

83. In its objections to jurisdiction, the Respondent relied on the fact that the SCA has an independent legal personality under Egyptian law to suggest that the present dispute is not a dispute with a Contracting Party<sup>17</sup> (Mem. J., ¶ 204, p. 82).
84. As the Claimants correctly pointed out, the issue of whether a State is responsible for the acts of a State entity is to be resolved in accordance with international law, and in particular with the principles codified in the Articles on State Responsibility for internationally wrongful acts. Referring to numerous ICSID precedents, the Claimants submit that “the SCA is part of the Government of Egypt and the Government itself is directly liable for its actions and omissions” (CM. J., ¶ 58, p. 29). Alternatively<sup>18</sup>, the Claimants submit that “the SCA committed the fraud in its capacity [of] *puissance publique* and [that] the remaining illicit acts were committed by the Government and by the judiciary” (Rejoinder J., ¶ 23, p. 12<sup>19</sup>).
85. According to the test set out above (see *supra* Nos. 69-71), it is not for the Tribunal at the jurisdictional stage to examine whether the case is in effect brought against the State and involves the latter's responsibility. An exception is made in the event that if it is manifest that the entity involved has no link whatsoever with the State<sup>20</sup>. This is plainly not the case in the present dispute.
86. Another exception was contemplated in *Salini v. Morocco*, a decision to which both parties referred:

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

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<sup>17</sup> The Tribunal notes though that the main developments regarding the independence of SCA were made with regard to the question of the “*soumission du litige à la clause attributive de juridiction stipulée au Contrat*”.

<sup>18</sup> At the hearing, the Claimants made clear that their “principal theory is that it is an Article 4 body; in the alternative it is certainly an Article 5 body” (Tr. J., p. 125).

<sup>19</sup> Claimants add that “these behaviors were carried out by a State in the exercise of its sovereign powers: when Egypt called for the tender for works on the Suez Canal, when it organized the tender, set draconian deadlines, modified the terms of the tender and selected the winning bidder, it did so by means of administrative procedures and was therefore undoubtedly acting as a sovereign. In the language of *RFCC v. Morocco*, all those decisions were adopted in the exercise of a *puissance publique*, i.e. in the interest and on behalf of the State”.

<sup>20</sup> *Consortium Groupement L.E.S.I. - DIPENTA v. République Algérienne Démocratique et Populaire*, Award of 27 December 2004, ¶ 19 ; available at <http://www.worldbank.org/icsid/cases/lesi-sentence-fr.pdf> [JTB 24].

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.<sup>21</sup>

87. However, contrary to the situation in *Salini v. Morocco*, the issue of attribution was only briefly touched upon by the parties in this case. In its last written submission, the Respondent elaborated on its argument regarding the absence of a dispute with the Egyptian state (see *supra* No. 77) with the following considerations:

The observations in the Claimants' reply that the acts or omissions of SCA could, in international law, be attributed to Egypt are without bearing, in particular as [...] the ICSID case law acknowledges that a contractual dispute between an investor or alleged investor and an independent administrative authority like the SCA is not covered by an ICSID arbitration offer related to disputes between the Contracting States and the nationals of the other Contracting State.

Or in the original French version:

*Les observations en réplique des Demanderesses, selon lesquelles les actes ou omissions de la S.C.A. pourraient, en droit international, être attribués à la R.A.E., sont sans portée, alors surtout que la jurisprudence du C.I.R.D.I., sans méconnaître les règles d'attribution ainsi invoquées, n'en reconnaît pas moins qu'un litige de nature contractuelle entre un investisseur ou prétendu tel, et une autorité administrative indépendante, comme l'est la S.C.A., n'est pas couvert par une offre d'arbitrage C.I.R.D.I. visant les différends entre les Etats signataires d'un BIT et les ressortissants de l'autre Etat signataire.*

(Reply J., ¶ 98, p. 37)

88. In response to a specific question of the Tribunal at the hearing, the Respondent added that *“rien dans l'appel d'offres et dans la signature du contrat ne relevait de la puissance publique”* (Tr. J. p. 104). By contrast, the Claimants made the following statements at the hearing:

Looking at the law which established SCA, if you have been constituted by law and your governance, presidency and the board are appointed not only by the government, but the President of the Republic himself, and replaced by his decision, and the law gives you the power to issue decrees for administrative delegation, which includes admitting or excluding passages, applying fines, applying charges, this should be an organ, this is a body which speaks and acts on behalf and in the name of the state. [...] [I]n a broader sense SCA is certainly part of the executive branch of the state administration, and it is the most important. SCA in Egypt is unquestionably much more important than seven ministries put together! [...] It is the most rich authority, the entries of SCA [...] go directly to the treasury, directly, so it is a tax”.

(Tr. J. p. 114)

<sup>21</sup>

*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001, 42 ILM, 2003 [JTB 2], at ¶ 30.

89. When assessing the merits of the dispute, the Tribunal will rule on the issue of attribution under international law, especially by reference to the Articles on State Responsibility as adopted on second reading in 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Resolution 56/83 of 12 December 2001 (the ILC Articles) as a codification of customary international law. In particular, the Tribunal will consider the following provisions:

- Art. 4 of the ILC Articles which codifies the well-established rule that the conduct of any State organ, according to the internal law of the State, shall be considered an act of that State under international law. This rule addresses the attribution of acts of so-called *de jure* organs which are empowered to act for the State within the limits of their competence.
- Art. 5 of the ILC Articles which goes on to attribute to a State the conduct of a person or entity which is not a *de jure* organ but which is empowered by the law of that State to exercise elements of governmental authority provided that person or entity is acting in that capacity in the particular instance. Such provision restates the generally recognized rule that the conduct of an organ of a State or of a person or entity empowered to exercise elements of governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

**b. Does the dispute arise out of an investment?**

**aa. An investment within the meaning of Article 25 ICSID?**

90. It is common ground between the parties that the jurisdiction of the Tribunal is contingent upon the existence of an “investment” within the meaning of Article 25 of the ICSID Convention and of an investment under the BIT<sup>22</sup>.

91. The ICSID Convention contains no definition of the term “investment”. The Tribunal concurs with ICSID precedents which, subject to minor variations, have relied on the so-called “*Salini test*”. Such test identifies the following elements as indicative of an “investment” for purposes of the ICSID Convention: (i) a contribution, (ii) a certain duration over which the project is implemented, (iii) a sharing of operational risks, and

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<sup>22</sup> See *infra* Nos 97 *et seq.*

(iv) a contribution to the host State's development<sup>23</sup>, being understood that these elements may be closely interrelated, should be examined in their totality<sup>24</sup> and will normally depend on the circumstances of each case<sup>25</sup> (see also the unchallenged statement of Prof. Schreuer, Exh. C-165, ¶ 24, p. 9).

92. The Tribunal agrees with the Claimants that their activities in connection with the dredging operation in the Suez Canal clearly meet these criteria. In particular, the amount of work involved (including the mobilization of two heavy ships for a period of approximately 19 months) and the related compensation show that the Claimants' contribution was substantial. Moreover, there can be no question that an operation of such magnitude and complexity involves a risk and one cannot seriously deny that the operation of the Suez Canal is of paramount significance for Egypt's economy and development.
93. These matters are not disputed. The only aspect which the Respondent appears to question is whether the duration of the operation is sufficient to qualify as an investment (Tr. J., p. 28)<sup>26</sup>. In response to a specific question by the Tribunal at the hearing on jurisdiction (Tr. J., p. 75), both parties expressed the opinion that an operation may be characterized as an investment if it lasts at least two years.
94. The Respondent asserted that "it did not intend to make any submission on the existence of an investment in 1992" and merely noted that "if one starts from the date of the contract, that is 29 July 1992, to the delivery of the works, i.e. in June 1994, this amounts to a little less than two years" (Tr. J., p. 100)<sup>27</sup>. According to the Claimants, in the construction industry an investment starts from pre-qualification, as the investor

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<sup>23</sup> *Salini v. Morocco*, [supra Fn. 21], *passim* as restated, for instance in *Bayindir v. Pakistan* [supra Fn. 9], ¶ 130.

<sup>24</sup> *Id.* See also *L.E.S.I. v. Algeria* [supra Fn. 20], ¶ 13 (iv).

<sup>25</sup> *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction of 6 August 2004, ¶ 53 *in fine*; available at <http://www.worldbank.org/icsid/cases/joy-mining-award.pdf>.

<sup>26</sup> In this respect, Counsel for the Respondent referred to "*paragraphe 24.3 de la requête d'arbitrage aux termes duquel* 'The claimants entered into an international construction contract with SCA for a considerable duration' - *disent-elles* -, 'almost three years from prequalification in December 1991 until the end of the demobilisation in October 1994'. *Je ne reviendrai pas ici sur la date de naissance du contrat selon elles, décembre 1991, je croyais que c'était le 25 juillet 1992, mais elles le font vivre jusqu'à la levée du chantier, si je puis dire, en octobre 1994, sachant que les travaux, eux, avaient été achevés dès le 5 mars 1994 et que leur réception définitive avait été prononcée le 29 juin 1994, c'est la pièce C81. Si on avait voulu discuter de l'existence ou pas d'un investissement, il y aurait déjà eu une bonne question à se poser qui était celle de la durée. On n'a jamais vu probablement un investissement sous l'empire du CIRDI être aussi court. Mais ce n'est pas mon propos.*"

<sup>27</sup> Free translation of the following French original: "*l'Égypte n'a pas entendu se prononcer sur l'existence d'un investissement ou pas en 1992 [...] si on part de la date du contrat, qui est le 29 juillet 1992, jusqu'à, disons, la réception des travaux en juin 1994, cela fait un peu moins de deux ans.*"

starts spending money and making expenditures when preparing the offer and deciding whether to pre-qualify or not (Tr. J, p. 107). Thus, in the present case the investment covers a period beginning with “the pre-tender or the tender stage”<sup>28</sup>, and lasting throughout “the contractual period of the works, [and] the subsequent period of the works” (Tr. J, p. 75) until “autumn 1994, when the two ships went back to Europe” (Tr. J, p. 107). Since the pre-qualification was initiated in March 1991, the Claimants consider that “the duration of the works is approximately three years [...] [which] is in line with standard BIT case law” (Tr. J, p. 75).

95. The Tribunal agrees with the Claimants that the duration of the operation was sufficient for it to qualify as an investment within the meaning of Article 25 of the ICSID Convention, even starting from the execution of the Contract on 29 July 1992.
96. Irrespective of the duration, it is common ground between the parties that the Tribunal’s jurisdiction is contingent upon the Claimants having made an investment within the meaning of the relevant BIT.

**bb. *An investment within the meaning of the 1977 BIT***

97. Article III(1) of the 1977 BIT contains the following general definition of investment:

The term "investments" shall comprise every direct or indirect contribution of capital and any other kind of assets, invested or reinvested in enterprises in the field of agriculture, industry, mining forestry, communications, and tourism.

98. It is not disputed that the Claimants have made a “contribution of capital or any other kind of assets” within the meaning of the 1977 BIT. It is also common ground that the definition of investment under the 1977 BIT is limited to the sectors listed in its Article III(1). The question on which the parties differ is whether the contribution was invested in one of the fields covered by the 1977 BIT or, more specifically, whether the dredging of the Suez Canal is related to “communications” within the meaning of Article III(1).
99. According to the Respondent, the dredging of the Canal cannot relate to communications since the ordinary meaning of "communications" in the English language is limited to the exchange of information. However, as the Claimants pointed out, two of the dictionaries cited by the Respondent in support of this argument contain a definition of “communication” which appears to cover the Claimant’s activity in Egypt:

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<sup>28</sup> The Claimants’ contention that “investment starts from pre-qualification in the construction industry, [because] you start spending money and making expenditures when you prepare the offer and you decide whether to pre-qualify or not” (Tr., p. 107) was not really contested by the Respondent.

- (i) The *American Heritage Dictionary*, contains the following definition: “Communication [...] Plural [...] 5. Any connective passage or channel”<sup>29</sup>;
- (ii) The *Websters New Collegiate Dictionary* (1973) contains the following definition: “Communication [...] 4. (pl) : a system (as of telephones) for communicating; a system of routes for moving troops, supplies, and vehicles”<sup>30</sup>.

100. Similar definitions are contained in other dictionaries, which demonstrates that the word "communications" is not limited to the transmission of information, but includes a geographic dimension<sup>31</sup>.
101. Under these circumstances, the Tribunal fails to see how the Respondent can argue that including “road of communication” or “transport of persons and goods” in the meaning of “communications” under Article III(1) can be “at odds with the common and ordinary meaning of the term communications” (Mem. J., ¶ 138 *ab initio*, p. 58, free translation).
102. Similarly, the Tribunal is unconvinced by the Respondent’s argument that, because the Claimants’ activity related to the dredging of the canal and not to the communications through the canal, the Claimants did not invest in an “*enterpris[e]* in the field of [...] communications” within the meaning of Article III(1) (the Respondent’s emphasis; see Mem. J., ¶ 138, p. 58). Of course, in the sense of “economic productive units”, the Claimants are companies that are active in the field of dredging (or, in the Respondent words of “travaux publics”<sup>32</sup>) and not in the field of communications. This does not mean that they did not invest in an enterprise in the field of communications in the sense of a “project” in that field.
103. Finally, the Tribunal notes that the mere fact that the Claimants never invoked the 1977 BIT before it was replaced by the 2002 BIT, which contains a broader definition of

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<sup>29</sup> As quoted in Mem. J., Fn. 19, p. 57.

<sup>30</sup> As quoted in Reply J., Fn. 13, p. 14.

<sup>31</sup> See for instance the quotations reported in Prof. Schreuer’s expert legal opinion: “The Shorter Oxford English Dictionary includes the following definition under ‘communication’: ‘Access or means of access between two or more persons or places; passage’. Webster’s College Dictionary includes the following definition for ‘communication’: ‘passage or an opportunity or means of passage between places.’” (Exh. C-165, ¶ 9, p. 5).

<sup>32</sup> Reply J., ¶ 32, p. 13.

investment, does not in and of itself mean that there was a common understanding among the parties that the Claimants' activities fell outside the 1977 BIT<sup>33</sup>.

104. In conclusion, the Tribunal holds that the Claimants have made investments in an enterprise in the field of communications according to Article III(1) of the 1977 BIT and dismisses the Respondent's objection on the "original inapplicability" of the 1977 BIT, i.e., the objection that the 1977 BIT does not apply *ratione materiae*.

**cc. An investment within the meaning of the 2002 BIT**

105. In its relevant part, Article 1(1) of the 2002 BIT defines "investment" as follows<sup>34</sup>:

The term "investments" means any kind of assets and any direct or indirect contribution in cash, in kind or in services, invested or reinvested in any sector of economic activity in the territory of one Contracting Party in accordance with its laws and regulations by an investor of the other Contracting Party [...].

106. It is not challenged that the activities of the Claimants in Egypt constitute a "contribution in [...] services" and that they are thus covered by the definition of "investment" as quoted above (which contains no limitation to specific economic sectors unlike the 1977 BIT)<sup>35</sup>.

**c. Have the parties consented in writing to arbitrate the dispute?**

107. In order to establish the jurisdiction of this Tribunal under Article 25 of the ICSID Convention, the Claimants rely upon (1) the consent of the Respondent to arbitration contained in the 1977 and/or 2002 BIT combined with (2) their own consent contained in the Request for Arbitration.

108. According to a now "well established practice, it is clear that the coincidence of these two forms of consent can constitute 'consent in writing' within the meaning of Article 25(1) of the ICSID Convention [...] if the dispute falls within the scope of the BIT."<sup>36</sup> The

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<sup>33</sup> Likewise, contrary to the Respondent's suggestions at the hearing (Tr. J., p. 24), the mere fact that the Claimants made submissions before the Egyptian Governmental Committee on Foreign Investment to demonstrate that they were "investors" according to the Egyptian regulations applicable before that Committee has no bearing on the question of whether they qualify as investors under the BIT.

<sup>34</sup> For the complete wording of Article 1(1), see *supra* No. 32.

<sup>35</sup> The Respondent objects to the jurisdiction of the Tribunal under the 2002 BIT on the ground that, assuming that the dispute arose on 23 May 2003, the Claimants' investment was no longer existing on that date. This argument will be discussed when examining the applicability *ratione temporis* of the 2002 BIT (cf. *infra* No. 134 *et seq.*).

<sup>36</sup> *Impregilo v. Pakistan* [*supra* Fn. 6] ¶ 108.



Respondent does not dispute this. It contends, however, that its offer to arbitrate under the 1977 BIT had already lapsed when the Claimants purportedly accepted it by filing their Request for Arbitration. With respect to its consent to arbitrate under the 2002 BIT, the Respondent contends that its offer to arbitrate does not cover the present dispute as it arose well before the entry into force of that BIT.

109. The Tribunal will assess the applicability *ratione temporis* of the two BITs following the Claimants' case, i.e. assuming primarily that the Tribunal has jurisdiction over the present dispute under the 2002 BIT and alternatively that it has jurisdiction under the 1977 BIT. It is self-evident that the latter assessment will not be necessary if the Tribunal finds that it has jurisdiction under the 2002 BIT.

### **C. THE APPLICABILITY *RATIONE TEMPORIS* OF THE 2002 BIT**

110. The 2002 BIT contains the following provision with regard to its application *ratione temporis*:

#### **Article 12 – Application of the Agreement**

This agreement shall apply to all investments made by investors of a Contracting Party in the territory/territories of the other Contracting State(s) prior to or after its entry into force in accordance with the law and regulations of either Contracting State. It shall, however, not be applicable to disputes having arisen prior to its entry into force.

111. It is common ground that the time when the investment was made has no relevance for the applicability *ratione temporis* of the 2002 BIT (Reply J., ¶¶ 46-47, p. 18; Tr. J., p. 30). Likewise, it is undisputed that Article 12 of the 2002 BIT restricts its applicability to disputes which have arisen after its entry into force, that is after 24 May 2002 (CM J., ¶12, p. 3 *a contrario*). In other words, for jurisdiction to be based on the 2002 BIT the dispute must have arisen after 24 May 2002.
112. On the Claimants' primary case, "the dispute submitted to the Tribunal – which is different from the one submitted to the Administrative Court of Ismailia – arose after the Judgment of that Court was handed down, and therefore after the entry into force of the Second BIT" (Rejoinder J. ¶ 9, p. 5). It is not challenged that the dispute decided by the Court of Ismailia arose well before 24 May 2002. Hence, the issue is whether the dispute before this Tribunal is different from the dispute decided by the Court of Ismailia.

113. In support of their contention that the dispute is different from the one currently before the Egyptian courts, the Claimants assert that (a) the dispute relates to the violation by Egypt of its obligations under international law. Moreover, they rebut the Respondent's objections which are based, (b) on the recent ICSID award in *Lucchetti*, (c) on the existence of a dispute settlement clause in the Contract, and (d) on the fact that in May 2003 the Claimants' investment no longer existed.

**a. A different dispute in terms of parties and applicable legal standards**

114. The Claimants insist on the fact that the parties to the two disputes are different. Before the Court of Ismaïlia, the defendant is the SCA acting as an entity under municipal law, albeit as an organ of the State. Before the Arbitral Tribunal, the respondent is the Egyptian State as a subject of international law.

115. The Respondent considers that the identity of the parties is relevant to determine whether a decision is *res judicata* or whether there is *lis pendens* and/or whether a party has made a choice under a fork in the road provision, but is irrelevant to determine whether the dispute before this Tribunal is a new dispute. According to the Respondent, to rely on the (different) identity of the parties and on the (different) legal bases for the claims would deprive Article 12 *in fine* of the 2002 BIT of any meaning:

It is obvious that when two States bound by a BIT decide to exclude the application of the BIT to the disputes that arose prior to its entry into force, they can not, when making such decision, have in mind disputes based on the said treaty given that, by hypothesis, no previous dispute that arose before the entry into force of a treaty can be based on a breach of that treaty. They regard thus necessarily disputes that have another *causae petendi* than the breach of the treaty, in particular the alleged violation of their own domestic law.

And in the original French version:

Il est en effet évident que lorsque deux Etats parties à un BIT décident d'en exclure l'application aux litiges nés antérieurement à son entrée en vigueur, ils ne peuvent avoir en vue, en prenant cette décision, des litiges fondés sur ledit traité puisque, par hypothèse, aucun litige antérieur à un traité donné ne peut avoir pour fondement la violation de ce traité. Ils visent donc nécessairement des litiges ayant d'autres *causae petendi* que la violation du traité, parmi lesquelles la violation alléguée de leur droit interne paraît devoir occuper la première place.

(Reply, ¶ 51, p. 20)

116. The Tribunal disagrees. The purpose of Article 12 of the 2002 BIT is to exclude disputes which have crystallized before the entry into force of the BIT and that could be deemed "treaty disputes" under the treaty standards. Indeed, considered *a contrario*,

the Respondent's position would mean that, failing a provision like Article 12 *in fine* of the 2002 BIT, the BIT would cover any previous contract dispute.

117. In the present case, while the dispute which gave rise to the proceedings before the Egyptian courts and authorities related to questions of contract interpretation and of Egyptian law, the dispute before this ICSID Tribunal deals with alleged violations of the two BITs, specifically of the provisions on fair and equitable treatment, on continuous protection and security, and on the obligation to promote investments.
118. There is nothing unsound in the Claimants' assertion that the damage they suffered because of the alleged fraud was compounded by the subsequent conduct of the organs of the Egyptian State until the Court of Ismaïlia adopted the judgment which – according to the Claimants – definitively eliminated all prospects that the Claimants could obtain redress from the Egyptian State.
119. Moreover, the claims regarding the judgment and the manner in which the Egyptian courts dealt with the dispute address the actions of the court system as such, and are thus separate and distinct from the conduct which formed the subject matter of the domestic proceedings. Hence, they do not coincide with the conduct examined in the course of the dispute brought under domestic law. The fact that the most important part of the Claimants' SoC is devoted to alleged BIT violations in connection with the very facts that founded the claim before the Ismaïlia court (and only a minor part to the alleged wrongdoings of the court system) does not change the situation. In Professor's Schreuer's words, the (relevant) fact is that "the domestic dispute antedated the international dispute and ultimately led towards it"<sup>37</sup>.
120. Under these circumstances, the Tribunal is unconvinced by the Respondent's (implied) argument that, in fact, the Claimants are merely trying to disguise their contract case as a treaty case.
121. Indeed, as set forth by the Claimants' legal expert, there is a clear trend of cases requiring an attempt to seek redress in domestic courts before bringing a claim for violations of BIT standards irrespective of any obligation to exhaust local remedies<sup>38</sup>. Although it agrees with the Respondent that there is no requirement for a mandatory

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<sup>37</sup> Cf. Schreuer Report (Exh. C-165) at ¶¶ 111.

<sup>38</sup> Cf. Schreuer Report (Exh. C-165) at ¶¶ 66-67 referring to *Generation Ukraine, Inc. v. Ukraine*, Award, 16 September 2003, paras. 20.30, 20.33 and 11.2, as well as *Waste Management, Inc. v. United Mexican States*, Award, 30 April 2004, para. 116.

“pre-trial” before the local courts, this consideration reinforces the Tribunal in its conclusion that the dispute only crystallized after 22 May 2003 when the Ismaïlia Court rendered its judgment.

122. Having concluded that the dispute arose after the entry into force of the 2002 BIT, the Tribunal does not need to consider the Claimants’ fall back argument that the alleged breaches by Egypt occurred through a composite act within the meaning of Article 15 of the ILC Articles on State Responsibility and that, for the purpose of assessing the jurisdiction *ratione temporis*, this kind of composite act does not “occur” until the completion of the series of acts of which it is composed (Tr., p. 110 et seq.<sup>39</sup>). It must, however, address the Respondent’s most emphatic argument with respect to the moment when the dispute arose. This argument relates to the ruling in *Lucchetti*.

**b. The relevance of the Lucchetti award**

123. In support of its contention that the dispute before this Tribunal is the same as the one before the Egyptian courts, the Respondent relies on an award rendered by an ICSID Tribunal on 7 February 2005 in *Lucchetti v. Peru*. In that case, the tribunal considered that there was no new dispute when “the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute” (at ¶ 50 *in fine*) and held that the adoption of a decree revoking an authorization granted by a local court merely continued the earlier dispute (at ¶ 53).

124. In substance, it is the Respondent’s case in this arbitration that the central element of this dispute remains the alleged misrepresentations made during the pre(contractual) phase (as it was before the Court of Ismaïlia). Hence, according to the Respondent, the Egyptian decision in the present case should, like the decree in the Peruvian case, be considered a mere “*péripétie de différends préexistants à l’entrée en vigueur des BIT, qui, partant, seraient inapplicables*” (Mem. J., ¶ 166, p. 68).

125. On the Claimants’ case<sup>40</sup>, the *Lucchetti* award is irrelevant because of the fundamental difference between that case and the present one, namely:

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<sup>39</sup> See also Cf. Schreuer’s Report (Exh. C-165) at ¶¶ 72 *et seq.* referring, *inter alia*, to Stanimir A. Alexandrov, The “Baby Boom” of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as “Investors” and Jurisdiction Ratione Temporis, in: The Law and Practice of International Courts and Tribunals, Volume 4, Number 1, 2005, pp. 19-59, 53.

<sup>40</sup> At the hearing, the Claimants added that the *Lucchetti* award should be not only “distinguished [...] on the basis of the facts” (Tr. p. 86) but also be considered as “probably wrong” (Tr. p. 87) and emphasized the

In the *Lucchetti* case, the same organ issued identical measures twice within a very short interval of time. Here, the acts complained of by the Claimants have been committed by different organs of the State at different stages within an extremely long period of time and are of a different nature. Indeed, there is a significant difference between the acts which took place before the entry into force of the Second BIT (the illegal misrepresentations and the Egyptian Government's refusal to adopt appropriate remedies and those which were committed after that date (in particular the handing down of the Judgment). Here again the Respondent seeks to downplay the relevance of the Judgment and the fact that it was, of its own, an illegal act.

(Rejoinder J., ¶ 21, p. 10)

126. The application to this case of the test adopted in *Lucchetti* leads to the conclusion that the present dispute is a new one. Indeed, in *Lucchetti*, the tribunal held that the relevant issue was whether “the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute”. Specifically, the *Lucchetti* tribunal took into consideration the facts underlying each dispute and their “origin or source” (¶ 53). It found unequivocally that “both disputes originated in the municipality’s stated commitment to protect the environmental integrity of the Pantanos de Villa and its repeated efforts to compel Claimants to comply with the rules and regulations applicable to the construction of their factory in the vicinity of that environmental reserve”.
127. In the present case, the position is different. Admittedly, the previous dispute is one of the sources of the present dispute, if not the main one. It is clear, however, that the reasons, which may have motivated the alleged wrongdoings of the SCA at the time of the conclusion and/or performance of the Contract, do not coincide with those underlying the acts of the organs of the Egyptian State in the post-contract phase of the dispute. Since the Claimants also base their claim upon the decision of the Ismaïlia Court, the present dispute must be deemed a new dispute.
128. The intervention of a new actor, the Ismaïlia Court, appears here as a decisive factor to determine whether the dispute is a new dispute. As the Claimants’ case is directly based on the alleged wrongdoing of the Ismaïlia Court, the Tribunal considers that the original dispute has (re)crystallized into a new dispute when the Ismaïlia Court rendered its decision.
129. Under these circumstances, the Tribunal considers that the decision of the Ismaïlia Court is, in the words of the *Lucchetti* award, “a legally relevant element that compels a

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fact that an appeal was currently pending against the *Lucchetti* award (Tr. p. 86). It is not for this Tribunal to second-guess the solution adopted in a previous award.

ruling that the dispute before this Tribunal is a new dispute”<sup>41</sup>. Hence, the Tribunal concludes that the present dispute arose on 22 May 2003.

130. The Tribunal is reinforced in this conclusion by the fact that the *Lucchetti* tribunal further justified its solution by “the fact that Lucchetti did not have an a priori entitlement to this international forum” and that “[i]t cannot say that it made its investment in reliance on the BIT, for the simple reason that the treaty did not exist until years after Lucchetti had acquired the site, built its factory, and was well into the second year of full production” (¶ 61).

131. In the present case, it is undisputed that a BIT did exist when the Claimants made their investment. Interestingly, the Respondent seems to acknowledge the relevance of the existence of previous protection when it argues that there is no reason to distinguish *Lucchetti* precisely because the 1977 BIT was inapplicable *ratione materiae*. In any event, as the Tribunal has rejected the Respondent’s objection regarding the “original inapplicability” or inapplicability *ratione materiae* of the 1977 BIT (see *supra* No 104), this is an additional reason to distinguish the findings of this Tribunal from those reached in *Lucchetti*.

**c. The relevance of the contractual dispute settlement clause**

132. The Respondent finally contends that the Tribunal cannot assert jurisdiction because the dispute resolution clause contained in the Contract submits all disputes between the Claimants and the SCA to the jurisdiction of the Egyptian administrative courts.

133. The Tribunal cannot follow the Respondent’s arguments in this respect. As the Claimants emphasized, this argument has no independent bearing as it presupposes that this dispute is the same as the one brought before the Egyptian courts. Moreover, it is undisputed that the claims brought in this arbitration are separate and juridically distinct from the contract claims asserted before the Egyptian courts. As such, they are not covered by the contract dispute settlement clause.

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<sup>41</sup> Under these circumstances, the Tribunal does not need to consider the holding of the *Lucchetti* tribunal that “[t]he allegation of a BIT claim, however meritorious it might be on the merits, does not and cannot have the effect of nullifying or depriving of any meaning the *ratione temporis* reservation spelled out in Article 2 of the BIT” (at ¶ 59; reference omitted, referred to in *Reply J*, p. 21, ¶ 54).

**d. Must the investment exist at the time of the entry into force of the BIT?**

134. The Respondent objects to the jurisdiction of the Tribunal under the 2002 BIT on the ground that, assuming the dispute arose on 22 May 2003, the Claimants' investment no longer existed. It is the Respondent's contention that a dispute is covered by a treaty only if the investment was present in the territory of the State at the time when the dispute arose (Reply J., ¶ 107, p. 40).

135. The Tribunal disagrees. As the Claimants stressed, not only is it stated "nowhere [...] that the investment should still be in existence when the dispute arises" but also and more importantly, "should this be the case the entire logic of investment protection treaties would be defeated" (Reply J., ¶ 26, p. 14). As convincingly explained by the Claimants' legal expert,

Providing an effective remedy is part of the duties of fair and equitable treatment and of continuous protection and security for investments. A violation of that duty after the investment has come to an end does not change its nature. The duty to provide redress for a violation of rights persists even if the rights as such have come to an end. Otherwise an expropriating State might argue that it owes no compensation since the investment no longer belongs to the previous owner.

(Schreuer, ¶ 38, p. 12 [not discussed in the Reply at pp. 38-39])

136. For the same reasons, the Tribunal rejects the Respondent's additional contention that in the absence of an investment on 22 May 2003, the current dispute could not be in relation to an investment within the meaning of Article 25 of the ICSID Convention (see Reply J., ¶ 110 *in fine*, p. 41).

**e. Conclusion**

137. Having concluded that the general conditions of Article 25 of the ICSID Convention are fulfilled, that the 2002 BIT is applicable *ratione temporis* and *materiae*, the Tribunal concludes that it has jurisdiction to decide the present dispute under the 2002 BIT.

138. Prior to reaching this conclusion, the Tribunal has extensively considered the issue of whether a dispute arising after the Ismailia Court judgment could include claims which do not arise directly out of the judgment but out of previous facts. While the Claimants' submissions were sufficient to assert jurisdiction under the applicable test, the Tribunal wishes to stress that the limited analysis it conducted at the jurisdictional stage is without prejudice to the full analysis which it will conduct when examining the merits.

Among other requirements, this analysis will in particular review whether the claims based on the SCA's alleged wrongdoings are attributable to the Respondent, a matter which the Claimants will have to establish.

**D. COSTS**

139. At this stage, the Tribunal takes due note of the parties' positions and requests with respect to costs. It will deal with costs at the merits stage, which will allow it to make an overall assessment.

**DECISION ON JURISDICTION**

For the reasons set forth above, the Tribunal makes the following decision:

- a) The Arbitral Tribunal has jurisdiction over the dispute submitted to it in this arbitration.
- b) The Tribunal will, accordingly, make the necessary order for the continuation of the proceedings on the merits.
- c) The decision on costs is deferred to the second phase of the arbitration on the merits.

Made on 16 June 2006

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/signed/

Prof. Pierre Mayer

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/signed/

Prof. Brigitte Stern

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/signed/

Prof. Gabrielle Kaufmann-Kohler