

*Date of dispatch to the Parties: January 10, 2005*

ICSID Case No. ARB/03/08  
Consorzio Groupement L.E.S.I.-DIPENTA v.  
People's Democratic Republic of Algeria

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## AWARD

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*Arbitral Tribunal:*

Professor Pierre Tercier, President  
Maître André Faurès, Arbitrator  
Professor Emmanuel Gaillard, Arbitrator

*Secretary of the Arbitral Tribunal:*

Mrs. Gabriela Alvarez-Avila

In the arbitration proceeding  
between

CONSORZIO GROUPEMENT L.E.S.I. – DIPENTA (Italy),

*Claimant*

represented by

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and

PEOPLE'S DEMOCRATIC REPUBLIC OF ALGERIA

*Respondent*

represented by

S.E.M. Abdelmadjid Attar, Minister of Water Resources, Ministry of Water Resources,  
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assisted by

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## I. THE FACTS OF THE CASE<sup>1</sup>

The description that follows is by choice of a summary nature, based entirely on statements by the Claimant, the Respondent having at this stage refused to enter a detailed plea. It serves only as a basis for discussion of the questions of law that will be examined here. Discussion of significant questions of fact as necessary for resolving the dispute could be reopened in a discussion of the merits of the case.

### A. The parties

1. The Claimant is Consorzio Groupement L.E.S.I. – DIPENTA (hereafter “Consortium”) with headquarters at Via Indonesia 100, 00144 Rome, Italy. It was constituted by notarized articles of association on December 20, 1993, under the name “*Groupement L.E.S.I. – DIPENTA*” by the companies Lavori Edili Stradali Industriali L.E.S.I. S.p.A. (hereafter “LESI”) and GRUPPO DIPENTA COSTRUZIONI S.p.A (hereafter “DIPENTA”). It was registered on January 12, 1994 under the name “*Consorzio Groupement L.E.S.I. – DIPENTA*” in the Enterprise Registry of Rome (cf. no. 9 et seq.; Claimant exhibits no. G11 and G15).
2. The Respondent is the People’s Democratic Republic of Algeria (hereafter “Algeria” or “the Algerian State”), represented by M. Abdelmadjid Attar, Minister of Water Resources, with headquarters at the Ministry of Water Resources, 3 Rue du Caire, B.P. 86, Kouba, Algiers.

### B. Chronology of events

3. On September 14, 1992 the *Ministry of Equipment of Algeria*, acting through its National Dams Agency (*Agence Nationale des Barrages*, ANB, hereafter “ANB”) issued a call for tenders for construction of the Koudiat-Acerdoune dam in the District (*Wilaya*) of Bouira. This dam was to provide drinking water for the city of Algiers (Respondent exhibit no. 10).

The call for tenders specified: “*The National Dams Agency, as the client and project owner, by means of this pre-selection notice, invites eligible firms to submit their bids, under seal, for execution of the supplies and works hereafter described.*”

4. On November 24, 1992, LESI and DIPENTA signed a “*Protocol of Agreement for Constitution of a Temporary Group of Companies*” for purposes of submitting

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<sup>1</sup> The key documents are hereafter indicated as follows:

Claimant’s Request for Arbitration of February 3, 2003 = Claimant 03.02.03;

Respondent’s Memorial of January 27, 2004 = Respondent 27.01.04;

Claimant’s Memorial in Response on Jurisdiction of April 3, 2004 = Claimant 03.04.04;

Respondent’s Memorial in Reply on Jurisdiction of May 5, 2004 = Respondent 05.05.04;

Claimant’s Memorial of Rejoinder on Jurisdiction of June 3, 2004 = Claimant 03.06.04.

a joint bid for construction of the dam. That protocol specified the following (Claimant exhibit no. G13):

*“4) If the works are awarded to the Group, the parties undertake to ratify this agreement by creating a consortium between the two companies, to be governed by corporate statutes, with each company retaining its own autonomy.”*

*“5) The parties shall be jointly and severally liable to the ANB, the client, for all obligations flowing from submission of the bid and execution of the works [...].”*

[...]

*“9) This protocol of agreement shall terminate:*

*(a) if the companies are not prequalified;*

*and if they are prequalified:*

*(b) if they are awarded the work, once the constitution of the association of companies has been signed;*

*(c)*

*[...].”*

5. At meetings held on October 27 and 30, 1993, ANB communicated to representatives of the “Group of Companies LESI-DIPENTA” its decision to award them the works for building the dam, subject to approval of the Contract by the supervisory authorities concerned (Respondent exhibit no. 8 = Claimant exhibit no. G14).
6. According to the Claimant, as soon as the Contract award was announced, LESI and DIPENTA constituted the Consortium with a view to signing the Contract. The articles of association establishing the Consortium were completed before a notary in Rome on December 20, 1993 (cf. below no. 9).
7. On December 20, 1993, LESI and DIPENTA, “*joined together as a Temporary Group of Companies, pursuant to the agreement of November 24, 1992 signed before Mr. Luigi Cerasi, notary at Rome, and annexed to this offer [...]*”, submitted a bid to ANB. That bid was signed, “*Groupement LESI-DIPENTA by proxy of the Groupement LESI-DIPENTA by proxy G. Medioli*” (Respondent exhibit no. 1).

According to the Claimant, the “*Protocol of Agreement for the Constitution of a Temporary Group of Companies*”, concluded on November 24, 1992 between LESI and DIPENTA (cf. no. 4; Claimant exhibit no. G13) was communicated.

8. On December 20, 1993, again:

*“Group of Companies  
LESI/DIPENTA COSTRUZIONI Sp.A,  
represented by Mr. Giovanni Medioli, President,  
with headquarters at 100 Via Indonesia, Rome,  
hereafter “the Company”,*

of the first party,

and ANB, of the other party,

signed a contract entitled “*Barrage de Koudiat Acerdoune - Dossier d’Offre*” (“Koudiat-Acerdoune Dam – Bid File”) relating to construction of the dam (hereafter “the Contract”). The overall time limit for fulfilling the Contract was 50 months, as of issuance of the service order that marked the beginning of the works (Claimant exhibit no. 1 = Respondent exhibit no. 2).

On the last page of that document, the stamp of “*the Company*” appeared as follows: “*Groupement LESI-DIPENTA by proxy G. Medioli*”.

9. On that same day, the Consortium was constituted in Rome by notarized articles of association pursuant to Articles 2602 et seq. and 2612 et seq. of the Italian Civil Code (ItCC). On January 12, 1994 it was registered in the Enterprise Registry of Rome at the Tribunal of Rome under number 138/94, and also with the Chamber of Commerce of Rome under number 685037 (Claimant exhibits G11 and G15).
10. According to the Claimant, while the Contract is dated December 20, 1993, the President of the Consortium, Mr. Medioli, had signed it a few days earlier in Rome, in accordance with instructions from the Algerian authorities, in a version that was undated. The date was added by ANB after approval and signature by the competent authorities. A ceremony was reported to have been held in Algiers on December 19 to make public the award of the Contract and the commencement of the work. Mr. Medioli sent his assistant, Mr. Ugo Napoli, to deliver the copies already signed by the President. The following day, the Algerian authorities added their signature and gave the service order to begin work to Mr. Napoli, who countersigned it (Claimant 03.04.04 no. 16 and 17).
11. Also on December 20, 1993, the service order to begin work was notified to the “*Groupement LESI-DIPENTA*”. That service order specified that the Contract had been approved by the National Procurement Commission and by the State Financial Comptroller (Claimant exhibit no. G16 = Respondent exhibit no. 9).
12. According to the Respondent, LESI and DIPENTA did not inform the Algerian authorities that they had constituted a consortium with external activities, within the meaning of the ItCC (Respondent 27.01.04 p. 5).

13. By letter of April 13, 1994, the “*Groupement LESI-DIPENTA*” sent to ANB a copy of the articles of association and by-laws of the Consortium, as well as Minutes of Meeting No. 1 of the Managing Council, giving powers of representation to Mr. Salvatore Giudice and Mr. Ugo Napoli (Claimant exhibits no. G36 and G37).
14. According to the Claimant, many difficulties were encountered in executing the Contract:
  - From December 1993 to April 1996, the commencement of work at the site was prevented by difficulties in securing rights-of-way and by security problems;
  - From April 1996 to November 1997, some of the works were performed, but in a very limited manner, because of persistent security problems;
  - From November 1, 1997 to June 27, 2001, the date the Contract was canceled, work was suspended by decision of the competent authorities, following the decision of ANB to change the method of constructing the dam (Claimant 03.02.03 p. 5 et seq.).
15. On December 31, 1996, the “*Groupement LESI-DIPENTA, with headquarters in Rome at 100 Via Indonesia, constituted by the companies LESI Spa (ROME) and GRUPPO DIPENTA COSTRUZIONE Spa (ROME), led by the company LESI Spa, represented by Mr. Salvatore Giudice [...] as Technical Director with full powers for these purposes, hereafter designated the Group*” and ANB concluded Amendment No. 1 to the Contract, applying the value-added tax (hereafter “VAT”) to the initial amount of the Contract. That amendment was signed under the letterhead of the “*Democratic People’s Republic of Algeria, Ministry of Equipment and Territorial Development, National Dams Agency*” (Respondent exhibit no. 3).
16. On October 28, 1997, ANB notified a service order to the “*Groupement LESI-DIPENTA*”, under the letterhead of the “*People’s Democratic Republic of Algeria, Ministry of Water and Forests, National Dams Agency*”, instructing it to cease work as of November 1, 1997. This stop-work order followed a decision by ANB to modify the method of constructing the dam, replacing the initial “rock fill” variant with the “roller-compacted concrete (RCC)” variant. According to the Claimant, ANB maintained that this modification required prior approval of the African Development Bank (hereafter the “ADB”), which had financed the Contract (Respondent exhibit no. 11 = Claimant exhibit no. G16 ; Respondent 27.01.04 p. 16 ; Claimant 03.02.03 pp. 5 and 8).
17. On November 1, 1997, work was effectively suspended.
18. On October 4, 1997-November 2, 1997, the “*Groupement LESI-DIPENTA*” and ANB concluded Amendment No. 2 to the Contract relating to the VAT and the

introduction of a new price. This was formally concluded in the same manner as Amendment No. 1 (see above, paragraph 15) (Respondent exhibit no. 4).

19. On June 27, 1998, “*Groupement LESI-DIPENTA*”, acting through “*Giovanni Medioli as President of the Managing Council of the Groupement LESI-DIPENTA, headquartered at Rome, Via Indonesia 100, registered in the Chamber of Commerce, Industry and Crafts of Rome under number 785037,*” submitted to the Respondent, in the form of a third amendment (Amendment No. 3), a proposal concerning the technical and economic aspects of building the dam with RCC (Respondent exhibit no. 5).

Mr. Medioli declared in that submission: “*I declare, under pain of automatic cancellation of the Contract or of having the work placed under State administration with full costs against the Group, that neither said group nor its component companies fall within the scope of the bans instituted by existing legislation and regulations and the provisions for violation of price regulations.*”

At the foot of the amendment appeared the following stamp: “*Groupement LESI-DIPENTA the President Giovanni Medioli*”.

According to the Claimant, this amendment was never signed by Algeria.

20. By letter of April 14, 2001, ANB informed “*The President and Director General of the Groupement LESI-DIPENTA*” of its decision to cancel the Contract. That letter explained that the difficulties encountered were beyond its control and it therefore invoked force majeure as the grounds for cancellation. These grounds consisted, according to the letter, of the fact that the signature of Amendment No. 3 was conditional upon obtaining financing and that the ADB had conditioned this financing on a new call for international tenders, and hence on cancellation of the Contract. ANB declared, however, that it was ready to compensate the Contractor for its costs, as accepted in its letter of March 16, 1998 (Claimant exhibit no. 3).
21. On April 24, 2001, according to the Claimant, the Consortium acknowledged the cancellation and announced that it would submit a substantiated claim under Article 566 of the Algerian Civil Code (Claimant 03.02.03 p. 12).
22. On June 5, 2001, again according to the Claimant, the Consortium confirmed its claim for compensation (Claimant 03.02.03 p. 12).
23. On June 20, 2001, the Claimant approached the Minister of Water Resources, requesting a meeting to find a solution to the difficulties (Claimant 03.02.03 p. 12).
24. On June 27, 2001, ANB sent a note under the letterhead of the “*People’s Democratic Republic of Algeria, Ministry of Water Resources, National Dams*”

- Agency”, notifying the *Groupement LESI-DIPENTA*, in the form of a “decision”, that the Contract was canceled (Respondent exhibit no. 12).
25. On September 5, 2001, according to the Claimant, the Consortium submitted a further claim for compensation, following which meetings were held in an unsuccessful attempt to reach agreement on the amount of compensation.
26. By letter of April 5, 2002, under the letterhead of the “*Groupement LESI-DIPENTA, 00144 Rome, Via Indonesia 100 [...] Tribunal of Rome 138/94 -- CCIAA Rome No. 785037 [...]*” and stamped “*Groupement LESI-DIPENTA President (Giovanni Medioli)*” (hereafter “letterhead”), *Groupement LESI-DIPENTA* wrote to the Minister of Water Resources requesting that an attempt be made to reach a friendly settlement of the dispute, and submitted a new file detailing and quantifying the damages that the Contractor claimed to have suffered (Claimant exhibit no. 10 = Respondent exhibit no. 18).
27. By a letter under letterhead dated May 15, 2002, *Groupement LESI-DIPENTA* sent to the Minister of Water Resources a formal appeal concerning the dispute with ANB over execution and cancellation of the Contract (Claimant exhibit no. 21) and attached thereto a “*Claim for damages and interest (following stoppage of work and cancellation)*”, in which the Claimant was described as follows (Respondent exhibit no. 6):

“1.1. *The Claimant: Groupement LESI-DIPENTA*

*The Groupement LESI-DIPENTA is a group under Italian law, with headquarters at Rome EUR, 100 Via Indonesia, the President of which is Mr. Giovanni Medioli. It has been registered in the Enterprise Registry of Rome since January 12, 1994 under number 785037.*

*It is referred to hereafter in this note as G. L. D. or “the claimant” or “the enterprise.” In the documents exchanged between the parties, it is variably designated as “the contractor” or “the enterprise” or “the Group”.*

*It is composed of companies under Italian law, “Lavori Edili Stradali Industriali” - LESI SpA and DIPENTA SpA; LESI is the lead member of the Group.”*

28. In another letter on its letterhead, dated the same day, the *Groupement LESI-DIPENTA* advised ANB that it had sent the case to the Minister of Water Resources (Claimant Exhibit no. 22).
29. By letter of June 15, 2002, addressed to “*the President of the Groupement LESI-DIPENTA -- Italy*”, the Ministry of Water Resources acknowledged receipt of the appeal and instructed the Group to reopen negotiations with ANB in search of an amicable settlement (Respondent exhibit no. 19).

30. In July 2002, according to the Claimant, the new contract was awarded to the French company Razel (Claimant 03.02.03 p. 14). Again according to the Claimant, that contract was awarded at a price higher than that of the draft Amendment No. 3 submitted by the Consortium to ANB in June 1998 (see above, no. 19). ANB allegedly refused to award the contract to the Claimant, in order to avoid or delay compensation.
31. By letter of July 3, 2002, under letterhead, *Groupement LESI-DIPENTA* accepted the suggestion of the Ministry of Water Resources to renew contact with ANB, while noting that all previous approaches to ANB had been unproductive and that its appeal was not premature (Claimant exhibit no. 20).
32. By letter of the same day, under letterhead, the Claimant sent to ANB a copy of the file attached to its formal appeal of May 15, 2002, and reiterated its proposal to seek a friendly settlement (Claimant exhibit no. 23).
33. By letter of September 26, 2002, under letterhead, the Claimant advised ANB of its refusal to sign the “General and Definitive Statement of Accounts” for the Contract, as established by ANB, and provided substantiating documentation on this point (Claimant exhibit no. 24).
34. By letter of October 11, 2002, under letterhead, *Groupement LESI-DIPENTA* wrote to ANB detailing the reasons for its refusal to sign the General and Definitive Statement of Accounts. It summarized its claims relating to the alleged damages arising from performance of the Contract and its cancellation (Claimant exhibit no. 25).
35. By letter of October 22, 2002, ANB advised “*the President of the Groupement LESI-DIPENTA*” that it was prepared to examine its claim, while formulating certain demands (Respondent exhibit no. 21).
36. By letter of October 28, 2002, *Groupement LESI-DIPENTA* wrote to the Minister of Water Resources that it could not accept the “General and Definitive Statement of Accounts” drawn up by ANB, and that discussions with ANB were proceeding without results (Respondent exhibit no. 22).
37. On February 3, 2003, the Consortium filed a “request for arbitration” with the International Centre for Settlement of Investment Disputes (hereafter “ICSID”) (see below, no. 39 et seq.).
38. On October 14, 2003, “*Groupement LESI-DIPENTA, an Italian company with headquarters at 00144 Rome, Via Indonesia 100, Italy*”, acting through its representative, filed suit against ANB before the Administrative Chamber of the Court of Algiers on grounds of having expropriated its “technical base” (*base technique*) for the benefit of the new contractor Razel (Respondent exhibit no. 25).



### C. The arbitration proceedings

39. On February 3, 2003, the Consortium addressed to the Secretary-General of ICSID a request for arbitration, directed against Algeria, which it declared was subject to the following provisions:
- a. Article 36 of the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereafter “the Convention”).
  - b. Article 8.2 (b) of the Bilateral Agreement on the Promotion and Reciprocal Protection of Investments between Algeria and Italy, which came into effect on November 26, 1993 (hereafter “the Bilateral Agreement”).
  - c. Articles 1 to 6 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (hereafter “Rules for Institution of Proceedings”).

Without entering any formal pleadings, the Claimant defined the object of this request as follows:

*“The Claimant has suffered the following damages:*

- (i) Damages caused by the prolonged stoppage of work at the site, including three types of damages:*
  - (i.1) The general expenses incurred by the investor because of its forced inactivity;*
  - (i.2) Immobilization of the companies’ material and structures during the suspension of work;*
  - (i.3) Lack of productivity of those structures for eight years, cited at points 1 and 2 above.*
- (ii) Damages flowing from cancellation of the Contract, including:*
  - (ii.1) Profits forgone;*
  - (ii.2) Lower volume of business and reduced equity value;*
  - (ii.3) Damage to the investor’s reputation and other moral damages.*
- (iii) Financial costs due to the delay in compensation.*

*In its appeal of May 15, 2002 to the Minister of Water Resources, the Claimant requested overall compensation of about €115 million, on the basis of five volumes of technical and economic documentation. That documentation, duly completed and updated, will be analyzed during the arbitration proceedings.*

*The investor requests an arbitration award ordering the Respondent to pay to the Claimant compensation in an amount equal to that mentioned above, subject to a more accurate quantification and updating of the financial charges. In calculating the amount claimed, the financial charges for late payment have been calculated up to June 30, 2001.*

*In any case, the Claimant maintains that the compensation to which it is entitled must reflect the “adequate amount” established in Article 4.4 of the Italy-Algeria bilateral treaty, i.e. “the effective market value of the investment”, determined “on the basis of accepted international rules or usages”, paid “in a convertible currency” or in any case “in the currency in which the investment was made”, plus “interest at the applicable interbank rates for the currency of settlement in the investor’s country of origin at the effective date of application of the measures”, pursuant to paragraphs 2 and 3 of Article 4.”*

40. On April 30, 2003, the ICSID Secretariat asked the Claimant to provide further explanations concerning Article 11 of the Bilateral Agreement, relating in particular to the condition of conformity with applicable laws and regulations in Algeria.
41. On May 14, 2003, the Claimant indicated to the Secretariat that the Contract had been awarded in accordance with the Algerian Code of Public Procurement and approved by the Algerian government.
42. On May 20, 2003, the acting Secretary-General of ICSID registered the request for arbitration, in accordance with Article 36(3) of the Convention and Articles 6(1) and 7(a) of the Rules for Institution of Proceedings, and invited the parties to proceed, as soon as possible, to constitute an Arbitral Tribunal.
43. The parties agreed that the Arbitral Tribunal should consist of three arbitrators: one arbitrator appointed by each party and the third, to serve as President of the Tribunal, named by the two arbitrators appointed by the parties.
44. On September 3, 2003, the Arbitral Tribunal was constituted. It consisted of Maître André Faurès, the arbitrator appointed by the Claimant; Professor Emmanuel Gaillard, the arbitrator appointed by the Respondent; and Professor Pierre Tercier, President, proposed by the two co-arbitrators.
45. On October 30, 2003, the Arbitral Tribunal held its first hearing in Paris, in the presence of the parties. Various decisions concerning procedures were taken. In particular, it was decided to limit discussion initially to examining objections of jurisdiction and admissibility raised by the Respondent (see minutes of the first session of the Arbitral Tribunal held in Paris on October 30, 2003).
46. On January 27, 2004, Algeria filed its Memorial on Jurisdiction. Without offering any formal arguments, it argued as follows:

*“The claim is inadmissible because the Claimant has no rights and no standing.*

*In the alternative, however improbable, that the Tribunal should find that the Consortium has rights and standing [...], the claim is inadmissible because the Claimant cannot claim benefit of the option of jurisdiction stipulated in Article 8.2 of the Bilateral Agreement.”*

*[...]*

*In the further alternative, however improbable, that the Arbitral Tribunal should rule the request for arbitration of February 3, 2003 to be admissible [...] it must decline jurisdiction pursuant to Article 41 of the Convention.”*

47. On April 3, 2004, the Claimant filed its “Memorial in Response on Jurisdiction”, in which it asked the Arbitral Tribunal to dismiss Algeria’s objections and to find as follows:

*“i) The claim is admissible, because the Consortium has standing and attempts to arrange a friendly settlement, as called for in the Bilateral Treaty, have repeatedly failed (Chapters I and I);*

*ii) The Tribunal has jurisdiction jure personae because the Algerian State is liable for violations of the Bilateral Treaty resulting both from its own actions or omissions and from the actions or omissions of ANB, which is deemed in international law to be equivalent to the State (Chapter I);*

*iii) The Tribunal has jurisdiction jure materiae because the Contract in question qualifies as an investment under the terms both of the Convention and of the Bilateral Treaty (Chapter IV);*

*iv) Even if the Respondent does not contest the existence of damages (an debeatur), the legal dispute remains, for the Tribunal must determine the amount of damages (Chapter V);*

*v) Pursuant to Article 8.2 of the Bilateral Treaty, the Algerian State consented to submit this dispute to the jurisdiction of the ICSID, because the dispute has to do not merely with contractual claims against ANB but, primarily, with obtaining compensation for an expropriation within the meaning of Article 4.3 of the Bilateral Treaty (Chapter VI).”*

48. On May 5, 2004, the Respondent submitted to the Tribunal its “Memorial in Reply on Jurisdiction”, in which it requested that it be awarded the benefits claimed in its previous memorials and that the Tribunal should find and rule that:

- “i) *The Arbitral Tribunal lacks jurisdiction to consider the dispute that gave rise to the request for arbitration of February 3, 2003, because the dispute does not fulfill the conditions required by Article 25.1 of the 1965 Washington Convention as needed to bring it within the scope of jurisdiction of ICSID.*
- ii) *In the alternative, however improbable, that the Arbitral Tribunal should declare itself competent to hear the dispute set forth in the request for arbitration of February 3, 2003, it should find and rule that such jurisdiction is limited to examining and deciding the claims formulated in the request for arbitration of February 3, 2003, which correspond to violations of the Agreement between the Government of the People’s Democratic Republic of Algeria and the Government of Italy on the Reciprocal Promotion and Protection of Investments, signed in Algiers on May 18, 1991 (the “Bilateral Treaty”).*
- iii) *In the further alternative, however improbable, that the Arbitral Tribunal should declare itself competent to consider the claims in the request for arbitration, corresponding to violations of the Bilateral Treaty, it should declare inadmissible all the claims submitted by the Consorzio Groupement LESI-DIPENTA in the Request for Arbitration of February 3, 2003, on the grounds that the Consorzio Groupement LESI-DIPENTA, which presents itself as the Claimant, was not a party to Contract 167/ANB/SM/93 of December 20, 1993, and therefore has no standing.*
- iv) *In the even less probable alternative that the Arbitral Tribunal should declare groundless the objections to jurisdiction and admissibility set forth above in (iii), it should declare inadmissible all the claims submitted by the Consorzio Groupement LESI-DIPENTA in its Request for Arbitration of February 3, 2003, because the Claimant does not meet the conditions of Article 8.1 and Article 8.2 of the Bilateral Treaty required to benefit from the option of jurisdiction stipulated in Article 8.2 of that treaty:*
- *The Claimant did not respect the period of six (6) months stipulated in Article 8.2 of the Bilateral Treaty before submitting its Request for Arbitration.*
  - *The plaintiff does not have the status of “investor” within the meaning of the Bilateral Treaty.*
  - *Execution of Contract 167/ANB/SM/93 of December 20, 1993 does not qualify as an investment by the Contractor.*

*Therefore, the dispute described in the Request for Arbitration of February 3, 2003 cannot be considered as “a dispute relating to investments between one of the Contracting States and an investor of the*

*other Contracting State” within the meaning of Article 8.1 of the Bilateral Treaty.”*

49. On June 3, 2004, the Claimant filed its “Memorial of Rejoinder on Jurisdiction”, in which it reaffirmed the arguments from its memorial of April 3, 2004 (see above, no. 46).
50. On June 21, 2004, the Arbitral Tribunal held a second hearing in Paris. At that time, it heard oral arguments by counsel for the parties and it closed the proceedings on questions related to its jurisdiction and to admissibility, subject to submission by counsel for the Claimant of copies and judicial decisions and doctrinal extracts (with translation) (see transcript of the hearing of June 20, 2004).
51. As promised during the hearing, the Claimant subsequently sent the Arbitral Tribunal the original versions, with an unofficial translation, of the passages of legal authority cited in its written submissions relating to the nature of the Consortium according to Article 2612 of the ItCC.

## **II. QUESTIONS OF LAW**

### **1. General**

1. In its written submissions, the Respondent raised various objections to the jurisdiction of the Arbitral Tribunal to decide this dispute, and against the admissibility of the claim.

The issue of jurisdiction is dealt with in Article 41 of the Convention, which reads as follows:

*“ (1) The Tribunal shall be the judge of its own competence.*

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

The power of the Tribunal to be the judge of its own competence is not contested. In this case, it was decided during the hearing with the parties in October 2003 that the Arbitral Tribunal would begin by rendering a decision on this matter. It was also agreed that it would deal in addition with the admissibility objections raised by the Respondent (see above, Facts of the Case, no. 45, and minutes of the session of October 30, 2003).

The parties had ample opportunity to present their arguments, first in writing (see Facts, no. 46 ff), and then orally during the hearing of June 21, 2004 (see Facts, no. 50). Finding that neither of the parties wished to debate the matter further, the Tribunal closed the proceedings on these matters, and is ready to decide.

2. From the positions taken by the parties, it emerges that the Tribunal must first rule on questions affecting its jurisdiction (see below, Chapter 2), and subsequently on those relating to admissibility (see below, Chapter 3). The two types of objections must be dealt with separately and successively, because they deal with different questions. It is true that, in ICSID proceedings, the distinction is without practical consequences, in contrast to what may be the case in other arbitration procedures: indeed, recourse against decisions rendered on one question or the other does not differ in the system instituted by the Convention, whether they relate to jurisdiction or to admissibility. Moreover, as will be explained, admissibility objections raised by the parties may also have a bearing on the competence of the Arbitral Tribunal (see below, no. 40). This is also the order of argumentation followed by counsel for the parties in their pleadings (see minutes of the hearing of June 21, 2004).

## 2. The jurisdiction of the Arbitral Tribunal

3. In its final written submissions (see Facts, no. 48), Algeria first put forward the following plea: *“To find and rule that:*

- “(i) The Arbitral Tribunal lacks jurisdiction to consider the dispute that gave rise to the request for arbitration of February 3, 2003, because the dispute does not fulfill the conditions required by Article 25.1 of the 1965 Washington Convention as needed to bring it within the scope of jurisdiction of ICSID.*
- “(ii) In the alternative, however improbable, that the Arbitral Tribunal should declare itself competent to hear the dispute set forth in the request for arbitration of February 3, 2003, it should find and rule that such jurisdiction is limited to examining and deciding the claims formulated in the Request for Arbitration of February 3, 2003, which correspond to violations of the Agreement between the Government of the People’s Democratic Republic of Algeria and the Government of Italy on the Reciprocal Promotion and Protection of Investments, signed in Algiers on May 18, 1991 (the “Bilateral Treaty”).*
- “(iii) In the further alternative, however improbable, that the Arbitral Tribunal should declare itself competent to consider the claims in the Request for Arbitration, corresponding to violations of the Bilateral Treaty, it should declare inadmissible all claims submitted by the Consorzio Groupement LESI-DIPENTA in the Request for Arbitration of February 3, 2003, on the grounds that the Consorzio Groupement LESI-DIPENTA, which presents*

*itself as the Claimant, was not a party to contract 167/ANB/SM/93 of December 20, 1993, and therefore has no standing.*

- (iv) *In the even less probable alternative that the Arbitral Tribunal should declare groundless the objections to jurisdiction and admissibility set forth above in (iii), it should declare inadmissible all claims submitted by the Consorzio Groupement LESI-DIPENTA in its Request for Arbitration of February 3, 2003, because the Claimant does not meet the conditions of Article 8.1 and Article 8.2 of the Bilateral Treaty required to benefit from the option of jurisdiction stipulated in Article 8.2 of that treaty:*
- The Claimant did not respect the period of six months stipulated in Article 8.2 of the Bilateral Treaty before submitting the Request for Arbitration;*
  - The plaintiff does not have the status of “investor” within the meaning of the Bilateral Treaty;*
  - Execution of contract 167/ANB/SM/93 of December 20, 1993 does not qualify as an investment by the Contractor.*

*Therefore, the dispute described in the request for arbitration of February 3, 2003 cannot be considered as “a dispute relating to investments between one of the Contracting states and an investor of the other contracting State” within the meaning of Article 8.1 of the Bilateral Treaty.”*

It is only the first argument that raises a problem of jurisdiction. In addressing that problem, the Arbitral Tribunal must nevertheless address several aspects raised in the second argument.

In all of its written submissions, the Claimant insisted that this argument should be rejected. In particular, with respect to problems of jurisdiction, it made the following arguments in its “Memorial in Response on Jurisdiction” of April 3, 2004 (see above, Facts, no. 47):

“[...]

- (ii) *The Tribunal has jurisdiction jure personae because the Algerian State is liable for violations of the Bilateral Treaty resulting both from its own actions or omissions and from the actions or omissions of ANB, which is deemed in international law to be equivalent to the State (Chapter I);*
- (iii) *The Tribunal has jurisdiction jure materiae because the Contract in question qualifies as an investment under the terms both of the Convention and of the Bilateral Treaty (Chapter IV);*

- (iv) *Even if the Respondent does not contest the existence of damages (an debeatu), the legal dispute remains, for the Tribunal must determine the amount of damages (Chapter V);*
- (v) *Pursuant to Article 8.2 of the Bilateral Treaty, the Algerian State consented to submit this dispute to the jurisdiction of the ICSID, because the dispute has to do not merely with contractual claims against ANB but, primarily, with obtaining compensation for an expropriation within the meaning of Article 4.3 of the Bilateral Treaty (Chapter VI)."*

4. It is uncontested that the competence of the Arbitral Tribunal to rule on the arguments of the Claimant is based on Article 25.1 of the Convention, 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 the 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."*

Nor are the parties in disagreement (see minutes of the hearing of June 21, 2004) that the competence of the Arbitral Tribunal, according to Article 25.1 of the Convention, is subject to four conditions. Although the Tribunal deems it useful to change slightly the order of questions suggested by the parties, it can accept this choice. It must then ascertain:

- whether the issue at hand is a “ legal dispute” (see below, Chapter 2.1);
- whether the dispute is one “arising directly out of an investment” (see below, Chapter 2.2);
- whether it arises from a problem “between a contracting State and a national of another contracting State” (see below, Chapter 2.3); and
- whether the State in question has given its “consent in writing” to the jurisdiction of the Centre, according to this provision (see below, Chapter 2.4).

## **2.1. A legal dispute?**

### a) The question to be resolved

5. The Respondent considers that the disagreement between the parties does not constitute a legal dispute within the meaning of Article 25.1 of the Convention, but is purely a matter of accounting or finance. The Claimant contests this objection of the Respondent.



b) The positions of the parties

6. In brief, the position of the Respondent is as follows:

- (i) There is no dispute between the Respondent and the Consortium relating to violations of the Bilateral Agreement. Whereas a dispute must have existed before the beginning of litigation, the Claimant complained of such violations only in its Request for Arbitration.
- (ii) The remaining dispute is not of a legal nature, for it has nothing to do with application or interpretation of existing law. The principle of compensation has not been contested, and the purpose of the litigation relates only to the method of determining damages suffered by the Claimant (see the letters from the Claimant addressed to ANB on April 5 and June 11, 2002, and the meeting of March 3, 2002). The dispute is thus of a purely accounting or financial nature, and falls within the jurisdiction of the Administrative Chamber of the Court of Appeals (Article 1.08 of the Book of Special Prescriptions, Respondent exhibit no. 1) (Respondent 27.01.04 p. 34 to 36 ; 05.05.04 no. 57 to 60 ; exhibits no. 18, 23 and 24).

7. In brief, the position of the Claimant is as follows:

- (i) In order for a dispute to exist prior to the beginning of litigation, the Claimant would merely have to declare its *petitum* (demand), without having to specify the legal provisions on which the demand might be based. Thus, before the beginning of this arbitration, the Claimant submitted repeated claims to the Respondent demanding fair compensation of the damages suffered, but this was never paid. It was not necessary for the Claimant to specify that cancellation of the contract without compensation constituted a violation of the Bilateral Agreement.
- (ii) Determination of the damages suffered by the Claimant would by itself constitute a legal dispute, for the courts would apply legal criteria in determining the amount of damages. The word “legal” was used in Article 25 of the Convention for the sole purpose of discarding civil conflicts of interest (political, economic etc.) that would not fall within the jurisdiction of the Centre (Claimant 03.04.04 no. 183 to 189; 03.06.04 pp. 29 to 32).

c) The position of the Arbitral Tribunal

8. In deciding whether the arguments placed before it so far by the Claimant are of a legal nature within the meaning of Article 25.1 of the Convention, the Tribunal considered the following elements:

- (i) The wording must be understood in its broadest sense. It covers all questions relating to conclusions based on the claims of one party against the other by virtue of legal rules, whether they are based on a contract or in law. These questions are therefore different from disputes that might have another object or another basis, such as questions of a political or economic nature (Ch. H. Schreuer, *The ICSID Convention: a Commentary*, 2001, p. 104). Questions of the latter kind cannot, from this viewpoint, be the subject of litigation under the Convention. For a legal dispute to exist, it is both necessary and sufficient that the Claimant should have submitted to the Arbitral Tribunal arguments that the Tribunal can decide by applying the procedure established by the Convention, and that its decision can, if necessary, be enforced.

In the present case, the Claimant demanded compensation for the damages it claimed to have suffered in the wake of the Contract's cancellation. These are apparently formal pleas, based on claims to which it believes it is entitled by reason of the contractual relationship that linked it to the Respondent. These arguments can be investigated, debated, and decided in accordance with Convention procedures, and they could subsequently be enforced.

- (ii) The fact that the dispute is not over the principle of compensation (which is not contested) but over the amount of compensation does not change the situation. It is frequent, in proceedings of this kind, to find that the difficult part concerns not the principle but the amounts, but that does not change the nature of the dispute. Moreover, these two aspects are often intimately intertwined. Even from the limited viewpoint of compensation, it is up to a tribunal to decide whether damages have been established, whether they should be compensated through application of the applicable rules, and if so, whether there are grounds that would justify a different distribution of compensation. These questions go beyond mere accounting operations, which are limited to recording the values accepted by the parties and do not involve any in-depth appreciation of the rules of law.

In the present case, while the Respondent does not contest the principle of compensation, there are apparently significant differences between the parties as to the nature and amount of damages for which the Claimant is entitled to receive compensation by virtue of the rules applicable to the Contract. Proof of this statement can be found in the difficulties encountered to date in reaching agreement between the parties, and the failure of the negotiations pursued to date. It is difficult to see how accountants could settle difficulties of this kind in a manner that would be binding and enforceable.

9. From the foregoing considerations, it may be concluded that:

- *The dispute between the parties is indeed a “legal dispute” within the meaning of the Convention.*

## **2.2. An investment-related dispute?**

### a) The question to be resolved

10. The Respondent considers that a construction contract does not have the characteristics of an “investment” within the meaning of Article 25.1 of the Convention. The Claimant asks that this objection be rejected.

### b) The positions of the parties

11. In brief, the position of the Respondent is as follows:

- (i) The Contract does not meet the definition of “investment” within the meaning of Article 25 of the Convention, as understood in conventional doctrine, which requires that contributions be made, that they have a certain duration, and that they involve some risk for the contributor. Only one decision rendered under ICSID auspices has found that a construction contract is an investment within the meaning of the Convention (*Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, case ARB/00/4, decision of July 23, 2001 on jurisdiction, *JDI* 2002, 196).
- (ii) The Claimant made no capital, material, or industrial contribution to ANB for establishing the worksite, which investments would have become the property of ANB. The Claimant did not even start construction work, and supplied only the services for which it was paid (D. Carreau et P. Juillard, *Droit international économique*, LGDJ, 4ème Ed., 1998, p. 398).
- (iii) The duration of construction (50 months) would not have been long enough (five years, according to the first draft of the Washington Convention). Moreover, there was no lasting link established between ANB and the Claimant, the latter being in no way associated with management or operation of the dam (D. Carreau et P. Juillard, *op. cit.* p. 398).
- (iv) It was not the intent of the Contract to have the investor bear all or any of the risks in the undertaking, for the investor was to have no part in the operating earnings of the dam. The Claimant incurred no risks other than those inherent in fulfillment of the Contract (bankruptcy of the client, supplementary works, force majeure, etc.), and those were already covered by specific provisions of the Contract (M. Bouhacene, *Droit de la coopération industrielle*, Publisud, 1986, p. 130 ; Respondent 27.01.04 p. 37 to 43 ; 05.05.04 no. 61 and 67).

12. In brief, the position of the Claimant is as follows:

- (i) The decision rendered in the *Salini* case is not the only ICSID decision to treat a construction contract as an investment (cf. ICSID case ARB/00/6, *Consortio RFCC v. Morocco*, decision on jurisdiction of July 23, 2001, published at the ICSID web site). Other decisions rendered under ICSID auspices have accorded the quality of investment to operations such as the purchase of promissory notes or the provision of inspection services to assist the government in determining applicable customs tariffs (see ICSID cases *Fedax*, *CSOB*, *SGS v. Pakistan* and *SGS v. Philippines*). The preamble to the Convention itself calls for a liberal and extensive interpretation of Article 25.1 (see ICSID case no. ARB/96/3 *CSOB v. Slovak Republic*) (Claimant exhibits no. G29, G30, G31, G32).
  - (ii) The Claimant made contributions in cash, in kind, and in work, and these contributions remained available to the Respondent until evacuation of the site was ordered following cancellation. Moreover, a contribution cannot be limited exclusively to transfer of ownership, and should include, in the present case, the financial charges that the Claimant had to assume for even partial execution of the construction works (ICSID cases *SGS v. Pakistan* and *SGS v. Philippines*).
  - (iii) With respect to duration, there is no minimum duration requirement: it must be assessed case-by-case (Ch. H. Schreuer, page 140). In the case at hand, the Contract was to last 90 months.
  - (iv) Risk is inherent in any construction contract, represented by the many risks such as expiry of the service order, compliance with future labor legislation, constraints imposed by reliance on public utilities, or suspension of work for less than one year, etc. (see Book of General Administrative Clauses, Claimant exhibit G33).
  - (v) In international practice, construction contracts are the most frequent examples of investments (cf. Ch. H. Schreuer, op.cit., p. 138 et 139 ; C. B. Lamm and A. C. Smutny, *The Implementation of ICSID Arbitration Agreements*, ICSID Review: Foreign Investment Law Journal, 1996, n. 1 p. 64 ff) (Claimant 03.04.04 no. 131 to 180, 03.06.04 pp. 25 to 28)
- c) The position of the Arbitral Tribunal

13. In deciding whether this case deals with an “investment” within the meaning of Article 25.1 of the Convention, the Arbitral Tribunal considered the following elements:

- (i) The Convention offers no definition of investment, although that notion is central to the functioning of the applicable regime (see Report of the

Executive Directors on the Convention, §27). It is not up to the Arbitral Tribunal to take a general position on this matter, but rather to decide whether, and under what conditions, a construction contract can fulfill the conditions of an investment within the meaning of the Convention

- (ii) Both parties cite the *Salini* decision. Contrary to the arguments of the Respondent, that decision is by no means unique: on the contrary, it is part of a current of jurisprudence that accepts, fairly broadly, what can constitute an investment (Decision of July 11, 1997 on jurisdiction, *Fedax N.V. v. Venezuela*, JDI 1999.278; decision of May 24, 1999 on jurisdiction, *CSOB v. Slovak Republic*, ICSID Rev. 1999, p. 251; decision of August 6, 2003 on jurisdiction, *SGS v. Pakistan*, JDI 2004.258 ; decision of January 29, 2004 on jurisdiction, *SGS v. Philippines*, 19 Int'l Arb. Rep. C1 (February 2004)).
- (iii) These decisions do not, however, provide clear guidelines, but seem rather to be based on choices made case-by-case. The Arbitral Tribunal notes that some objective criteria emerge from those cases, sufficient to guarantee a degree of security.
- (iv) It would seem consistent with the objective of the Convention that a contract, in order to be considered an investment within the meaning of the provision, should fulfill the following three conditions:
  - a) the contracting party has made contributions in the host country;
  - b) those contributions had a certain duration; and
  - c) they involved some risks for the contributor.

On the other hand, it is not necessary that the investment contribute more specifically to the host country's economic development, something that is difficult to ascertain and that is implicitly covered by the other three criteria.

14. In examining these conditions, the Arbitral Tribunal considered the following elements:

- (i) With respect to contributions: there can be no investment unless a portion of the contribution is made in the country concerned and brings with it economic value. This would presumably involve financial commitments, in the first place, but it would be too restrictive an interpretation not to admit other sacrifices. These contributions could, then, consist of loans, materials, works, or services, provided they have an economic value. In other words, the Contractor must have committed outlays, in some way, in order to pursue an economic objective. It is often the case that these investments are made in the country concerned, but that again is not an absolute condition. Nothing prevents investments from being committed,

in part at least, from the contractor's home country, as long as they are allocated to the project to be carried out abroad.

In the case at hand, the Claimant insists that it committed significant resources to the construction. At this stage, the Arbitral Tribunal cannot assess the reality of these commitments, which underlie the Claimant's arguments, but from its limited perspective in examining the admissibility of the claim, it must accept that reality. Moreover, the Respondent does not contest that expenditures were committed and that services were provided that justified payment or compensation: otherwise, it would not have gone into the issue of claims for compensation. The fact that the amounts claimed may, as the Respondent argues, cover primarily expenses incurred in the Claimant's home country is not in itself a determining factor, as noted above. Indeed, experience shows that in contracts of this kind the initial expenditures required to prepare the project and the worksite consist of material and intangible contributions that can and must often be made in the home country, but that are nevertheless destined for the country concerned.

- (ii) With respect to duration: while this matter is more difficult to assess, because it includes an element of judgment, the notion must be understood in a broad sense. In order to speak of an investment in the meaning of the Convention, there must be economic commitments of significant value, sufficient at least that one may agree that the operation is of a nature to promote the economy and development of the country concerned. The Convention provides no objective criterion. For construction contracts, available jurisprudence relies on the duration of the contract, which would seem a good measure in this case, inasmuch as it concerns a project of real national significance (decision on jurisdiction of July 16, 2001, *RFCC v. Kingdom of Morocco*, case ARB/00/4, §62, available at the ICSID web site; decision on jurisdiction of July 23, 2001, *Salini v. Kingdom of Morocco*, *op. cit.*, §54; decision on jurisdiction of September 27, 2001, *Autopista Concesionada de Venezuela v. Venezuela*, case ARB/00/5, 6, ICSID *Rev.* 469 (2001)).

In the present case, this condition would seem at first sight to be fulfilled. The Contract involved construction of the Koudiat Acerdoune Dam in the District of Bouira; its minimum duration was exactly 50 months. One must not interpret the matter too rigorously, for experience shows that projects of this kind often justify extensions, without mentioning the duration of the warranty.

- (iii) With respect to risk: this requirement is also understandable, in light of the objectives of the Convention. The idea was, indeed, to offer a particular guarantee of jurisdiction to firms seeking to invest in another country. It would be too restrictive to limit its application to contracts containing a

risk element, as in the case of insurance contracts, or more broadly for certain loan contracts. The risk in question can in fact apply to any contract that implies increased risk for the contracting party. It is not sufficient for the State to show that the contract offers control mechanisms and that any litigation flowing from application of the contract can be submitted to domestic jurisdiction. Without intending to cast any doubt on the independence and quality of local jurisdictions, the Tribunal notes that the intent is to offer a readily understandable procedure that allows for intervention by international arbitrators, in addition to ordinary mechanisms.

In the present case, the Contract implies risks and uncertainties some of which, according to the Claimant, materialized upon cancellation of the Contract. The fact that litigation can also be settled in the domestic courts, as the Claimant initially tried to do, does not deprive the Claimant of the right to turn to international jurisdiction if it considers that it is entitled to such protection.

15. From the foregoing considerations, it may be concluded that:

- *The dispute submitted to the Arbitral Tribunal arises directly out of an investment within the meaning of the Convention.*

### **2.3. A dispute with a State?**

a) The question to be resolved

16. The Respondent considers that this is not a dispute between a contracting State and a national of another contracting State. The Claimant insists that this objection should be rejected.

b) The positions of the parties

17. In brief, the position of the Respondent is as follows:

- (i) The Contract was concluded not with the Algerian State but with an autonomous entity, ANB. ANB issued the call for tenders on September 14, 1992 and issued the instruction to begin work on December 20, 1993, and it is ANB that negotiated the three amendments and issued the notice of cancellation.
- (ii) Moreover, the Claimant never wrote to the Ministry of Hydraulics or to the Ministry of Water Resources to complain of any default by Algeria in its obligations under the Bilateral Agreement, which alone would be applicable to any dispute between the two parties. All of its letters

concerned default by ANB on its obligations under the Contract or under the Algerian code.

- (iii) Because ANB is an autonomous legal person under public law, it lacks the prerogatives of public authority and cannot be deemed equivalent to the State. According to jurisprudence and legal doctrine, there is also a presumption of autonomy for legal persons under public law (see United States Court of Appeals, 5th Circuit: *Bridas et al. v. Government of Turkmenistan* of September 9, 2003; K.-H. Böckstiegel, *Arbitration and State Entreprises*, Respondent exhibit no. 13).
  - (iv) Finally, the Contract is not a government contract under Algerian regulations, but a contract of public establishments of an administrative nature. It was approved only by the Director General of ANB (Respondent 27.01.04 p. 12 to 17 ; 05.05.04 no. 34 to 54).
18. In brief, the position of the Claimant is as follows:
- (i) The dispute concerns breach of the Bilateral Agreement by the Algerian State, since the Contract constitutes an investment protected by that agreement. Only the Respondent could be held responsible for any breach.
  - (ii) ANB is deemed equivalent to the Algerian State. According to international practice, its conduct may be attributed to the State notwithstanding its formal autonomy. ANB is part of the effective organization of the Algerian State (United Nations International Law Commission, Articles on the International Responsibility of States; ICSID cases ARB/00/4 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* and ARB/97/7 *Maffezini v. Kingdom of Spain*; Claimant exhibit no. G26).
  - (iii) The Algerian State is responsible for the acts of ANB. It was created by decree and it is managed, supervised, and administered by members of the Algerian government. Its activities are entirely subject to government decisions. Its activities depend on the budget and resources of the Algerian State. It exercises certain functions in the public interest, under rules applicable to public administrations. No special powers of representation or delegation are therefore necessary, for its institutional functions derive from the laws that constituted it and that govern its activity (Claimant exhibits G8 and G9).
  - (iv) ANB concluded the Contract as an agent of the State. It was designated as “the Administration” in the Book of Special Prescriptions and in the two Amendments (Respondent exhibits no. 2 to 4).



- (v) The involvement of other State bodies in negotiating and executing the Contract confirms that its conclusion and execution committed the responsibility of the State (Respondent exhibits no. 10, 9, 11 and 19; Claimant 03.04.04 no. 71 to 110 ; 03.06.04 pp. 12 to 24).

c) The position of the Arbitral Tribunal

19. In deciding whether the present case involves a dispute with a contracting State, within the meaning of Article 25.1 of the Convention, the Arbitral Tribunal considered the following elements:

- (i) To judge from the wording of the provision, it is a necessary and sufficient condition that the action has been brought against a State. This point is purely formal, but it prevents an arbitral tribunal from entering at this stage into an examination of the merits and from verifying whether it is possible to attribute responsibility to the State. This is a question of substance that will have to be addressed during a detailed examination in light of the arguments put forward.

In the present case, it is sufficient for the Arbitral Tribunal to find that the claims were brought against Algeria, and this satisfies the condition, at least formally.

- (ii) This *prima facie* approach must nevertheless be abandoned if it becomes clear that the State in question has no connection to the contract and that the action was unjustifiably brought against the State. This would be the case, in particular, if the contract has been negotiated with an enterprise totally removed from its activity and its influence. Case law accepts, however, that the responsibility of the State can be engaged in contracts signed by public enterprises distinct from the State, when the State still retains important or dominant influence (decision on jurisdiction of January 25, 2000, *Emilio Augustin Maffezini v. Kingdom of Spain*, case no. ARB/97/7, 16 *ICSID Rev.* 212(2001), §71-89; decision on jurisdiction of July 16, 2001, *Consortium R.F.C.C. v. Kingdom of Morocco*, *op. cit.* §28-35; see also Article 8 of the Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, annexed to UN General Assembly Resolution 56/83 of December 12, 2001 (Doc A/RES/56/83)).
- (iii) In the present case, it is true that the Contract was signed by ANB, which is an independent agency of the Algerian State, with its own legal personality. The Tribunal cannot, however, on the basis of the elements submitted to date, exclude a priori an involvement of the Algerian State: it appears to have participated indirectly, at least, in the negotiation of the Contract; it has important and perhaps determining influence over the agency; and it also appears that it may have played a role in souring the

relations between the Parties. The Arbitral Tribunal therefore considers, without at this stage wishing to prejudge the merits of the case, that it cannot exclude the possible involvement of the State. Naturally, this finding in no way prejudices the question of attributing responsibility.

20. From the above considerations it may be concluded that:

- *The dispute submitted to the Arbitral Tribunal is between the Claimant and a Contracting State, within the meaning of the Convention.*

#### **2.4. Is the dispute covered by the consent of the State?**

a) The question to be resolved

21. The Respondent considers that the dispute is not covered by the terms of the Bilateral Agreement signed by it with Italy and that consequently it has not “consented in writing to submit [disputes of this nature] to the Centre.” The Claimant is of the opposite view.

The question is linked to the interpretation of the Bilateral Agreement, in particular the following provisions, which establish the jurisdiction of the Centre.

##### *Article 1*

*“For the purpose of this agreement:*

*1. The term “investment” means every kind of asset and any contribution in cash, in kind or in services, invested or reinvested in any sector of economic activity.*

*In particular, but not exclusively, contributions by investors are deemed investments within the meaning of this agreement if they consist of the following elements:*

*(a) Movable and immovable property as well as any other real rights of investors, including real rights of guarantee on the property of a third person, provided those rights can be used for purposes of the investment;*

*(b) Shares, stocks, and other forms of participation in companies constituted on the territory of one of the contracting States;*

*(c) Bonds, lending assets, and claims to any performance having an economic value associated with an investment, as well as public securities and revenues deriving from investments, which are reinvested;*

*(d) Copyrights, intellectual property rights such as patents, licenses, trademarks, industrial designs and models, know-how, technology, trade names, and goodwill;*

*(e) Any rights conveyed by law or by contract and any other licenses deriving from a contract or concession consistent with the law, including rights deriving from an administrative contract or concession to search for, extract, or exploit natural resources, with the exception of activities reserved to the State.*

*It is understood that the assets and other contributions defined above must have been invested in conformity with the laws of the Contracting State on whose property those investments are made, after the date of signature of this agreement.*

*Investments by a natural or legal person that is a national of one contracting State, made on the territory of the other contracting State before the date of signature of this agreement, in conformity with the laws and regulations in force, may benefit, upon request, from the provisions of this agreement after they have been brought into conformity with the legislation of the latter contracting State, applicable at the date of signature of this agreement.*

*Any change in the form in which the above assets and contributions are invested or reinvested shall not affect their character as an investment, provided that the change is in conformity with the legislation of the Contracting State on whose territory the investment was made.”*

*[...]*

## *Article 2*

*“Each contracting State shall, in accordance with its legislation and the provisions of this agreement, admit and encourage investments made on its territory by nationals and legal persons of the other contracting State.”*

## *Article 8*

*“(....)*

*2. If the dispute cannot be settled amicably within six months from the date of a request, formulated in writing for this purpose, the investor concerned must submit the dispute to one of the following:*

*(a) The competent jurisdiction of the Contracting State on whose territory the investment was made;*

*(b) The “International Centre for Settlement of Investment Disputes”, for initiation of conciliation or arbitration proceedings covered by the Washington Convention of March 18, 1965 on the Settlement of Investment Disputes between States and Nationals of Other States”, provided both contracting states have subscribed fully to that Convention;*

*(c) An ad hoc arbitral tribunal, constituted in accordance with the provisions of Article 9 of this agreement.*

#### *Article 11*

*“This agreement shall apply equally to investments made, after the date of its signature and before its entry into force, by investors of one of the Contracting States in the territory of the other contracting State, provided that those investments are consistent with the applicable laws and regulations in the latter Contracting State, at the date of signature of this agreement.”*

#### b) Positions of the parties

22. In brief, the position of the Respondent is as follows:

Article 8.2 of the Bilateral Agreement requires the consent of the Respondent to submit certain disputes to jurisdiction of the ICSID. However, this does not apply to the present case, for three reasons (Respondent 27.01.04 p. 43 to 47):

- (i) The Respondent’s consent applies only to disputes relating to “investments”. In order to qualify as an investment within the meaning of the Bilateral Agreement, and to benefit from its protection, a foreign investment must not only meet the definition of Article 1 of that agreement but must also satisfy the condition of conformity with Algerian legislation, pursuant to Articles 1 *in fine*, 2, and 11. This requirement is a customary rule that is found not only in all the bilateral agreements concluded by Algeria since 1990, but also in nearly all bilateral treaties around the world. When the Contract was concluded, the Claimant was not in compliance with Legislative Decree 93-12 of October 5, 1993, which requires that foreign investments be declared to the Agency for Promotion, Maintenance and Monitoring of Investments (hereafter “APSI”). Moreover, neither ANB nor the Claimant considered the construction contract as an investment: the word “investment” does not appear in the contract documents or in the correspondence exchanged between the parties to the Contract. Furthermore, the Contract was submitted for prior approval of the National Procurement Commission and not to the APSI, which makes it a public contract within the meaning of Executive Decree 91-434 of November 9, 1991, and not an “investment” within the meaning of Legislative Decree 93-12 of October 5, 1999 (Respondent 27.01.04 p. 17 to 27).

- (ii) Disputes relating to contracts signed with ANB, an entity separate from the Algerian State itself, are excluded from the jurisdiction of ICSID (see ICSID decision *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* of 23 July, 2001).
  - (iii) The competence of the Tribunal is limited to examining violations of the Bilateral Agreement. The Respondent has committed no violation of the agreement, other than the grievance that the Claimant has brought against ANB, i.e. cancellation of the Contract without compensation (cf. ICSID cases *Tradex Helas v. Albania*, JDI, 2000, p. 151 et seq. and *SGS v. Philippines*; Respondent 27.01.04 pp. 43 to 47 ; 05.05.04 no. 68 to 73 ; exhibit no. G32).
23. In brief, the position of the Claimant is as follows:
- (i) The Contract is an “investment” and the Respondent’s objections are covered by the dispute settlement clause in Article 8 of the Bilateral Agreement. The definition of “investment” is determined exclusively within the meaning of the agreement, without reference to domestic law in the host country. Moreover, Article 1 refers to the regularity of the investment and not to its definition (see the *Salini* decision, Claimant exhibit G26, and other bilateral treaties concluded by Algeria, Respondent exhibits no. 14 to 16). Consequently, the Contract can certainly be qualified as an investment within the meaning of the Bilateral Treaty, although this might not be possible within the meaning of Algerian Decree 93-12 governing the admission of foreign investments. Moreover, that decree does not cover all foreign investments made in Algeria. The required declaration to the APSI merely accords certain advantages to the investor, and the investor’s refusal does not entail an obligation to cease operations (Respondent exhibit no. 17; Claimant 03.04.04 no. 117 to 130).
  - (ii) The requirement of conformity with legislation merely means that the Bilateral Agreement would not protect investors who have set up in the country in violation of its laws, or who act unlawfully.
  - (iii) The Claimant’s demands are not based on purely contractual breaches by ANB, but primarily on violations of the Bilateral Agreement, even if they originated in the actions of ANB.
  - (iv) In deciding the issue of its jurisdiction, the Tribunal will conduct only a *prima facie* test of the existence of claims based on the Bilateral Agreement, in light of the circumstances of fact and of law submitted by the Claimant. The proof and foundation of these claims will be left to the examination on the merits (cf. cases *Vivendi*, *SGS v. Pakistan*, *SGS v. Philippines* ; Claimant exhibits no. G31 and G32).

- (v) In fact, the Claimant's arguments are based on the Bilateral Agreement:
- Unjustified and uncompensated cancellation of contract constitutes indirect expropriation (cf. R. Jennings and A. Watts, *Oppenheim's International Law*, Longman, 9th ed., pp. 928 and 929; S. M. Schwebel, *On Whether the Breach by a State of a Contract with an Alien Is a Breach of International Law*, in *Le droit international à l'heure de sa codification*, Etudes en l'honneur de Roberto Ago, Milano, 1987, p. 405, 406, 410, and 411 ; ICSID cases no. ARB/84/3 *SPP v. Egypt*, no. ARB (AF)/97/1 *Metalclad*, etc.) and violates Articles 4.2, 4.3, and 4.4 of the Bilateral Treaty.
  - The requisitioning of the Claimant's technical base in December 2002 constituted an indirect expropriation (Claimant exhibit 25; Articles 4.2, 4.3, and 4.4 of the Bilateral Treaty).
  - The Respondent's inability to guarantee the security and availability of worksites, discriminatory measures, suspension of works etc. constitute violations of Articles 2, 4.1, and 4.5 of the Bilateral Agreement.
- (vi) ICSID jurisdiction over Algeria's violations also flows from Article 8.1 of the Bilateral Agreement, which is worded in general terms and contains no limitation other than the relationship between the dispute and an investment.

c) The position of the Arbitral Tribunal

24. In determining whether the dispute submitted to it is covered by the consent required in the Bilateral Agreement, the Arbitral Tribunal considered the following elements:
- (i) Algeria's consent to ICSID jurisdiction, which is the sole basis for the Tribunal's competence, is linked to investments. The controversy has to do with the meaning that should be given to this term in the Agreement.
  - (ii) The Bilateral Agreement provides a very broad and general definition of investment, in Article 1 (1.1): the term designates "every kind of asset and any contribution in cash, in kind or in services, invested or reinvested in any sector of economic activity." This formulation is deliberately broad, and, in the opinion of the Arbitral Tribunal, it covers the meaning generally given to the term when interpreting the Convention.

The Tribunal concluded earlier, in relation to this notion, that under the specific conditions the Contract signed by the Claimant could fall within this category. The Tribunal sees no reason to decide differently here.

This interpretation is clearly confirmed, moreover, by some of the examples set forth (in a nonexhaustive manner) by Article 1 (1.2). Thus, at letter e), we find mention of “Any rights conveyed by law or by contracts and any other licenses deriving from a contract or concession consistent with the law, including rights deriving from an administrative contract or concession to search for, extract, or exploit natural resources, with the exception of activities reserved to the State.”

- (iii) The Respondent bases its argument on the fact that the text of the agreement specifies, at several places, that the investment must be made “in conformity with the laws and regulations in force” (see for example p.ex. art. 1 ch. 1 para 2 lett. e, art. 1 ch. 1(3), art. 1 ch. 1(4), art. 1 ch. 1(5), art. 11). According to the Respondent, the Contract does not formally fulfill the requirements for recognition as an investment under Algerian law, which stipulates in particular a special procedure leading to formal recognition.

The Tribunal cannot subscribe to such an interpretation. In the first place, because the Bilateral Agreement is an international treaty, its meaning should be the one given it by both parties, as opposed to a meaning based on one party’s domestic legislation. Next, the text’s mention of conformity with laws and regulations in force does not constitute a formal recognition of the notion of investment, as understood in a restrictive manner in Algerian law, but rather, under a traditional and perfectly justified formula, it seeks to exclude from protection all investments made in violation of the fundamental principles in force. Finally, it is by no means certain that the definition used in Algerian law can prevail in a context such as this, for it serves above all to establish the framework within which investments may benefit from tax privileges in Algeria, a perfectly understandable concern, but one having nothing to do with the objective of the treaty.

- 25. Nevertheless, the fact that the Respondent has given its written consent does not necessarily mean that such consent is general in scope and that it establishes the basis of jurisdiction for any violation that the Claimant might invoke. The consent given holds only as far as the Bilateral Agreement allows.

- (i) The objective of protection is described very generally in Article 4 (1) of the agreement:

*“Investments made by nationals or legal persons of one contracting State shall at all times enjoy full protection and security in the territory of the*

*other contracting State, excluding any unreasonable or discriminatory measure that would impair, in law or in fact, their management, maintenance, use, enjoyment, transformation, or disposal, with the exception of measures necessary to maintain public order.”*

It may be concluded that the consent was not given in an extensive way for all claims and actions that might be related to an investment. The measures taken must amount to a breach of the Bilateral Agreement, which means in particular that they must be unjustified or discriminatory, in fact or in law. That is not necessarily the case with every breach of contract.

- (ii) This interpretation is confirmed, *a contrario*, by the wording of other treaties. Some treaties contain what is known as an “umbrella clause” that in effect transforms the State’s breaches of contract into violations of that provision of the treaty, thereby granting jurisdiction to the Arbitral Tribunal established pursuant to the treaty to consider such violations (see for example Article 10(1) *in fine* of the Energy Charter Treaty; Article 3 of the bilateral investment treaty of November 30, 1995 between France and Hong Kong; or Article 11(2) of the bilateral investment treaty of March 30, 1994 between Germany and Kuwait). Such a provision is specifically absent from the treaty between Algeria and Italy, and this confirms *a contrario* the Tribunal’s interpretation.
  - (iii) It may be concluded that the consent given by Algeria is of limited scope. It is not sufficient for the Claimant to demonstrate a violation of the Contract: it must also demonstrate that this violation constitutes at the same time a violation of the treaty and of the protection it guarantees.
  - (iv) The Tribunal is excluded at this stage from addressing the nature and scope of the violations cited by the Claimant. It is up to the Claimant to demonstrate this during the proceedings on the merits. The Tribunal can only note that the Claimant is invoking violations of the Bilateral Agreement.
26. From the above considerations it may be concluded that:
- *The plaintiff has indeed given its consent in writing to the jurisdiction of the Centre, but only if the measures challenged by the Claimant constitute violations of the Bilateral Agreement.*

## **2.5. First conclusion**

27. Consequently:



*The Arbitral Tribunal is, prima facie, competent to rule on the arguments of the Claimant, but only to the extent that they are based on a breach of the protection offered by the Bilateral Agreement.*

### **3. Objections to admissibility**

28. In its submissions, the Respondent has also put forward the following arguments:

- “(ii) *In the alternative, however improbable, that the Arbitral Tribunal should declare itself competent to hear the dispute set forth in the Request for Arbitration of February 3, 2003, it should find and rule that such jurisdiction is limited to examining and deciding the claims formulated in the Request for Arbitration of February 3, 2003, which correspond to violations of the Agreement between the Government of the People’s Democratic Republic of Algeria and the Government of Italy on the Reciprocal Promotion and Protection of Investments, signed in Algiers on May 18, 1991 (the “Bilateral Treaty”).*
- (iii) *In the further alternative, however improbable, that the Arbitral Tribunal should declare itself competent to consider the claims in the Request for Arbitration, corresponding to violations of the Bilateral Treaty, it should declare inadmissible all the claims submitted by the Consorzio Groupement LESI-DIPENTA in the Request for Arbitration of February 3, 2003, on the grounds that the Consorzio Groupement LESI-DIPENTA, which presents itself as the Claimant, was not a party to Contract 167/ANB/SM/93 of December 20, 1993, and therefore has no standing.*
- (iv) *In the even less probable alternative that the Arbitral Tribunal should declare groundless the objections to jurisdiction and admissibility set forth above in (iii), it should declare inadmissible all claims submitted by the Consorzio Groupement LESI-DIPENTA in its Request for Arbitration of February 3, 2003, because the Claimant does not meet the conditions of Article 8.1 and Article 8.2 of the Bilateral Treaty required to benefit from the option of jurisdiction stipulated in Article 8.2 of that treaty:*
- *The Claimant did not respect the period of six months stipulated in Article 8.2 of the Bilateral Treaty before submitting the Request for Arbitration;*
  - *The plaintiff does not have the status of “investor” within the meaning of the Bilateral Treaty;*
  - *Execution of contract 167/ANB/SM/93 of December 20, 1993 does not qualify as an investment by the Contractor.*

*Therefore, the dispute described in the request for arbitration of February 3, 2003 cannot be considered as “a dispute relating to investments between one of the contracting States and an investor of the other*

*contracting State” within the meaning of Article 8.1 of the Bilateral Treaty.”*

The Claimant, for its part, argues that all these objections should be dismissed. In particular, in its Memorial in Response on Jurisdiction of April 3, 2004 (see above, Facts no. 47), it asked the Arbitral Tribunal to find that:

*“(i) The claim is admissible, because the Consortium has standing and attempts to arrange a friendly settlement, as called for in the Bilateral Treaty, have repeatedly failed (Chapters I and II);*

*[...].”*

The Tribunal will consider these three arguments, examining successively:

- the objections relating to failure to respect the six months “cooling-off” period following attempts to settle the Contract (see below, chapter 3.1).
- the objection as to the Claimant’s lack of standing (chapter 3.2); and
- the objection relating to the public contracting procedure (chapter 3.3).

**3.1. Failure to pursue attempts at friendly settlement of the dispute and failure to respect the six-month cooling-off period (Article 8.2 of the Bilateral Agreement)**

a) The question to be resolved

29. In the Respondent’s opinion, the request for arbitration should be inadmissible because the Claimant did not respect the conditions of seeking friendly settlement and of respecting a six-month cooling-off period as stipulated in Article 8.2 of the Bilateral Agreement. The Claimant contests this objection and the Respondent’s interpretation of this Article.

Article 8 of the Bilateral Agreement reads as follows:

- “1. Any dispute relating to investments between one of the contracting States and an investor of the other contracting State shall, as far as possible, be settled amicably between the two parties concerned.*
- 2. If the dispute cannot be settled amicably within six months from the date of a request, formulated in writing for this purpose, the investor concerned must submit the dispute to one of the following:*
  - a) The competent jurisdiction of the Contracting State on whose territory the investment was made;*

- b) *The “International Centre for Settlement of Investment Disputes”, for initiation of conciliation or arbitration proceedings covered by the Washington Convention of March 18, 1965 on the Settlement of Investment Disputes between States and Nationals of Other States”, provided both contracting states have subscribed fully to that convention;*
- c) *An ad hoc arbitral tribunal, constituted in accordance with the provisions of Article 9 of this agreement.”*

b) Positions of the parties

30. In brief, the position of the Respondent is as follows:

- (i) The request for friendly settlement, stipulated in Article 8.2 of the Bilateral Agreement, is a formal requirement, and failure to respect it deprives the investor of the option of jurisdiction that it offers. This requirement should be invoked together with reference to the six-month period allowed for responding to such request, something that the Claimant fails to mention.
- (ii) The Claimant, in fact, has not mentioned Article 8.2 of the Bilateral Agreement, or the six-month period; nor did it define the purpose of the litigation, present itself as an “investor”, or put a figure to its claim (see its requests of April 5 and May 15, 2002; Claimant exhibits G10 and G21).
- (iii) The Claimant’s approach constitutes an “escalation” of the dispute to the supervisory authority for ANB, in application of Algerian Decree 91-434 of November 9, 1991 on Public Procurement (see its letter of May 15, 2002; Claimant exhibit G22).
- (iv) The six-month delay should run not from the first but from the last attempt at friendly settlement. As it happens, the Claimant’s last proposal was dated October 28, 2002, and so the six months would not have elapsed by February 3, 2003, when the Request for Arbitration was submitted (Respondent 27.01.04 pp. 27 to 32 ; 05.05.04 no. 27 to 33).

31. In brief, the position of the Claimant is as follows:

- (i) The attempt at settlement began in April 2002 and continued until September or October 2002. The reference date for calculating the six-month delay should not be the date on which the attempt at settlement failed, but the date on which settlement was first attempted, in this case April 5, 2002. At the latest, the reference date might be May 15, 2002, on which date the Minister received the additional information needed to understand the purpose, value, and justification of the claim.

- (ii) Thereafter, the Minister should have instituted the stipulated proceedings, but he took no interest in the case and referred the Claimant back to ANB, which received a copy on July 3, 2002.
- (iii) Article 8.2 of the Bilateral Agreement is by no means formal. It is limited to requiring submission of a written request, identifying the dispute and its object, which does not necessarily have to be detailed or quantified. Nor does the request have to indicate the jurisdictional option that the investor would choose after expiry of the six months (cf. ICSID case ARB/00/4, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*) (Claimant 03.04.04 no. 60 to 68; exhibit no. G26 ; 03.06.04 pp. 10 and 11).

c) The position of the Arbitral Tribunal

32. In deciding whether the formal requirements of the Bilateral Agreement have been respected, the Arbitral Tribunal considered the following elements:

- (i) The requirement of Article 8.1 of the Bilateral Agreement is found frequently in treaties of this kind, and generally speaking in contracts that have an arbitration clause. The idea is that it would run counter to the rules of good faith if one of the parties to a contract were to open judicial or arbitration proceedings without having first attempted a settlement. In the spirit of a contract, it is up to the parties to settle their differences if they can. The rule must be interpreted in this context, and must not be taken too formally.
- (ii) That said, the first question is to determine the starting point for calculating the six-month period. According to the treaty, it begins to run “from the date of the request, formulated in writing for this purpose.” Thus, it is the time of the first request that counts, and not the time when negotiations are found to have failed. The rule is understandable: it amounts to saying that the parties must in all cases respect the cooling-off period of six months during which they will attempt conciliation, a delay that seems reasonable for both parties. If that period were to run from the date negotiations break down, which in any case is difficult to establish, it would be hard to justify the suspension, which would force the Claimant to wait but would not prevent the other party from dragging its feet.

In fact, the request for arbitration is dated February 3, 2003 (see above, Facts, No. 39). The procedure is thus respected, if the Claimant addressed a request to the Respondent no later than August 3, 2002.

- (iii) The second question is to identify the requirements that the request must meet in order for the six-month delay to begin. The treaty is not specific

on this point, and for that reason alone it should not be interpreted too formally. There is nothing to show that the Claimant must formulate its claims in a specific manner, or that it must give warning to the other party of the procedural measures that it might take. What should be considered is the first moment at which the Claimant officially approaches the other party to advise of its intent to seek payment, describing the general situation. Nowhere is it required that this request include other elements, which would in any case be irrelevant to the purpose of the rule.

In fact, the Claimant was informed of the Contract's cancellation in April 2001 (Facts, No. 20). It immediately took the initiative by addressing compensation claims to the representatives of Algeria (Facts, No. 21 ff). It approached these authorities again, and more formally, by letter of April 5, 2002, officially requesting negotiations towards a friendly settlement (Facts, No. 26 ff). Once again, it addressed the Ministry on May 15, 2002 (Facts, No. 27). Under the circumstances, the six months were fully respected even under the least favorable version.

- (iv) The Tribunal also notes that this condition is not absolute, and that it should be waived when it is obvious that any conciliation attempt would be doomed given the clearly demonstrated attitude of the other party.
33. From the above considerations it may be concluded that:
- *The six-month period stipulated in Article 8.2 of the Bilateral Agreement was respected.*

### **3.2. The Claimant's lack of standing**

#### a) The question to be resolved

34. The Respondent argues that the Request for Arbitration submitted on February 3, 2003 should be inadmissible because the Claimant lacks standing to bring action against Algeria. According to the Claimant, the objection of inadmissibility has no substance and reflects bad faith on the part of the Respondent (Respondent 27.01.04 p.10 ; Claimant 3.04.04 no. 11 and 56). As the Tribunal will demonstrate, the Claimant's argument in fact goes beyond a simple question of admissibility and affects the competence of the Arbitral Tribunal.

#### b) The positions of the parties

35. In brief, the position of the Respondent is as follows:
- (i) The company's L.E.S.I. S.p.A and Gruppo DIPENTA Costruzioni S.p.A. did not advise ANB that they were constituted as a consortium as of December 20, 1993. They continued to represent themselves as a

“Temporary Group of Companies” which, under Italian law, would have no legal personality (cf. same letterhead, same name, etc.).

- (ii) Moreover, the Contract was signed by the Claimant a few days before December 20, 1993, the date on which the Consortium was constituted, and consequently it is only the two companies constituted as a “temporary group” that were parties to the Contract. The Consortium was constituted for the sole purpose of performing the Contract.
- (iii) The Consortium has no rights under the Contract or under the Bilateral Agreement. To be admissible, the request for arbitration should have been submitted by the two companies as co-claimants, since they alone were beneficiaries of the contract award.
- (iv) That, however, would be impossible today, for the Gruppo DIPENTA Costruzioni S.p.A. has ceased to exist and was struck from the Enterprise Registry on July 19, 1999 (Respondent 27.01.04 p. 4 to 10 ; 05.05.04 no. 1 to 26).

36. In brief, the position of the Claimant is as follows:

- (i) The existence of the Consortium was confirmed by the bid of December 20, 1993. In the protocol constituting the Group, contained therein, the two companies announced that if they were awarded the works they would set up a consortium to sign the Contract, and this was constituted on December 20, 1993 under the name “*Groupement LESI-DIPENTA*”. In addition, the articles of association constituting the Consortium and its by-laws were transmitted to ANB on April 13, 1994 (Claimant exhibits no. G13, G14, G15, G11, and Respondent exhibit no. 1).
- (ii) The Consortium is the beneficial owner of the Contract, because it was already constituted at the date of signature, and it was with this status that it executed the works until cancellation of the Contract. The Respondent was aware of this, for the Claimant had signed all the contractual documents in the name of the Consortium, and it also transmitted its deed of incorporation to ANB, and it at all times used the Consortium’s letterhead showing its corporate address.
- (iii) According to its statutes, the Consortium has all the characteristics of a consortium under Italian law. Its administrative structure follows the normal model (corporate headquarters, Board of Directors, President); it has a business purpose, which was originally to build the Koudiat-Acerdoune Dam, and was later expanded to include the El-Achir Tunnel; its members are jointly and severally liable (Claimant exhibits G15 and G17).

- (iv) Both the Consortium and its members are claimants. It is the Consortium that concluded the Contract and as such enjoys the rights flowing from it. As a transparent entity with mandated powers, its members are the beneficiaries of the rights flowing from the Contract and from the Bilateral Agreement, including the right to open this arbitration.
- (v) The takeover of Gruppo DIPENTA Costruzioni S.p.A. by ASTALDI SpA and its succession *ope legis* in the Consortium at 0.01% affected neither the identity nor the continuity of the Consortium. Moreover, this occurred when work on the Contract had already been paralyzed for several years (Claimant exhibit G19).
- (vi) This was also the finding in another arbitration case (ICC 11504/ACS/FM) between the Consortium and the Algerian Ministry of Transport and the Algerian National Railway Works Company (*Société Nationale des Travaux Ferroviaires*, SNTF) relating to a dispute over construction of the El-Achir Tunnel (Claimant exhibits G20 and G17).
- (vii) Moreover, the Respondent's objection is not made in good faith, particularly since the Respondent was in no way injured by the change in the Consortium's makeup (Claimant 3.04.04 no. 12 to 56).
- (viii) Under the alternative hypothesis that the Contract had been signed not by the Consortium but by the two companies acting jointly, the Consortium would still be the true investor within the meaning of Article 8 of the Bilateral Agreement. Under the further alternative assumption that the Consortium were not accepted as Claimant, its members would still have standing by virtue of the Request for Arbitration that the Consortium submitted on their behalf. Finally, the two companies would have the right to bring action, if necessary, in the place of the Consortium (Claimant 03.04.04 pp. 2 to 9).

c) The position of the Arbitral Tribunal

37. There can hardly be any doubt, nor does the Claimant contest this point, that if the Tribunal goes strictly by the documentation submitted to it, without entering into further discussion, it must find that the parties that signed the Contract are not identical to the party that submitted the request for arbitration:

- (i) According to the exhibits, the bid was submitted by the Temporary Group of Companies consisting of two independent firms, namely Lavori Edili Stradali Industriali L.E.S.I S.p.A and Gruppo Dipenta Costruzioni S.p.A. (Facts, no. 7). On that same day, the Contract was signed (Facts, no. 8). On the cover page, the two companies are mentioned separately; on the signature page, there is mention of the "Groupement d'Entreprises LESI/DIPENTA Costruzioni S.p.A."

There is no dispute over the fact that this is a “simple” consortium of companies, of an “internal” nature within the meaning of Article 2602 of the Italian Civil Code. The structure does not imply recognition of a new legal subject in relations with third parties. Consequently, rights and obligations belong jointly to all the members, who must exercise them in common. A similar institutional form can be found in most continental European legal systems. To ensure that there is no ambiguity, we shall use the term “internal consortium” for this aspect.

- (ii) The wording of the request for arbitration shows that it was submitted by the “Consorzio Groupement LESI-DIPENTA” (Facts, no. 1). It consists of two companies, LESI and DIPENTA. It was constituted by notarized instrument on December 20, 1993 (Facts, no. 9) and registered in the Enterprise Registry of Rome, with the Tribunal of Rome, and with the Chamber of Commerce of Rome (Facts, no. 9).

There is no dispute that this is a “qualified” consortium, with “external” effects vis-à-vis third parties, in accordance with Articles 2612 to 2615-bis of the ItCC. This type of consortium is of a special nature, because it is entitled to assume rights and obligations in its own name, it has the capacity to sue and to be sued (Article 2613, ItCC), and it has its own capital (Article 2615-bis, ItCC). To ensure that there is no ambiguity, we shall use the term “external consortium” to designate it in the rest of this discussion.

- (iii) Thus, it is apparent that the two entities are not the same. There is no doubt that a qualified consortium has the capacity to go to arbitration: the problem is to discover whether it is authorized to do so by contractual links with the Respondent. It has never been claimed that the two companies ceded their contractual position to the external consortium: the Contract does not provide for such a possibility, and it would therefore have had to be the subject of a formal ratification.
- (iv) It is evident to the Arbitral Tribunal that it cannot go into the substance of a claim if that claim is submitted to the Tribunal by a legal entity that is not bound by the Contract on which the claim is based. This point is so obvious that it does not need special documentation. The economic links that may exist between the companies do not matter here: thus, a parent company cannot claim payments due under contract to a subsidiary, even if that subsidiary is totally dependent on the parent company, unless there are very particular circumstances in play that have not been alleged in this case. These parties opted for different legal structures, for their own reasons, and they cannot now insist that the other party simply overlook that fact.



- (v) Consequently, the Arbitral Tribunal must declare the request inadmissible, because the Claimant lacks standing, and it must then draw the logical consequences as to its competence, unless there are considerations of fact, of law, or of circumstance that might justify a different decision. Even if it were to grant admissibility on this point, it would still have to examine the influence that the transfer of DIPENTA's share to ASTALDI SpA might have had in this regard.

38. The Claimant maintains that, while the Contract was indeed signed by the two individual companies that joined in an internal consortium, the Contract was immediately taken over by the external consortium, a fact that the Respondent was aware of, and accepted.

- (i) In the (internal) agreement signed on November 24, 1992 (Facts, no. 4), the two companies committed themselves, in the event that they were awarded the Contract, "to ratify this agreement by creating a consortium between the two companies, to be governed by corporate statutes, with each company retaining its own autonomy." The idea was, then, that the two companies would form an internal consortium for the bid, and that if they won the bid that internal consortium would be replaced by an external consortium that would be constituted at that time.

The intent of the companies was clear between themselves, from these provisions: the question now is to determine whether they drew that intent sufficiently to the attention of the Respondent, and whether the Respondent gave its implicit consent thereto.

- (ii) According to the documentation submitted to the Tribunal, the external consortium was constituted, in accordance with the protocol agreement, on the same day the contract was executed (Facts no. 9). It was registered on January 12, 1994, i.e. within 30 days of its constitution, as called for in Article 2612 of the ItCC. Internally, at least, it was the intent of the companies thereby to substitute that consortium for the internal consortium.

According to the Claimant, the articles of association and the by-laws of the Consortium were sent to the Respondent by letter of April 13, 1994. The Arbitral Tribunal has no reason to doubt that this was done. The Claimant offers no explanation to justify the time that elapsed between the Consortium's registration and this communication, but it is reasonable to assume that this time was needed to complete administrative formalities and to report them. It is clear from the letter cited that the Claimant indeed transmitted "the articles of association", a document demonstrating that there was in fact a new entity. The letter also included the text of the articles of association and the by-laws. These refer to a new consortium that is "external" within the meaning of Articles 2612 et seq. of the ItCC.

It is clear from these texts that the Respondent was informed of the constitution of the external consortium, and that it at no time manifested the least opposition.

As the Tribunal sees it, however, that information is not by itself sufficient to conclude that the Respondent understood that in doing so it was giving its accord to the replacement of the two companies signatory to the Contract by a new legal entity. Even if it was based on the “new” rules of Italian law, the institution of the external consortium is very peculiar. If it was the companies’ idea to proceed in this way, then their representatives should have drawn it clearly to the Respondent’s attention and asked for its explicit agreement. It was difficult for Algeria to conclude from the information provided that this amounted to a substitution of parties. It could on the contrary have interpreted the information as meaning that the signatory companies were constituting a new entity intended not to replace them but to be responsible for carrying out the works, an arrangement that is frequently used in practice.

In the Tribunal’s eyes, the mere communication of documents substantiating constitution of the external consortium is not sufficient to imply that the Respondent gave its approval to substitution of the signatory companies by the external consortium.

- (iii) The Tribunal must not attempt to draw broader conclusions from the attitude of the parties during the implementation of the Contract. In practical terms, the difficulty lies in the fact that it is virtually impossible to tell, from subsequent exchanges of correspondence between them, or even from the amendments that were signed, whether dealings were conducted with the two individual companies or with the external consortium.

In effect, both the internal consortium and the external consortium had the same name. The subtlety involved may have escaped the Respondent’s representatives. It is true that the stationery used for letters sent by the Claimant’s representatives contained mention of registration in the business registry, but that nuance is difficult to grasp. It was impossible to conclude with certainty from the wording of the amendments that one was no longer dealing with the same parties.

For example, the proposal submitted on June 27, 1998 as Amendment No. 3 is accompanied by a declaration from Mr. Medioli concerning the “Group” and its component companies (Facts, no. 19), which would seem to show that there was a special entity, in addition to the two companies forming the internal consortium. Yet this does not seem sufficient for, as noted above, the Respondent might conclude that the two signatory companies were still its contractual partner and that the external

consortium was involved only in carrying out the Contract and not as a party thereto; otherwise, it would not have been necessary to indicate further in the declaration that it was issued by the two companies forming the Consortium.

As the Tribunal sees it, it is not possible to conclude, from this fact, that the Respondent understood, and accepted, that there had been a substitution of parties.

39. In legal terms, there is no doubt that the juridical nature of the Consortium is determined by the law governing it, in this case the provisions of the Italian Civil Code. The Tribunal must then take into consideration the information provided to it by the Claimant, as well as information that it has been able to retrieve for itself.

- (i) Under Italian law, an external consortium is a hybrid, as noted by several authors. For example, C. Crescenti, *I consorzi negli appalti di opere pubbliche*, in *Rivista trimestrale degli Appalti*, 1991 p. 91: “Within the rigid distinction made by the 1942 Civil Code between a natural person (an individual) and a legal person (exclusively the collective entity recognized as such by a formal act) there is now, as a kind of ‘third species’, an unrecognized collective entity, which today is unanimously accorded the status of a legal entity, i.e. ‘the position [...] of being the object of legal effects’ and thus with juridical capacity.” Having this nature, an external consortium has the status to sue and to be sued, to plead and to contest the pleas of others. The central provision is, in effect, Article 2613 of the ItCC, which reads as follows: *I consorzi possono essere convenuti in giudizio in persona di coloro ai quali il contratto attribuisce la presidenza o la direzione, anche se la rappresentanza è attribuita ad altre persone.*”

In the present case, it is the external consortium that has taken legal action and filed claims. Formally speaking, there is nothing to prevent Algeria from filing counterclaims against the Consortium as well, even if they are limited to reimbursement for the costs of arbitration and payment of party indemnity. This finding does not, however, change the facts of the problem.

- (ii) It is possible, first of all, that the external consortium might act in its own name, sign a contract, or be a party to arbitration. But it can only do so with respect to the rights and obligations that pertain to it personally, deriving from a contract to which it is party, and that substantiate its claim.

As we have seen, the Consortium was not a party to the Contract and was never recognized as a partner, either at the time the Contract was concluded or later. The rights that must be enforced are those of the

Contract, which was undeniably signed by the individual companies. The claims that it has made in this proceeding are not its to make.

- (iii) It is possible, next, that an external consortium might act as representative of its component companies, as an agent for the members that comprise it. Support for this view can be found in decisions of the *Corte di Cassazione* cited by the Claimant. For example, *Corte di Cassazione*, ruling 6774 of July 26, 1996: “Thus, by concluding contracts with third parties within the meaning of Article 2615(2) of the ItCC, and in conformity with the principles of Articles 2608 and 2609 of the ItCC, the Consortium is acting as agent for its members. As such, the Consortium can legitimately, pursuant to Article 1710 of the ItCC, take actions that interrupt prescription (the workings of the statute of limitations)”. Ruling 9509 of September 27, 1997: “As an exception to the general principle established in Article 1705 of the ItCC, the Consortium and its members are jointly and severally liable within the meaning of Article 2615(2), for obligations contracted by the Consortium on behalf of its members, without the need for the Consortium to act in the name of those members, who thus remained directly obligated by the simple fact that the obligation was contracted in their interest.”

In the present case, the Consortium has consistently maintained that it was acting on its own behalf, and not as representative of the component companies, which have not intervened in these proceedings, either directly (in person) or indirectly (through representatives). The Request for Arbitration was not submitted by the Consortium in the name of the companies, but rather by the Consortium itself, in its own name. Powers of attorney subsequently given change nothing, for what is at issue is not a problem of powers but rather of standing to sue and be sued.

- (iv) The only solution would be to accept that an external consortium under Italian law has power to execute in its own name the rights that in reality belong to its component members. Contrary to the Claimant’s assertions, there is nothing in the documentation submitted that would allow the Tribunal to draw clearly such a conclusion: to do so would be extraordinarily audacious, and would run counter to the concepts generally accepted in other legal systems. It would amount in fact to recognizing the rights of an entity, which is recognized as having real autonomy, to take over in its own name the rights and obligations of others, without allowing its partner the right of consent or objection.

According to the Claimant, this point is of no practical importance particularly given the fact that it is the Claimant that took the initiative to bring action and file claims. The Tribunal does not share that view. There is nothing in the documents cited by the Claimant to suggest that the decision to be taken by the Tribunal will be enforceable against the

companies that form the Consortium. Even if this were the case in Italian law, which has not been demonstrated, there is no reason to believe that an enforcement authority in another country would accept it. It is true that, to date, the Respondent has not filed counterclaims on the merits, and that the risk is assumed primarily by the member companies of the Consortium. However, there is nothing to prevent the Respondent from doing so, if the proceeding were to continue.

- (v) Moreover, the Respondent has filed claims relating to arbitration costs. It seems that the external consortium has a degree of financial autonomy and that it has commitments that are backed by its own capital, to the exclusion of any liability of its component companies. In the “hybrid” system recognized by Italian law, this principle is expressed by Articles 2615(2) of the Civil Code, according to which a distinction must be drawn between the liability of a consortium’s capital and the joint and several liability of its members. In principle, a consortium with external activities has its own sphere of liability. However, this liability, which is limited to the consortium’s own capital, applies only to obligations that are strictly those of the consortium, i.e. for obligations that relate to the existence of the consortium itself. Commentators cite, for example, office and personnel expenses (F. Galgano, *Diritto civile e commerciale*, Vol. III, 3rd ed., Padua 1999, p. 218). There are no grounds to conclude that arbitration costs are not part of this category.
  - (vi) As the Tribunal noted above, the issue of the status of party to a contract and, consequently, of party to a judicial or arbitration proceeding is essential to the functioning of private law. The bold legal constructions put forward by the Claimant in support of its thesis cannot in law justify the automatic substitution of a party to a contract and a proceeding.
40. In practice, the Tribunal is aware that a finding of inadmissibility will cause a number of difficulties for the Claimant.
- (i) First of all, it would oblige the individual members of the Consortium (the internal consortium) to submit a new request, which would likely be simply a corrected copy of the request submitted in this case. Yet the conditions would at least be clarified, whereas an opposite decision at this juncture would open the risk of recourse against the award, and that too would involve complications and prolongations, and an uncertain outcome.
  - (ii) Once a new proceeding is opened, it would be up to the parties to appoint a new arbitral tribunal, which could be identical to the present one, but does not have to be, since the intent of one or other of the parties or the availability of adjudicators might justify or impose another choice. There are no legal grounds that would prevent the Respondent from raising the same jurisdictional objections as those dealt with in this decision: this

decision would not bind the Respondent in a different proceeding. Nevertheless, the Tribunal considers that it has discussed these objections in a manner that might facilitate examination in another proceeding.

In the end, because the Claimant was not the holder of the rights and obligations of the Contract under which the investment was made, it follows that its Request for Arbitration is inadmissible and that it cannot claim to be an investor within the meaning of Article 25(1) of the Convention. For this reason, not only is the Request for Arbitration inadmissible but, applying the provisions of the Convention, the Arbitral Tribunal has no jurisdiction, since it can consider the matter only at the request of an investor within the meaning of the Convention.

This decision does not of course prejudice the ability of the companies that hold the rights and obligations flowing from the Contract to initiate ICSID proceedings against Algeria, in their own name and on their own behalf, on the basis of the Bilateral Agreement.

41. From the above considerations it may be concluded that:

- *The request for arbitration submitted by the Consortium in its name is inadmissible, because the Consortium does not have standing, and the Arbitral Tribunal lacks jurisdiction to consider the claim.*

### **3.3. The problem relating to the public contracting procedure**

42. The Respondent complains that the Claimant brought suit against ANB before the Administrative Chamber of the Court of Algiers and that in so doing it brought two actions relating to the same cause in two different forums, which constitutes an arbitrary act in breach of Article 26 of the Convention (Respondent 05.05.04 p. 63 and 64).

The Claimant considers that this action does not affect the jurisdiction of the Arbitral Tribunal. If the Tribunal declares itself competent, the suit would be abandoned (Claimant 03.04.04 no. 219 to 223 ; 03.06.04 pp. 33 to 41).

Given the position taken by the Arbitral Tribunal on the admissibility of the action, it is not necessary to discuss this objection.

## **4. ARBITRATION COSTS**

43. Each party has argued that the other should be ordered to pay the full cost of the proceedings, as well as a party indemnity.

The Tribunal has broad power of discretion on this point. Considering the decisions taken in this award, the Tribunal finds that it has rejected most of the

objections raised by the Respondent, but it has accepted the objection challenging the standing of the Claimant and, for the reasons set forth above, its own jurisdiction. Under these circumstances, it considers it fair that each party should bear one half of the costs.

Both parties have contributed to the costs of the proceedings, in the amount of US\$150,000 for the Claimant and US\$59,900 for the Respondent. The Respondent must therefore pay to the Claimant the amount of US\$45,050. If there should remain a balance in favor of the parties after ICSID has established a final accounting of costs, the funds not used will be returned to the parties, in equal portions.

Each party shall also bear its own costs of representation.

### **III. DECISION**

The Arbitral Tribunal

#### **For these reasons decides**

1. The Arbitral Tribunal has no jurisdiction to consider the dispute between the Consortium LESI-DIPENTA and Algeria.
2. Each party shall bear one half of the arbitration costs and its own costs of representation.
3. The Respondent owes to the Claimant the amount of US\$45,050 with respect to the advance.

PIERRE TERCIER

*President*

ANDRÉ FAURÈS

*Arbitrator*

EMMANUEL GAILLARD

*Arbitrator*