

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

In the matter between

TOTO COSTRUZIONI GENERALI S.P.A.
(Claimant)

and

THE REPUBLIC OF LEBANON
(Respondent)

(ICSID Case No. ARB/07/12)

DECISION ON JURISDICTION

Members of the Tribunal

Professor Hans van Houtte
Mr. Alberto Feliciani
Mr. Fadi Moghaizel

Secretary of the Tribunal

Ms. Aïssatou Diop

Representing the Claimant

Mr. Bechara S. Hatem
Hatem, Kairouz, Moukheiber and Messihi
Law Firm

Representing the Respondent

Mr. Nabil B. Abdel-Malek
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Date of Dispatch to the Parties: September 11, 2009

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I. PROCEDURAL HISTORY

A. Registration of the Request

1. On April 12, 2007, the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received a request for arbitration (the “Request”) dated March 19, 2007, from Toto Costruzioni Generali S.p.A. (“Toto”) against the Republic of Lebanon (“Lebanon”). Toto is a company incorporated under the laws of Italy, registered at the commercial register of the Chamber of Commerce of Chieti.

2. The Request invoked the ICSID arbitration provisions contained in the Agreement between the Italian Republic and the Lebanese Republic on the Promotion and Reciprocal Protection of Investments (the “Treaty”) which was signed on November 7, 1997, and entered into force on February 9, 2000.

3. In accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the “Institution Rules”), the Centre acknowledged receipt of the Request on April 12, 2007, and on April 13, 2007, transmitted copies thereof to Lebanon and its Embassy in Washington, D.C.

4. In the process of reviewing the Request, the Centre addressed a letter dated May 21, 2007, to Toto asking for clarification on the date on which the alleged dispute arose. The Claimant responded on May 25, 2007, specifying that the dispute arose in June 2004. Subsequently on July 3, 2007, the Centre registered the Request as supplemented by the letter of May 25, 2007, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”). On the same day, the Centre notified the parties of the registration of the Request and invited them to proceed without delay to constitute an arbitral tribunal, in accordance with Institution Rule 7.

B. Constitution of the Tribunal

5. On June 8, 2007, Lebanon appointed Mr. Fadi Moghaizel, a Lebanese national, as arbitrator. By letter of July 27, 2007, the Centre informed Lebanon that it could not proceed with

Mr. Moghaizel's appointment in view of Rule 1(3) of the Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules") according to which the co-national of a party to a proceeding cannot be appointed as an arbitrator by a party without the agreement of the other party to the dispute. On August 21, 2007, Toto appointed Mr. Alberto Feliciani, an Italian national, as arbitrator, and proposed that it would not object to Lebanon's appointment of Mr. Moghaizel as a co-national of Lebanon provided that Lebanon does not object to Toto's appointment of Mr. Feliciani as a co-national of Toto. On September 24, 2007, Lebanon confirmed that it had no objection regarding Mr. Feliciani's appointment. On September 27, 2007, the parties filed a joint letter invoking Article 37(2)(b) of the ICSID Convention and appointing Professor Hans van Houtte, a Belgian national, as the third, presiding arbitrator. On October 1, 2007, the Centre asked the parties to clarify whether Professor van Houtte's appointment was by the two party-appointed arbitrators, reflecting the method of constituting the Tribunal agreed by the parties, or by another method and, if so, to indicate which one. The parties informed the Centre by joint letter of October 16, 2007, that the appointment of the third arbitrator was by the two party-appointed arbitrators. Thus, the Centre contacted the two party-appointed arbitrators who, on October 19, 2007, confirmed their appointment of Professor van Houtte as the third arbitrator.

6. All three arbitrators having accepted their appointments, the Centre informed the parties, pursuant to Arbitration Rule 6(1), of the constitution of the Arbitral Tribunal and the commencement of the proceedings as of October 30, 2007, with Mr. Ucheora Onwuamaegbu, and later Ms. Aïssatou Diop, serving as Secretary.

C. Written and Oral Proceedings

7. By joint letter of November 9, 2007, the parties proposed Paris as the venue of the proceedings. On November 20, 2007, the Tribunal, after consulting with the ICSID Secretariat, scheduled a first session with the parties for December 13, 2007, at the World Bank European Headquarters in Paris, France. By joint letter of December 6, 2007, the parties communicated their agreement on certain matters identified in the provisional agenda for the first session, which the Secretary had circulated in preparation for the first session.

8. The first session took place as scheduled. Participating were:

Members of the Tribunal

1. Professor Hans van Houtte, *President*
2. Mr. Alberto Feliciani, *Arbitrator*
3. Mr. Fadi Moghaizel, *Arbitrator*

ICSID Secretariat

4. Mr. Ucheora Onwuamaegbu, *Secretary of the Tribunal* (by video conference from Washington, D.C.)

Toto

5. Mr. Bechara S. Hatem, Counsel, *Hatem, Kairouz, Moukheiber and Messihi Law Firm*
6. Mr. Hadi Slim, Professeur de Droit, Consultant en Droit du Commerce

Lebanon

7. Mr. Nabil B. Abdel-Malek, Counsel, *Nabil B. Abdel-Malek Law Offices*

9. At the session, the parties reiterated their agreement on the matters indicated in their joint letter of December 6, 2007, and reached an agreement on the remaining aspects of the proceedings, including bifurcation of the jurisdiction and merits phases, and a schedule for the submission of written pleadings on jurisdiction. All conclusions were recorded in the Minutes of the first session, which were signed by the President and Secretary of the Tribunal and circulated to the parties and other members of the Tribunal on January 15, 2008. The Minutes were subsequently amended at items 15 and 20, and re-circulated on February 27, 2008.

10. The following calendar was tentatively agreed for the preliminary phase of the proceedings:

- Lebanon to file its Memorial on jurisdiction by February 29, 2008;
- Toto to file its Counter-Memorial on jurisdiction by April 30, 2008;

- Lebanon to file a Reply on jurisdiction by June 30, 2008;
- Toto to file a Rejoinder on jurisdiction by August 31, 2008;
- A pre-hearing conference call to take place at the beginning of October 2008; and
- A hearing for the examination of witnesses and/or experts, if any, or for oral arguments on jurisdiction to take place on October 16 and 17, 2008, in Paris.

11. In accordance with the schedule, the parties filed their submissions on the agreed dates, except Toto which filed its Rejoinder two days early, on August 29, 2008.

12. On September 8, 2008, the Centre invited the parties to submit items they wished to include on the agenda for the pre-hearing conference. On September 25, 2008, the parties submitted a response on the basis of which the Secretary prepared and circulated a provisional agenda on October 1, 2008. The Tribunal held a pre-hearing conference by telephone with the parties on October 3, 2008. During the pre-hearing conference, the Tribunal asked the parties to submit a synthesis of the agreed facts relating to jurisdiction, which the parties did on October 9, 2008. Before the conclusion of the pre-hearing conference, the parties reached an agreement on all the substantive, procedural, logistical, and administrative matters listed on the agenda circulated in advance of the pre-hearing conference. The parties' agreement was recorded in the Minutes of the pre-hearing conference which were circulated on October 7, 2008.

13. In accordance with the agreed schedule, the Tribunal held a hearing on jurisdiction at the World Bank European Headquarters in Paris, France, on October 16-17, 2008. The parties were represented by their respective Counsels who made presentations to the Tribunal. There were no witnesses. Present at the hearing were:

Members of the Tribunal

1. Professor Hans van Houtte, *President*
2. Mr. Alberto Feliciani, *Arbitrator*
3. Mr. Fadi Moghaizel, *Arbitrator*

Toto

4. Mr. Bechara S. Hatem, Counsel, *Hatem, Kairouz, Moukheiber and Messihi Law Firm*
5. Mr. Hadi Slim, Professeur de Droit, Consultant en Droit du Commerce

Lebanon

6. Mrs. Mireille Rached, Counsel, *Nabil B. Abdel-Malek Law Offices*
7. Mr. Joseph Bsaibes, Counsel, *Nabil B. Abdel-Malek Law Offices*

14. After the hearing, the Tribunal started to deliberate on the case. However, as both parties had not yet paid their share of the advance payment on arbitration costs requested by the Centre on September 29, 2008, in spite of several oral and written reminders, the deliberations had to be suspended. After Lebanon and thereafter Toto paid their respective shares of the advance, the deliberations could be resumed by the Tribunal and completed on June 15, 2008, leading to a decision which is reported herein.

II. THE DISPUTE

15. For the purpose of this Decision on Jurisdiction, the Tribunal does not need to provide a detailed description of the factual background of the dispute between the parties. The Tribunal shall limit the scope of its decision to the jurisdiction issue and summarize the facts that are pertinent in that regard. Such summary, however, is not to be taken as prejudging in any way the issues of fact or law considered by this Tribunal.

16. The dispute arose from a Contract dated 11 December 1997 entered into between the *Lebanese Republic – Conseil Exécutif des Grands Projets*, on one hand, and *Toto Costruzioni Generali S.p.A.*, on the other hand, in the context of the construction of a portion of the Arab Highway linking, *inter alia*, Beirut to Damascus. Pursuant to the Contract, Toto undertook to build the section of the Arab Highway identified as the “Hadath Highway-Syrian Border-Saoufar-Mdeirej Section.”

17. Toto alleges that the Lebanese Government and first the *Conseil Exécutif des Grands Projets* (the “CEGP”), and later its successor, the Council for Development and Reconstruction

(the “CDR”), acting on behalf of the Government, created numerous problems for Toto and/or refused to adopt adequate corrective measures. These actions and omissions, according to Toto, caused material damage to the construction of the Highway, jeopardized Toto’s investment in Lebanon, and had, and are still having, a direct negative impact on the reputation of the Toto group. Toto seeks an award of damages for breaches of the Treaty and payment for moral prejudice.

18. Although the Contract set a start date of February, 10, 1998, and a completion date of October, 24, 1999, for the execution of the works, *i.e.* a time-span of 20 months, the formal contractual time contemplated for completion was 18 months, with December, January and February being considered as one month because of weather conditions. Moreover, the Contract provided for a post-completion maintenance period of 12 months. The total contractually-provided time (including the maintenance and guarantee period) thus ended on 24 October 2000, *i.e.*, 12 months after the contractual construction completion date. However, the actual construction was only completed in December 2003 and the project was handed over after the 12 month maintenance and guarantee period in December 2004.¹

19. Between 1997 and 2003, various claims were submitted by Toto to the CEPG and its successor the CDR. Such claims covered (a) additional costs due to changes in legislation leading to (i) change in customs duties, (ii) increase of the price of diesel, (iii) increase in government fees on cement, and (iv) increase in aggregates prices; (b) increase in the price of bitumen due to delayed execution; (c) additional works due to misleading information; (d) loss of productivity due to unforeseen circumstances; (e) additional costs occasioned by the nature of the soil not meeting the qualifications originally set in the Contract; (f) additional works resulting from a change in the design; (g) delayed site possession and expropriation and unforeseen works; and (h) extra works due to damages caused by third parties on site.

20. In August 2001, Toto filed two claims before the *Conseil d’Etat* (the Lebanese Administrative Court). Pursuant to the first claim, submitted on August 1, 2001, Toto requested to be indemnified for unforeseen works it had to carry out because the nature of soil did not meet the specifications set out in the Contract. Pursuant to the second claim, submitted on August 24,

¹ Request of Arbitration, p. 12.

2001, Toto requested to be indemnified for additional works it had to carry out because the design specified in the Contract had been substantially changed.

21. On June 30, 2004, Toto addressed a letter to Lebanon extending an invitation to negotiations between the parties for possible settlement as per Article 7 of the Treaty (cited in paragraph 24 *infra*) and, in the alternative, requesting arbitration. On August 18, 2004, Lebanon informed Toto that the CDR's Board of Directors had appointed its President to carry out the negotiations.

22. In October 2004, a new Lebanese Government came into power and decided to nominate a new Board of Directors for the CDR. The new Board was effectively appointed in December 2004.

23. On May 11, 2005, Toto attempted to restart the negotiations, addressing a letter to the new President of the CDR's Board of Directors. Toto did not receive an answer to this second request for negotiations. According to Toto, up to its filing of the Request for Arbitration in March 2007, it continuously tried to negotiate a settlement but remained unsuccessful.

24. By its Request for Arbitration, Toto submitted the dispute to ICSID arbitration in accordance with Article 36 of the ICSID Convention and on the basis of Article 7 of the Treaty which states:

1. *In case of disputes regarding investments between a Contracting Party and an investor of the other Contracting Party, consultations will take place between the Parties concerned with a view to solving the case, as far as possible, amicably.*
2. *If these consultations do not result in a solution within six months from the date of written request for settlement, the investor may submit the dispute, at his choice, for settlement to:*
 - a) ...
 - b) *the International Center (sic) for Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of the other States, opened for signature at*

Washington, on March 18, 1965, in case both Contracting Parties have become members of this Convention; or

c)

25. In its Request for Arbitration, Toto alleged various breaches of the Treaty by Lebanon, such as changing the regulatory framework; delaying or failing to carry out the necessary expropriations; failing to deliver sites; failing to protect Toto's legal possession; and giving erroneous design information and instructions. Moreover, Toto asserts that the fact that the Lebanese *Conseil d'Etat* had not yet decided on the two cases pending before it, from August 2, 2001, to the date of submission of the Request for the Arbitration, constitutes a denial of justice.

26. As a result of the alleged breaches, Toto submits the following request for relief:

10.1. The Claimant respectfully requests an award in its favour

10.1.1. *Declaring that the Respondent has breached its legal obligations under the BIT, thus jeopardizing the Investment made by the Claimant through the Contract and caused damages to said Investment;*

10.1.2. *Directing the Respondent to indemnify the Claimant for all material damages set below, caused to its Investment as a result of BIT breaches for a total amount of L.P /41,199,514,712.59/ (i.e. US\$ /27,320,633.10/):*

10.1.2.1. *Damages suffered by the Claimant due to additional costs and charges occasioned by the change of legislations after the submission of the tender amounting to L.P /1,016,076,098/ (i.e. US\$ /673,790.52/);*

10.1.2.2. *Damages suffered by the Claimant as a result of the delays it faced during the execution of the Project which were totally beyond its control and which amounted to L.P. /15,289,737,554/ (i.e. US\$ /10,139,083.26/);*

10.1.2.3. *Damages suffered by the Claimant for extra works and charges due to erroneous instructions, misleading information, and errors in Design for a total amount of L.P /5,782,357,809/ (i.e. US\$ /3,834,454.78/);*

- 10.1.2.4. *Interests on payments received from the Respondent but which were received after their due date and amounting to L.P/807,799,237/ (i.e. US\$/535,675.89/);*
- 10.1.2.5. *Interests on the amounts claimed under this Request from the issuing date of each unpaid claim calculated on the basis of the legal rate applicable in Lebanon, which is 9%, and until December 31st, 2006, amounting to L.P /10,976,833,391.23/ (i.e. US\$ /7,279,067.24/), plus additional interests until the date of final effective payment;*
- 10.1.2.6. *Losses suffered by the Claimant depriving it from new investment opportunities calculated at the rate of 8% per year starting from the date the last claim was duly submitted i.e. from December 19, 2002 until December 31st, 2006 and amounting to L.P /7,326,710,623.36/ (i.e. US\$ /4,858,561.42/);*
- 10.1.3. *Directing the Respondent to pay the Claimant for moral prejudice suffered by the latter as a result of all the hassle calculated at the rate of 10% of the main Contract value for an amount of L.P /6,048,403,161.90/ (i.e. US\$ /4,010,877.43/);*
- 10.1.4. *Directing the Respondent to pay the Claimant the arbitration and arbitrators' fees and expenses as will be substantiated later on, as well as the Claimant's attorneys fees;*
- 10.2. *Ordering any such further relief as may be available and appropriate in the circumstances.*

III. SUMMARY OF THE PARTIES' SUBMISSIONS ON JURISDICTION

27. The submissions of the parties can be briefly summarized as follows, without prejudice or limitation of their actual content, which has been considered in details by the Tribunal:

A. Lebanon's Memorial on Jurisdiction

28. Lebanon argues that the claims made by Toto fall outside the jurisdiction of ICSID, asserting that the building of the Arab Highway is not an investment as intended in the ICSID Convention, that Toto was not entitled to invoke Article 7(2) of the Treaty to submit claims to an ICSID arbitral tribunal, that Lebanon had not committed breaches of the Treaty and is not directly a party to the Contract, and that the claims are contractual claims and not Treaty claims.

29. Lebanon asserts that the dispute settlement clause stated in the Contract has priority over the general jurisdiction clause contained in the Treaty.

30. According to Lebanon's Memorial, Toto's choice to submit to the Lebanese Courts the disputes arising out of the Contract is final under Article V.1.2 of the *Cahier des Clauses Juridiques et Administratives*, which is part of the Contract and precludes Toto from resorting to ICSID arbitration.

31. Lebanon stresses that the Treaty entered into force in February 2000 and, under its Article 10, does not apply to disputes that have arisen before that date. In addition, Lebanon adhered to the ICSID Convention only in 2003 thus excluding to submit to ICSID all the disputes for alleged breaches that had arisen before the ICSID Convention entered into force.

B. Toto's Counter-Memorial on Jurisdiction

32. Toto, in its Counter-Memorial, infers that, notwithstanding the dispute settlement mechanism provided for in the Contract, the Treaty provisions and the ICSID Convention entitle referral of the dispute to an ICSID arbitration panel.

33. According to Toto's Counter-Memorial, Lebanon was a direct party to the Contract and the alleged breaches are to be considered as Treaty breaches because they relate to public works, which implies the exercise of *puissance publique*.

34. Toto rejects Lebanon's position of lack of jurisdiction *rationae temporis* of the Tribunal, asserting that Article 10 of the Treaty gives retroactive effect to the ICSID Convention.

C. Lebanon's Reply on Jurisdiction

35. Lebanon reaffirms that the alleged claims have to be treated as contractual ones and not as Treaty breaches.

36. Lebanon argues that Toto did not point to any action taken by Lebanon which can be considered as discriminatory.

37. Lebanon asks the Tribunal to grant relief only for Treaty breaches, if any, and not for damages resulting from any other breaches.

38. According to Lebanon, Lebanon is not a party to the Contract because it was entered into between Toto and the CDR, a council with separate legal personality from the State.

39. Lebanon reiterates that the claims set forth in the Request are essentially contractual in nature. Thus, the agreement between Toto and the CDR to submit their disputes to the Lebanese courts should prevail over the general dispute settlement provisions of the Treaty.

40. Lebanon asserts that ICSID arbitration would be premature until Toto's contractual claims are decided by the competent Lebanese courts.

D. Toto's Rejoinder on Jurisdiction

41. Toto in its Rejoinder on Jurisdiction denies Lebanon's assertions, reiterates its assertion of the Tribunal's jurisdiction over the dispute as submitted in the Request and makes reference to and confirms all arguments set out in the Request for Arbitration and in the Counter-Memorial.

IV. ANALYSIS OF ARGUMENTS

42. In its analysis, the Tribunal has determined the points that must be studied in accordance with the claims submitted by Toto and with Lebanon's response. For every point, the Tribunal has summarized the position of the two parties to the arbitration and then stated its decision with due regard to the arguments put forward by each of them.

A. Relationship between the CEGP and its successor, the CDR, and the State of Lebanon

43. The Republic of Lebanon, which is the Respondent in the present arbitration, is a Contracting Party to the Treaty on which the jurisdiction of the Tribunal is based as well as a Contracting Party to the ICSID Convention, under which rules the arbitration proceedings are conducted. However, Toto concluded the contract, which lies at the origin of the dispute, with the CEGP, later succeeded by the CDR, and the claims follow from acts and omissions of the

CEGP and the CDR. Lebanon will only be held responsible under the Treaty for such acts and omissions that can be attributed to Lebanon.

44. The principal rule of international law on attribution are presently reflected in Articles 4 and 5 of the International Law Commission's ("ILC") Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001 ("Draft Articles").

Article 4 reads :

Conduct of organs of a State

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

Article 5 reads :

Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Consequently, the Tribunal has to determine whether the CEGP and the CDR are State organs or entities exercising governmental authority as defined above.

45. In the event the domestic law of Lebanon would consider the CEGP and/or the CDR as State organs, they would unquestionably have the status of State organs under international law. Indeed, under Article 4.2 of the ILC Draft Articles, "[a]n organ includes any person or entity which has that status in accordance with the internal law of the State."

46. In the event that Lebanese law would not give the CEGP and/or the CDR the status of State organs, the Tribunal will have to examine whether these bodies exercise executive or any other functions of the Republic of Lebanon, as required under Article 4.1 of the ILC Draft Articles. The circumstances in which the CEGP and/or the CDR would be considered separate entities pursuant to Lebanese law would be irrelevant in this context: a State cannot escape international responsibility by delegating its State functions to entities to which it gives separate legal personality under its domestic law.²

47. If the CEGP and/or the CDR do not have the status of State organs under Lebanese law, but they exercise some of the functions of governmental authority, enumerated in Article 4.1 of the ILC Draft Articles, their acts and/or omissions in the exercise of governmental authority would still be attributable to Lebanon under the principle formulated in Article 5 of the ILC Draft Articles.

The Tribunal will now examine to which extent these principles apply in the case at stake and make the acts and/or omissions of the CEGP and the CDR attributable to Lebanon.

Toto's Position

48. Toto argues that the CEGP was fully controlled by the Government of Lebanon through the Ministry of Public Works and Transport. The CEGP undertook only public works projects entrusted to it by the Council of Ministers of the Lebanese Government. Moreover, the President and Board of Directors of the CEGP were appointed by decree of the Council of Ministers and its funding came mainly from the State budget.

49. Toto adds that, following the merger by absorption of the CEGP by the CDR, the CDR replaced the Ministry of Planning and became the successor of the CEGP in all its rights and obligations, including the Contract in the matter at hand. The CDR ensures the study and implementation of the public works entrusted to it by the Council of Ministers. Its President and Board of Directors are designated by the Council of Ministers. Its projects are funded by the

² See K. Hober, *State Responsibility and Attribution*, in P. Muchlinski e.a., Ed., *International Investment Law*, Oxford University Press 2008, 549 at 582.

State budget and are awarded in line with the public adjudication process. Therefore, Toto concludes that the CEGP and, later, the CDR are two entities acting on behalf of the Republic of Lebanon to carry out public works projects decided by the Council of Ministers, and they thus form one single entity with the State.

Lebanon's Position

50. Lebanon contends that it is not a party to the Contract which was signed by the CEGP and assumed by the CDR, two independent entities that are distinct from the State. Both the CEGP and the CDR have financial and administrative autonomy. Lebanon adds that the Contract itself names the CEGP as the contacting party. The same applies to the *Cahier des Charges Juridiques et Administratives* (Article 1.03) which names the CEGP as the employer. Lebanon explains further that it does not take part in the implementation of the projects carried out by the CEGP; and later, the CDR. Lebanon concludes that the Tribunal has no jurisdiction because Article 7 of the Treaty does not apply to breaches of contracts by entities that are not the State.

Tribunal's Decision

The status of the CEGP

51. The Contract was initially made with the CEGP, which was established by Decree no. 6839 of June 15, 1961. Article 1 of this Decree provided that the CEGP is in charge of studying and implementing the projects entrusted to it by the Council of Ministers. The CEGP was attached to the Ministry of Public Works and Transport which monitored the execution of the projects entrusted to the CEGP. The CEGP had a distinct legal personality and enjoyed administrative and financial autonomy. However, it operated under the control of the aforementioned Ministry and the authority of the Council of Ministers, and was also subject to the disciplinary authority of the Central Inspectorate. The CEGP had its own funds, which originated from the amounts allocated in the State budget to the projects to be performed by the CEGP.

52. Based on the foregoing, the CEGP, being an *établissement public administratif* linked to the Ministry of Public Works and Transport and operating under the authority of the Council of

Ministers, was a public entity (“*personne morale de droit public*”) that was created and mandated by Lebanon to exercise elements of governmental authority.

53. In brief, the CEPG, with projects funded by the State budget, and in charge of implementing the decisions of the Council of Ministers, exercised Lebanese governmental authority when it entered into the Contract with Toto. As also confirmed by Article 5 of the ILC Draft Articles, its conduct has to be considered as an act of the Lebanese state.

The Status of the CDR

54. By Law no. 295 of April 5, 2001, the CEPG was absorbed by the CDR, which assumed all the rights and obligations of the CEPG (Article 1, amending Article 15 of Law no. 247 of August 7, 2000). Following the absorption, all the projects entrusted to the CEPG were transferred to the CDR including the Contract at hand, made between the CEPG and Toto in 1997. The CDR therefore became the universal successor (*ayant cause universel*) to the CEPG. The Contract made by the CEPG with Toto thus has been transferred to the CDR. In this way the CDR equally exercised elements of governmental authority of the Republic of Lebanon.

55. Moreover, as to its institutional status, the CDR is a public entity (in the form of an *établissement public administratif*) established by Decree-Law no. 5 of January 31, 1977. It has a legal personality and enjoys administrative and financial autonomy. It is directly attached to the Council of Ministers.

56. The CDR has two types of prerogatives. It acts autonomously, notably for the tasks of the Ministry of Planning that were transferred to the CDR when the CDR replaced the Ministry pursuant to Decree-Law no. 5 of January 31, 1977. Moreover, the CDR acts as an agent of the State.

57. The CDR acts autonomously when, as the Council of Ministers’ consultant, it plans and programs development and reconstruction and elaborates the economic, social, and financial policy to attain the set objectives.³ The CDR prepares the budget relating to the implementation of the general plan that it lays down, and it ensures consistency between the State budget and the

³ Article 3-1 of Decree-Law no. 5.

general plan by giving its opinion regarding the draft of the State budget law.⁴ It also acts as a consulting authority for the drafting of legislation falling within the scope of development and reconstruction.⁵ However, all the plans and projects entrusted to the CDR must finally be approved by the Council of Ministers.

58. The CDR, however, mainly acts as the agent and implementing authority of the Lebanese Government. Pursuant to Article 5 of Decree-Law no. 5, it is in charge of studying and implementing development and reconstruction projects. It elaborates and implements the projects included in the general plan and the successive plans as well as any development and reconstruction projects assigned to it by the Council of Ministers.

59. The CDR implements all the projects entrusted to it by the Council of Ministers in the field of reconstruction and development, in areas stricken by war or natural disasters, and areas posing a threat to public health and safety.⁶ Through adjudication, solicitation of proposals or mutual agreement, it designates the public authority, public entity, municipality, mixed company, or private company which will perform the project. It represents all the public authorities and municipalities in their expropriation prerogatives: it carries out expropriations on behalf of all public authorities and municipalities.⁷ It controls all the projects included in the general plan, the projects established by it and the projects entrusted to it by the Council of Ministers.⁸ The funds allocated to the performance of the projects included in the plans approved by the Council of Ministers are provided for in the State budget.

60. Based on the foregoing, the Tribunal's view is that the CEGP and thereafter the CDR are exercising in the context of the Contract the governmental authority of the Republic of Lebanon, Therefore their acts are acts of the State of Lebanon, as also confirmed by Article 5 of the ILC Draft. Lebanon may be internationally liable for the acts of the CEGP and thereafter the CDR.

⁴ Article 3-2 of Decree-law no. 5.

⁵ Article 4, paragraph 1 of Decree-Law no. 5.

⁶ In line with Decree-Law no. 107 of June 30, 1977.

⁷ Article 5, paragraph 3 of Decree-Law no. 5.

⁸ Article 7-1 of Decree-Law no. 5.

This means that the Tribunal has jurisdiction *ratione personae* pursuant to Article 7 of the Treaty for acts committed by the CEGP and the CDR.

B. Is there an Investment?

1. An investment as defined in the Treaty?

Toto's Position

61. In its Request for Arbitration Toto argues that the dispute arises out of an investment as defined in the Treaty. Article 1.2 of the Treaty states:

The term "investment" means every kind of asset established or acquired by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter and shall include particularly, but not exclusively:

- a) *movable and immovable property as well as any other rights in rem, such as mortgages, liens, and pledges;*
- b) *...*
- c) *claims to money which have been used to create an economic value or claims to any performance having an economic value;*
- d) *intellectual property rights, such as copyrights, patents, industrial designs or models, trade or service marks, trade names, technical processes, know-how and goodwill, as well as other similar rights recognized by the laws of the Contracting Parties;*

[...]

62. In arguing for the existence of an investment in the sense of Article 1.2 of the Treaty, Toto points out several elements:

- (a) the claims for payment of amounts that were necessary "to create an economic value," i.e., major infrastructure works for the building of the Saoufar-Mdeirij section of the Arab Highway, including the construction of the highest viaduct of

the Middle East (Treaty, Article 1.2.c). These claims are listed in the Request for Arbitration (Section 6, p. 25) and include:

- a claim for reimbursement of the extra charges incurred by Toto as a result of a change in legislation after the submission of the tender;
 - a claim for payment of the cost of additional works carried out upon the request or with the approval of the Respondent;
 - a claim for compensation for losses incurred as a result of delays attributable to the Respondent;
 - a claim for compensation for extra costs resulting out of misleading information;
 - a claim for payment of interest on all outstanding amounts due to delayed payments during the execution of the Contract.
- (b) “the industrial designs or models ... know-how and goodwill” (Treaty, Article 1.2.d): for the execution of the construction project Toto brought in especially skilled personnel from Italy.
- (c) “movable property” (Treaty, Article 1.2.a): heavy equipment, machinery and technical processes were brought in by Toto for the purpose of carrying out the project.

63. Toto contends that the Tribunal has jurisdiction because the dispute arises out of an “investment” in the sense of the Treaty. It refers in this context to *M.C.I. Power Group L.C. and New Turbine inc. v. Ecuador*,⁹ in which the Tribunal stated that elements such as duration and risk, which some Tribunals take into account to accept the existence of a Treaty-protected investment, are not essential or required elements for the existence of an investment but rather mere illustrations.

⁹ *MCI Power Group LC and New Turbine Inc v. Ecuador*, Award, ICSID Case n° ARB/03/6, IIC 296 (2007), 31 July 2007.

Lebanon's Position

64. Lebanon disagrees with Toto that it is sufficient that the dispute arises out of an “investment” as it is defined in the Treaty to be within the Tribunal’s jurisdiction. What Toto must prove, and has failed to prove, according to Lebanon, is that the dispute arises out of an “investment” as understood in the ICSID Convention. Otherwise, the mere agreement of the parties on the scope of “investments” in a bilateral investment treaty would become the sole determinant of the ICSID jurisdiction.

Tribunal's Decision

65. This Tribunal agrees with Toto that in the case at hand the requirements for an “investment” as set forth in Article 1.2 of the Treaty are indeed fulfilled since an investor of Italy has established in accordance with Lebanese laws and regulations in the territory of Lebanon assets which included movable property (Article 1.2 a of the Treaty), claims to money which have been used to create an economic value or claims to any performance having an economic value (Article 1.2 c of the Treaty), and technical processes and know-how (Article 1.2 d of the Treaty).

2. An investment as per the meaning of the ICSID Convention ?

66. This being said, given that the case at hand is submitted to an ICSID Tribunal, the Tribunal agrees with Lebanon that, for this Tribunal to have jurisdiction, it is not sufficient that the dispute arises out of an investment as per the meaning of “investment” given by the parties in the Treaty, but also as per the meaning of “investment” under the ICSID Convention.

67. Article 25.1 of the ICSID Convention provides as follows:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (...) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.

68. The ICSID Convention itself does not set forth a definition of the term “investment” which it mentions in its Article 25 as a requirement to bring a dispute within its jurisdiction. However, as Lebanon points out, its preparatory works do not suggest in any manner that by

leaving out such a definition the founders of ICSID intended to bestow upon the Centre a jurisdiction *ratione materiae* without limits.

69. The notion of “investment” under the ICSID system has been clarified by legal scholars and jurisprudence. A number of legal scholars and some ICSID Tribunals follow the four criteria to be found in *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*¹⁰ to determine whether a transaction qualifies as an “investment” in the sense of the ICSID Convention. These four criteria, sometimes called the *Salini* test, comprise a) duration, b) a contribution on the part of the investor, c) a contribution to the development of the host state, and d) some risk taking.

Toto's Position

70. Although Toto, as noted above, regards compliance with the requirements of the Treaty as sufficient to determine the jurisdiction of this Tribunal, it contends that the dispute at hand relates to an “investment” also in the sense of the ICSID Convention. Toto argues that the four criteria of the *Salini* test are fulfilled:

- the **perpetuation of the contract for a certain period of time**: the expected duration was 30 months (including the maintenance period), but the execution of the Project ended up taking more than five years.
- a **contribution by the investor: Toto brought in its own skilled personnel**, heavy equipment and machinery required because the nature of the works, including the building of the highest viaduct in the Middle East. The works required indeed specialized skills and knowledge.
- a **substantial contribution to the State's economic development**: Toto's involvement in the Project significantly contributed to the economical development of Lebanon: the highway built by Toto is part of the backbone of Lebanese economic activity, connecting Lebanon with Syria and other Arab

¹⁰ *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, Decision on Jurisdiction, ICSID Case n° ARB/00/4, 42 ILM 609 (2003), 23 July 2001 (*Salini v. Morocco*).

countries, making Lebanon a passage way for international trade between Europe and the Middle East;

- a **risk**: the risk stems from the nature of the Contract. Toto refers to *Salini v. Morocco*:

With regard to the risks incurred by the Italian companies, these flow from the nature of the contract at issue. ... Notably, among others the risk associated with the prerogatives of the Owner permitting him to prematurely put an end to the contract, to impose variations within certain limits without changing the manner of fixing prices; the risk consisting of the potential increase in the cost of labour in case of modification of Moroccan law; any accident or damage caused to property during the performance of the works; those risks relating to problems of co-ordination possibly arising from the simultaneous performance of other projects; any unforeseeable incident that could not be considered as force majeure and which, therefore, would not give rise to a right to compensation; and finally those risks related to the absence of any compensation in case of increase or decrease in volume of the work load not exceeding 20% of the total contract price.¹¹

71. Regarding the element of risk, Toto also refers to *SAIPEM v. Bangladesh*,¹² in which the Tribunal states that the fact that the investor receives an advance payment does not mean that it does not incur commercial risks. Moreover the exorbitant clauses that contribute to the risk element in *SAIPEM v. Bangladesh* also exist in the present case, where furthermore no advance payment has been received: “the contract, the construction, the retention money, the warranty, in addition to other dispositions concerning non scheduled works, increase or decrease of the

¹¹ Cf. *supra*, footnote 10, para. 55.

¹² *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case n° ARB/05/07, Decision on Jurisdiction and Recommendation on provisional measures, para. 110.

volume of works, variation of economical conditions, which are also exorbitant clauses.”¹³ On each monthly payment, 10% had to be retained as retention money.¹⁴

Lebanon's Position

72. According to Lebanon, Toto failed to prove that the Project meets the definition of an “investment” for the purposes of the ICSID Convention. Lebanon does not object to the application of the *Salini* criteria; indeed it applies such criteria itself. However, it argues that the Tribunal lacks jurisdiction because the dispute at hand does not arise out of an investment, since, in its view, the Contract does not involve taking risks.

73. For Lebanon, an investment requires the specific risk that the operation might not be profitable, not the general risk that some contractual obligation will not be honoured, since the latter kind of risk is inherent to any contract whatsoever. The possibility that a contractual obligation will be defaulted or that a force majeure event may occur, is not the kind of risk required to qualify the operation as an “investment” under the ICSID Convention.

74. For Lebanon a road construction contract, such as the present Contract, involves a commercial sale of goods and services and is not an “investment,” since the contractor’s remuneration is guaranteed under the contract and covers the profits and estimated costs and risks. It is only when a construction contract is linked with the management of the operation, whereby the contractor’s remuneration is contingent on the outcome of its management and whereby profits depend on the success of the operation that such construction contract may be considered part of an investment.

75. Lebanon points out that, in those ICSID cases in which the Tribunal had to decide on the qualification of a civil engineering contract, the contract constituted part of an entrepreneurial activity, such as the building and operation of a hotel, the construction of housing units, the

¹³ Claimant’s Rejoinder, 29 August 2008, para 86. Toto refers to Exhibit 11 of its Request for Arbitration: CEDG, Autoroute Hadath – Frontière Syrienne, Troncon Saoufar-Mdeirej, *Cahier des Clauses Juridiques et Administratives*, Articles I-10, III-01, III-02, III-04, IV-03.

¹⁴ Article IV.03 (2) of the *Cahier des Clauses Juridiques et Administratives*, (“*Attachements et établissement des décomptes*”)

construction and management of a hospital ward, etc.¹⁵ In such cases, the risk that was taken into consideration for qualifying the operation as an investment under the ICSID Convention was the one associated with the chances of success of the business operation.

76. Lebanon refers to *SAIPEM v. Bangladesh*, in which the Tribunal considered the entire operation, including “the Contract, the construction itself, the Retention Money, the warranty, and the related ICC Arbitration,”¹⁶ and not just the civil construction part of it. According to Lebanon, it was exorbitant clauses like the retention money of 10% that led the Tribunal in *SAIPEM v. Bangladesh* to decide that there was a risk in the operation and to qualify it as an investment.

Tribunal’s Decision

77. Lebanon’s argument that there is no element of risk in the present case is unconvincing. The Tribunal finds, rather, that the criteria as set forth by legal scholars and jurisprudence following *Salini v. Morocco* are met in the present case.¹⁷

78. The Tribunal agrees with Toto that the risk stems from the nature of the contract and, as stated in *Salini v. Morocco*, does not require that the investor be “linked to the exploitation of the completed work.”¹⁸ A construction contract in which the execution of the works extends over a substantial period of time involves by definition an element of risk.¹⁹ The duration of the

¹⁵ *AMCO v. Republic of Indonesia*, ICSID case n° ARB/81/1; *Holiday Inns S.A. and other v. Morocco*, ICSID Case No. ARB/72/1; *Gabon v. Société Serete S.A.*, ICSID Case n° ARB/76/1; *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroun and Société Camerounaise des Engrais*, ICSID Case n° ARB/81/1; *Société Ouest Africaine des Bétons Industriels v. Sénégal*, ICSID Case n° ARB/82/1; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case n° ARB/01/7.

¹⁶ Cf. *supra*, footnote 12, para. 110.

¹⁷ This conclusion holds regardless of the discussion between the parties as to how these requirements should be assessed. Toto argues that the criteria as defined in the *Salini v. Morocco* are to be assessed globally rather than cumulatively. Toto refers to Farouk Yala, “*Rapport préliminaire – La notion d’« investissement » dans la jurisprudence du CIRDI : actualité d’un critère de compétence controversé*”, *Colloque* 3 mai 2004, p. 6, para. 18-19: “... une opération d’investissement suppose la réunion de quatre éléments interdépendants ...”. Toto contends that “*interdépendent*” should be translated as “*interrelated*” and not as “*cumulative*”. According to Lebanon, the Tribunal in *Salini v. Morocco* did require the four conditions to exist cumulatively.

¹⁸ Cf. *supra*, footnote 10, para. 56.

¹⁹ One might argue whether it is the expected or the actual duration of the project that should be considered, but in either case the criterion of duration would be passed.

contract is a determining factor with regards to the magnitude of the risk since the exposure to changes and unexpected occurrences increases in proportion to the duration of the contract.

79. Lebanon's argument that Toto's alleged risk was covered by a "guaranteed payment" does not stand: profits and costs are seldom fully covered by a payment agreed in advance when the price has been negotiated competitively and when many unforeseen events may occur.

80. In this regard this Tribunal refers to *SAIPEM v. Bangladesh*, in which the Tribunal stated: "*Bangladesh's argument appears to refer more to . . . the fact that the investor did not incur any commercial risk because it received an advanced payment. The Tribunal cannot agree with this argument. In the present case, the undisputed stopping of the works which took place in 1991 and the necessity to renegotiate the completion date constitute examples of inherent risks in long term contracts.*"²⁰

81. The Tribunal finds that, regarding the issue of investment, the requirements for jurisdiction under the ICSID Convention are fulfilled in this case. However, the Tribunal wishes to make clear that it does not reach this conclusion strictly on the basis of the *Salini* test, even if it agrees with Toto that in the present case that test is met, as demonstrated above. The Tribunal deviates from this commonly followed test in a desire to delineate the necessary features of an investment in a way that it considers more appropriate to the present case.

82. It should indeed be noted that the *Salini* test has not been universally applied by ICSID Tribunals. An alternative set of criteria was used, for example, in an award rendered on July 24, 2008 in the ICSID case *Biwater v. Tanzania*,²¹ in which the Tribunal stated that there is no basis for a "rote or overly strict" application of the test in every case:

These criteria are not fixed or mandatory as a matter of law. They do not appear in the ICSID Convention. On the contrary, it is clear from the travaux préparatoires of the Convention that

²⁰ Cf. *supra*, footnote 12, para. 109.

²¹ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID case 05/22, para. 312

*several attempts to incorporate a definition of 'investment' were made, but ultimately did not succeed.*²²

83. As stated in *Biwater v. Tanzania*, in the ICSID Convention the term “investment” “was left intentionally undefined, with the expectation (*inter alia*) that a definition could be the subject of agreement as between Contracting States.”²³ And: “[g]iven that the Convention was not drafted with a strict, objective, definition of ‘investment’, it is doubtful that arbitral tribunals sitting in individual cases should impose one such definition which would be applicable in all cases and for all purposes.”²⁴

84. In the absence of specific criteria or definitions in the ICSID Convention, the underlying concept of investment, which is economical in nature, becomes relevant: it implies an economical operation initiated and conducted by an entrepreneur using its own financial means and at its own financial risk, with the objective of making a profit within a given period of time. It has been argued that “investment” should include some duration, e.g., a minimum duration of two years, although a shorter duration also may be conceivable, or that the investment should serve the public interest.²⁵

85. Additional criteria have been applied in some cases, for example, in *Phoenix v. Czech Republic*, in which the Tribunal added two criteria to have an “investment” under the ICSID Convention: that assets be invested in accordance with the laws of the host state and that they be invested bona fide.²⁶ These two criteria, however, are not relevant to the case at hand.

²²Cf. *supra*, footnote 21, para. 310. In *Biwater v. Tanzania* the Tribunal attributes five, rather than four, criteria to *Salini v. Morocco*. These five criteria were originally suggested by the Tribunal in *Fedax N.V. v. Republic of Venezuela*, ICSID case ARB/96/3, Decision on Jurisdiction of July 11, 1997, 5 ICSID Rep. 183 (2002): (i) duration, (ii) regularity of profit and return, (iii) assumption of risk, (iv) substantial commitment, and (v) significance for the host State’s development. Four of these criteria were taken over by the Tribunal in *Salini*.

²³ Cf. *supra*, footnote 21, para. 312, with reference to Ch. Schreuer, *The ICSID Convention: A Commentary* (2001), p. 121-125, paras. 80-88.

²⁴ Cf. *supra*, footnote 21, para. 313.

²⁵ This is not a requirement of the ICSID Convention. See *L.E.S.I. S.p.A. et Astaldi S.p.A. v. République algérienne démocratique et populaire*, ICSID case 05/3, Decision on Jurisdiction, July 12, 2006, para 72 (iv) : « *Il ne paraît en revanche pas nécessaire qu’il réponde en plus spécialement à la promotion économique du pays, une condition de toute façon difficile à établir et implicitement couverte par les trois éléments retenus.* »

²⁶ *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case n° ARB/06/5, Award, April 15, 2009, para. 114.

86. In the present case, Toto's construction project meets the requirements deemed necessary by this Tribunal, i.e., a contribution by the investor, a profitability risk, a significant duration and a substantial contribution to the State's economic development, as follows:

- (a) Toto used its financial means before, during, and until completion of the works. At the start of the project, organizing personnel, machineries, and materials involved expenditures. The investment remains even though the contractor receives payments during the progress of the work. Indeed, these payments are received only after the contractor has pre-financed himself the costs of personnel, machineries, and materials. Moreover, as the costs must be certified by the engineer in order to obtain payment, there is always a risk that the costs will not be approved. Furthermore, 10% of the amounts, certified by the engineer, was retained as retention money, of which half would be paid at the provisional taking over and half at the final taking over.
- (b) There is no guarantee that the price paid by Lebanon, the employer, will be sufficient to cover the actual costs of the contractor for the performance of its obligations, especially since many unknown factors might intervene.
- (c) Toto was involved in the investment for well over five years (and even well over six years if Toto's maintenance period is also included). Several activities were carried out during the period in order to perform its contractual obligations.
- (d) The project at hand is a major construction work that will facilitate land transportation between Lebanon, Syria and other Arab countries and thus increase Lebanon's position as a transit country for goods from and to Middle East countries.

87. Thus, it is the considered conclusion of this Tribunal that the construction carried out by Toto in Lebanon was an "investment" according to Article 25 of the ICSID Convention, and as such, the disputes related to this construction qualify for the ICSID arbitration.

C. Can Toto rely on Article 7.2.b to submit claims to an ICSID tribunal?

Lebanon's Position

88. Lebanon has argued that Toto was not entitled to rely on Article 7.2.b of the Treaty to submit for settlement to an ICSID tribunal the dispute related to claims which dated from before the Treaty entered into force on February 9, 2000. Indeed, Article 10 *in fine* of the Treaty indicates that it “shall not apply to disputes that have arisen before its entry into force.” In this context, Lebanon points out that the subject-matter of the many claims that Toto has submitted to Lebanon or its engineer between 1997 and February 9, 2000, would be excluded from the Tribunal’s jurisdiction. It refers to *Tradex v. Albania* that stated: “[t]he term “arise” indicates that the beginning of the dispute is relevant and the term “dispute” is rather general and would usually be understood not to be restricted to a legal procedure”.²⁷

Toto's Position

89. For Toto, a mere claim is not a dispute. The *Clauses et Conditions Générales* (“CCG”), Articles 50 and 51, and the *Cahier des Charges Particulières*, Article V.01, provided for an intricate claim system, whereby Toto, in the event it disagreed with the decision of Lebanon’s engineer, had to object to the latter’s position. When the engineer then replied and Toto did not agree with this reply, it had to submit a formal Memorandum to the Owner within 60 days. Then, when the Owner did not reply or did not reply satisfactorily, again within 60 days after the submission of this Memorandum, there was a dispute and Toto had to bring the claim before the appropriate jurisdiction. Mere claims are not disputes. In fact, the dispute submitted to the Tribunal arose in 2004, well after the Treaty entered into force, when it became clear that Lebanon in different ways was jeopardizing the investment and a claim had to be introduced before an ICSID arbitral tribunal.

²⁷ *Tradex Hellas S.A. (Greece) v. Republic of Albania*, ARB 94/2, Decision on Jurisdiction, December 24, 1996, p. 188.

Tribunal's Decision

90. The Tribunal agrees that a mere demand is not a dispute. In the Tribunal's view the dispute arose on June 30, 2004, for the following reasons: The CCG, which are part of the Contract, distinguish between "*difficultés*" or problems (Article 50) and "*contestations*" or disputes (Article 51). The former arise when the engineer and the contractor have different views which need to be referred for final decision to the employer/administration. The latter implies that the contractor does not agree with the position of the employer/administration. However, in the case at stake, the CDR did not take a position so that Toto invited it on June 30, 2004, to have recourse to Article 7 of the Treaty ("*Settlement of Disputes*").

91. Lebanon, moreover, alleges that the Tribunal has no jurisdiction over the present dispute under the ICSID Convention as that Convention only became applicable to Lebanon in 2003, while the Agreement was concluded in 1997 and Lebanon's general offer to submit investment disputes to arbitration under the ICSID Convention, contained in Article 7 of the Treaty, became effective in 2000 with the entry into force of the Treaty.

92. However, a general offer from Lebanon, made in 2000, is only the preliminary step for the consent to submit a dispute to ICSID arbitration because it needs acceptance. In fact, this general offer was only accepted by Toto on June 30, 2004, when Toto informed Lebanon of its intention to submit the dispute to ICSID arbitration. It was thus well after the ICSID Convention entered into force, i.e., on June 30 2004, that, by Toto's acceptance, the parties consented to submit the dispute to ICSID Arbitration.

93. Moreover, the Tribunal's jurisdiction is not affected by the fact that Lebanon has made the general offer to accept ICSID arbitration for investment disputes with Italian investors, well before the ICSID Convention entered into force for Lebanon. It is sufficient that Lebanon had offered to accept ICSID jurisdiction and that the ICSID Convention was in force at the time of the consent, i.e., on June 30, 2004.²⁸

²⁸ See C. Schreuer, *The ICSID Convention: A Commentary*, 2001, nos. 322 and 323, referring, *inter alia*, to *Holidays Inns v. Morocco*, N° ARB 72/1, also discussed in Lalive, *The First 'World Bank' Arbitration*, 1 ICSID Reports 645.

94. With respect to Lebanon's argument that Article 25(1) of the ICSID Convention requires a written consent of the parties to submit the dispute to ICSID, the Tribunal considers that such consent has been given by Lebanon in its written offer to accept ICSID's jurisdiction under Article 7.2 of the Treaty, and by Toto pursuant to its letter of June 30, 2004 and its actual submission of the Request for Arbitration.

D. Breach of Article 2 of the Treaty: Failure to Promote and Protect the Claimant's Investment

95. Toto argues that the Tribunal has jurisdiction over Lebanon's failure to promote and protect its investment in breach of Article 2 of the Treaty, which provides:

1. *Each Contracting Party shall in its territory promote investments by investors of the other Contracting Party and admit such investments in accordance with its laws and regulations.*
2. *Each Contracting Party, in accordance with its laws and regulations, shall allow the investor to engage top managerial and technical personnel of his choice, regardless of nationality and grant the related permits.*
3. *Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale or liquidation of such investments. In particular, each Contracting Party or its competent authorities shall issue the necessary permits mentioned in paragraph 2 of this Article.*
4. *Each Contracting Party shall create and maintain, in its territory favourable economic and legal conditions in order to ensure the effective application of this Agreement.*

96. Toto has claimed that Lebanon, exercising its sovereign authority, has failed to protect its investment, in breach of Article 2 of the Treaty, by:

- a. delaying the necessary expropriation required under the contract to enable the Claimant to take possession of the site;
- b. failing to deliver major sites due to presence of Syrian troops in the area;

- c. failing to protect legal possession due to problems with occupants who opposed leaving the expropriated properties;
- d. providing erroneous instructions, misleading information, and errors in design;
- e. changing the regulatory framework in which the investment was made²⁹; and
- f. changing legislations after the submission of the tender.

1. Delay in expropriation

Toto's Position

97. The Government of Lebanon, according to Toto, failed to carry out the required site expropriations in order to deliver the sites, a responsibility under Lebanese law of the Government in the exercise of its prerogatives. This failure adversely affected Toto's investment, in breach of Article 2 of the Treaty.

98. Contrary to what Lebanon alleges in its Reply, the delay to carry out the necessary expropriations is distinct from the delay to deliver the sites. The expropriation is a legal measure that can be carried out notwithstanding the factual situation of the expropriated parcels, i.e., notwithstanding the fact that the expropriated parcels are occupied by squatters or by army troops.

99. Toto does not claim specific compensation because of delays in expropriation. It claims a total amount of US\$10,139,083.26 to cover damages suffered as a result of all the delays it faced (due to delay in expropriation, failure to protect legal possession, etc.) that were beyond its control.

Lebanon's Position

100. Lebanon argues that the alleged delay to carry out the expropriations does not constitute a breach of the Treaty because it concerns the performance of the works, required under the Contract. Consequently it is a pure contractual claim and is not covered by the Treaty. Although

²⁹ Sometimes Toto refers to a "change of the regulatory framework," sometimes "changes in the legal framework

Toto distinguishes the delay in expropriation from the failure to deliver sites. Both result in an alleged delay in the delivery of the site, a performance required from the CEGP/CDR under the Contract; it is not an act of the Government of Lebanon as State.

101. The fact that the delay in expropriation is constituent of the contractual claim for delay in delivery of the site is confirmed by the fact that Toto is not seeking specific compensation for the former but only a global compensation for the latter.

Tribunal's Decision

102. The Tribunal starts from the fact that, pursuant to the applicable law and to the terms of the Contract,³⁰ the CEGP and the CDR had committed themselves to site expropriations. Lebanon is responsible for these commitments made by an entity in the exercise of its governmental authority. In its capacity as a sovereign authority, it is moreover responsible for deciding and implementing site expropriations. The question that arises is whether the Tribunal has jurisdiction because the failure by Lebanon to carry out the required site expropriations, if established, constitutes a violation of Article 2 of the Treaty, which obliges Lebanon to create and maintain favourable economic and legal conditions that allow investors to perform their obligations and use their rights without hindrances and to protect investments and refrain from any unreasonable or discriminatory actions that would impair such investments.

103. As a general rule, a mere non-performance of a contractual obligation does not by itself fall within the scope of the State's undertakings under the Treaty. In *Impregilo S.p.A. v. Islamic Republic of Pakistan*, the Tribunal stated that exceptional geological conditions “*that concern the implementation of the Contracts, and do not involve any issue beyond the application of a contract and the conduct of the contracting parties.*”³¹ In particular, these exceptional geological conditions did not result in “unfair and inequitable treatment” or “unjustified or discriminatory

³⁰ Article II.03, §6 of the *Cahier des Charges Particulières*.

³¹ ICSID case no. ARB/03/3, Decision dated April 22, 2005, §268.

measures.” They moreover did not “concern any exercise of *‘puissance publique’* by the State.”³²

104. A State could, as an ordinary contracting partner, have a dispute with an investor. For a breach of Article 2 of the Treaty, however, the State or its emanation has to go beyond what an ordinary contracting partner would do and act within its sovereign authority.³³

105. In *Consortium RFCC v. The Kingdom of Morocco* the Tribunal stated: “[a] violation can certainly result from the violation of the contract, but without a possible violation of the contract constituting, *ipso jure*, and in itself, a violation of the Treaty.”³⁴ Moreover, the Tribunal hereby also referred to *Joy Mining Machinery v. Republic of Egypt*, which stated that “a basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some form of State interference with the operation of the contract involved.”³⁵

106. On the contrary, when the State acts as an administrative authority, holder of the “*puissance publique*,” while performing obligations arising from the Contract, such State must be viewed both as a party to the contract and as a sovereign.

107. The authority to expropriate is a typical example of a prerogative that can only be exercised by the State (or by its emanation) as holder of the “*puissance publique*.”

108. Thus, clearly, in the matter at hand, expropriation by Lebanon through the CDR is a prerogative that does not pertain to the simple performance of ordinary contractual duties. It falls within the scope of the “*puissance publique*” that must be used to allow performance of the contract by Toto and enters within the scope of Article 2, paragraph 3 of the Treaty.

³²ICSID case no. ARB/03/3, Decision dated April 22, 2005, §268.

³³ E. Gaillard, “*Chronique des Sentences Arbitrales*”, JDI 2006, p. 296.

³⁴ ICSID case no. ARB/00/6, Decision dated December 22, 2003, § 48.

³⁵ ICSID case no. ARB/03/11 – Decision on jurisdiction dated August 6, 2004, §72.

109. Consequently the Tribunal decides that it has jurisdiction over the alleged failure by Lebanon to timely carry out the expropriations required for the performance of the works by Toto under the Contract.

2. Failures to remove Syrian troops and to protect legal possession

Toto's Position

110. The State of Lebanon also failed to free major sites – as required under the Contract - because of the presence of Syrian troops in the area. The Syrian troops, which were assisting the Lebanese State in restoring and maintaining peace and order on the Lebanese territory, were legally under the command of Lebanon.³⁶ Consequently, the Lebanese Government was responsible for their occupation of the sites and thus for the delays and damages resulting from it.

111. As a matter of fact, Lebanon was aware, at the time when the Contract was concluded with Toto, that Syrian troops were occupying the site so that it assumed the risk related to it.

112. Toto further alleges that Lebanon failed to protect access to the expropriated sites when occupants refused to leave the expropriated properties.

113. Again, Toto does not claim specific compensation due to failure to remove Syrian troops and to protect legal possession but rather claims a total amount of US\$10,139,083.26 to cover damages which resulted from all the delays it faced due to late expropriations, failure to protect legal possession, etc.

Lebanon's Position

114. For Lebanon, the delay in the delivery of sites due to Syrian troops breaches the obligation under the contract to deliver and give access to the site. The reasons for the presence of the Syrian troops at the site and for the failure to vacate do not affect the characterisation of the failure to give access to the site as a contractual claim.

³⁶ Toto refers to *Makssoud v. Republic of Lebanon* (1986), which ruled that the Lebanese State is responsible for the Syrian troops present in Lebanon (CRJ, p. 14 §41, Toto's exhibit RJ2: Civil judge Baabda (concerning rent matters), file n° 474/1983, judgment n° 54, dated August 7, 1986).

115. Besides, there is international consensus that Lebanon had no control over the Syrian troops at the time the works had to be performed under the Contract. Their removal by force was factually impossible and an attempt thereto could have threatened the existence of the country itself. As stated in *LG & E v. Argentina*: “[t]he stability of the legal and business framework should not pose any danger for the existence of the host state itself which could not be put at risk by meticulously respecting contractual engagements.”³⁷

116. For Lebanon, the alleged failure to protect legal possession is likewise related to the delay in the execution of the works and thus is “a pure contractual claim, not covered by the Treaty.”

Tribunal’s Decision

117. The same reasoning that applies to Lebanon’s alleged failure to expropriate also applies to its alleged failure to remove Syrian troops from the site and to prevent protesters and occupants from obstructing the works. Lebanon, although concerned with these matters as a contracting party through the CEGP and the CDR, had itself to act as holder of the “*puissance publique*.”

118. The alleged inaction of Lebanon with respect to those two matters, if proven, would thus constitute a failure to protect investments under Article 2 of the Treaty. Therefore, the Tribunal has jurisdiction to decide on this matter.

3. Erroneous instructions and design

Toto’s Position

119. Toto further claims that Lebanon failed to protect its investment by giving misleading information, wrong instructions and erroneous design. Toto requests the Tribunal to award US\$3,834,454.78 for damages suffered for extra works and charges due to wrong instructions, misleading information and erroneous design.

³⁷ *LG&E Energy Corp. LG&E Capital Corp., LG&E International Inc. v. Argentine Republic* (hereafter “*LG&E v. Argentine*”), ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, para. 124 *in fine*).

Lebanon's Position

120. For Lebanon, construction instructions and design are not a prerogative of “*puissance publique*,” an error in design is a purely technical matter. The claims related to the alleged erroneous instructions and design are thus pure contract claims concerning technical issues which the Treaty obviously does not cover.

Tribunal's Decision

121. Toto's claims appear to relate to the standard duties in a construction contract, i.e., an alleged failure by an employer to comply with his obligations towards the contractor. It does not involve the use of sovereign authority or “*puissance publique*.”

122. Consequently, such a claim does not fall within the scope of Article 2, paragraph 3 of the Treaty. The Tribunal thus has no jurisdiction under Article 2 of the Treaty with respect to the claim of “Erroneous Instructions and Design.”

4. Change of the regulatory framework

Toto's Position

123. Lebanon introduced new legislation that changed the regulatory framework under which the Claimant had entered into the contract with the CEGP/CDR. It increased, for instance, customs duties and taxes as well as government fees on cement. These and other such changes negatively affected Toto's investment in breach of Article 2 of the Treaty.

124. While Lebanon is certainly entitled to change the legal and regulatory framework in the public interest of the country, Toto is entitled to compensation for the losses its investment suffered due to these changes under Article I.13 of the *Cahier des Clauses Juridiques et Administratives*.

125. On this ground, Toto requests to be awarded by the Tribunal US\$ 673,790.52 for damages suffered due to additional costs and charges occasioned by the changes in the regulatory framework.

Lebanon's Position

126. For Lebanon, changes in the regulatory framework and in administrative law are remedied under the contract law concept of “*fait du prince*,” to which Toto itself has referred in its submission. Such reference confirms that this claim is a contractual claim.

127. Further, the new legislation applied generally and did not affect Toto in an unjustified or discriminatory manner. Besides, the alleged effect of the legislative change on the execution of the contract is rather small (US\$673,790.52), compared to the total amount of the works. Consequently, Toto's argument that such changes constitute a breach under the Treaty becomes manifestly groundless.

128. Finally, the Treaty does not aim at forbidding mere changes in legislation but rather at the maintenance of a favourable legal framework. Toto's claim referring to mere changes in legislation is manifestly without legal merits and should be dismissed at the jurisdictional phase.

Tribunal's Decision

129. The Tribunal finds that the Treaty does not sanction changes in legislation. It rather obliges Lebanon to create and maintain favorable economic and legal conditions. The Tribunal does not regard a mere increase in customs duties and taxes as *prima facie* evidence of failure to maintain “favorable economic and legal conditions” of the investment.

130. However, if Toto could demonstrate that these changes in legislation were discriminatory, unreasonable, or otherwise in violation of the Treaty, the Tribunal would have jurisdiction under Article 2, paragraph 3 or other provisions of the Treaty.

E. Breach of Article 3.1 of the Treaty: Lack of Fair and Equitable Treatment

131. Toto argues that Lebanon failed to “ensure fair and equitable treatment” of its investment and thus breached Article 3.1 of the Treaty.

1. Disruption of negotiations with the CDR regarding claims submitted between 2000 and 2002

Toto's Position

132. Between 1997 and 2002, Toto submitted various claims first to the CEGP and then, when the CEGP was replaced in 2001 by the CDR, to the latter. Some of these claims were resolved, some were not. The claims from the first years of the works were largely dealt with at the time. However several claims from the later years remained unaddressed.

133. Between October 2000 and December 2002, the following claims for additional compensation to the CEGP/CDR remained unanswered up to March 27, 2007, date of the Request for Arbitration, and beyond.

Claims:

- (1) for changes of legislation (increase in customs duties on steel in October 2000, increase in price of diesel in June 2001, increase in government fees on cement in October 2001, increase in aggregates price in December 2002);
- (2) for extra works executed due to misleading information given to Toto (April 2001);
- (3) for loss of productivity due to landslides (August 2001);
- (4) for delays in expropriation and site possession as well as for additional unforeseen work and conditions (September 2002);
- (5) for an increase in the price of bitumen due to delays in the works (December 2002); and
- (6) for extra works due to third-party damages that occurred after the opening of the highway (December 2002).

134. On June 30, 2004, Toto submitted to the CDR a draft Request for Arbitration and an invitation to negotiate as provided for per Article 7.1 of the Treaty.³⁸ In August 2004, the CDR authorised its President to conduct the negotiations. Because of a change in the Lebanese Government and in the CDR's Board of Directors, the negotiations were suspended at the end of 2004. The negotiations did not resume despite Toto's renewed invitation thereto in May 2005. Upon the request of the Italian Government, there were two or three meetings; but at the last meeting, in May 2008, it became clear that the negotiations were at a standstill.

135. For Toto, Lebanon's failure to seriously negotiate was "*a clear manifestation of serious administrative negligence and inconsistency jeopardizing the investment of the Claimant...*" The disruption of negotiations and the refusal to resume them is contrary to standards of fair and equal treatment and thus a violation of Article 3.1 of the Treaty.

Lebanon's Position

136. Lebanon contends that the Treaty does not require that negotiations be undertaken without disruption or that such negotiations ultimately succeed. It only requires that consultations between the parties take place, which is what happened. Thus the CDR's failure (if any) to resume the negotiations cannot be considered a breach of the Treaty.

137. Moreover, there is no indication that, if the negotiations had been resumed, they would have resulted in acceptance of Toto's claims.

Tribunal's Decision

138. The Treaty requires that negotiations take place between the parties, which is what happened in the present case. However, nothing in the Treaty addresses the conduct of the negotiations or requires a positive outcome. Consequently, when Toto became dissatisfied with the negotiations, it was entitled to submit its claims under the contract to the *Conseil d'Etat*. The Tribunal's *prima facie* review of those and other previously mentioned facts relevant to this issue lead it to decide that it has no jurisdiction under Article 3.1 of the Treaty with respect to the claim for disruption of negotiations.

³⁸ Toto's letter of June 30, 2004 to the Chairman of the CDR.

2. Delay in the two lawsuits before the *Conseil d'Etat*

Toto's Position

139. Toto also refers to two proceedings it introduced before the Lebanese *Conseil d'Etat* in August 2001 under the jurisdiction clause of Article V.01 (1) of the *Cahier des Clauses Juridiques et Administratives*, which forms part of the Contract. The first of these proceedings, which started on August 1, 2001, concerned a claim for compensation for additional “crushed materials” required because the soil did not meet the contractual qualifications. The second, which started on August 24, 2001, concerned a claim for compensation for unforeseen changes to the original, erroneous design.³⁹ According to Toto, these proceedings have not progressed substantially since the end of August 2002 when the parties submitted their last briefs of reply.

140. Toto emphasizes that it does not criticize the *Conseil d'Etat* in general. However, in these two particular cases, the slow pace of the *Conseil d'Etat* constitutes a breach of Article 3.1 of the Treaty. Indeed, the proceedings began in 2001 and both parties submitted their briefs to the *Conseil d'Etat* by the end of August 2002. The lawsuits then remained unattended for six years. No report of the Juge-Rapporteur has been issued yet. In January 2008, well after the start of the present ICSID arbitration, the *Conseil d'Etat* requested the parties to submit copies of some documents, which Toto regards as irrelevant to the lawsuits. In fact, because the entire documents, such as the signed Contract, would be too voluminous Toto had already submitted excerpts of such documents, as is usually done.

141. Toto argues that Lebanon, as a State, is liable for the *Conseil d'Etat's* behaviour, even if it did not intervene in its functioning. The judicial system is one of the attributes of a sovereign State for the functioning of which the State is responsible.

142. In comparison with other proceedings before the *Conseil d'Etat*, the two lawsuits at issue have proceeded at an abnormally slow pace, the normal time for proceedings being one to five years. The fact that the lawsuits were not attended to for such a long period constitutes a denial of justice under international law that entails the responsibility of Lebanon.

³⁹ Exhibits R24 and R25 submitted by the Respondent.

143. Moreover, the fact that the lawsuits were not attended to for such a long period also constitutes a breach of Article 3.1 of the Treaty. Indeed, the obstruction of the *Conseil d'Etat* proceedings is in breach of good faith, the most basic component of fair and equitable treatment.

144. Although Lebanon is not party to the Council of Europe, Toto finally refers to the case law on due process of the European Court of Human Rights. It also refers to Article 14 of the 1966 International Covenant on Civil and Political Rights (“ICCPR”), ratified by Lebanon, which imposes the right of every person to have an equitable trial.

Lebanon's Position

145. Lebanon argues that the time required by the *Conseil d'Etat* should not be compared to the swift resolution of disputes through arbitration in general, and through ICSID arbitration in particular.

146. Besides, the time needed to settle a case depends on the complexity and the circumstances of each case.

147. Despite the fact that Toto was well aware that proceedings before the *Conseil d'Etat* may extend over a number of years, it nevertheless “knowingly and willfully” agreed to submit the disputes to the *Conseil d'Etat*.

148. In fact, the delay in Toto's procedure before the *Conseil d'Etat* is not abnormal: most cases extend over five years. Moreover, the two cases are advancing, as evidenced by the decisions for production of additional documents, issued by the *Conseil d'Etat* in January 2008. Due process is thus being respected.

149. Lebanon also points out that Toto has not requested a separate or specific compensation for these claims, and that it has only submitted two claims to the *Conseil d'Etat*, whereas it now submits fifteen claims before this Tribunal.

150. Lebanon dismisses the references made by the Claimant to the European Convention on Human Rights (“ECHR”) and to the case law of the European Court of Human Rights as irrelevant, since Lebanon is not a member of the Council of Europe.

151. Lebanon reiterates that “denial of justice entails scandalous behaviour and bad faith on the part of the court.” Toto has offered no *prima facie* evidence for such a charge.

Tribunal’s Decision

152. Toto does not allege that it has been treated less favourably by the *Conseil d’Etat* than have Lebanese investors or investors of any third State who have submitted claims to the *Conseil d’Etat*. Rather, it merely alleges that the *Conseil d’Etat* is malingering with regard to the two cases Toto has submitted to it.

153. Only if there is *prima facie* evidence that the court delays in the case at stake are unfair and inequitable would the Tribunal have jurisdiction under Article 3.1 of the Treaty.

154. The Treaty sanctions not only breaches of specific Treaty provisions, such as Article 3.1, but also breaches of any rule of international law (Article 7.3). The Treaty thus covers also a denial of justice under international law.

155. It has to be conceded that international law has no strict standards to assess whether court delays are a denial of justice.

156. As a matter of principle, the failure to render justice within a reasonable period of time may constitute a breach of international customary law. In the *Fabiani* case of 1896, Fabiani, a French national wanted to enforce an arbitral award in Venezuela, but his request for an exequatur met with a long series of suspensions and appeals, culminating in the refusal of a tribunal d’exception, especially selected to deal with this case, even to schedule a hearing. The sole arbitrator found that “*upon examining the general principles of international law, denial of justice includes wrongful delays of the judicial authority in giving judgment.*”⁴⁰ The question, however, is whether in the case at hand the delay in the proceedings of the two claims before the *Conseil d’Etat* constitutes a denial of justice.

157. Article 6 of the ECHR certainly covers the question to which extent lengthy court proceedings are a breach of the right to due process and to a fair and equitable trial. This matter

⁴⁰ Antoine Fabiani (n°1) (France v. Venezuela) , Moore , *Arbitrations*, 4878 at 4895

has been extensively subject of decisions from domestic courts and from the European Court of Human Rights. However, as Lebanon is not party to the ECHR and lies outside the territorial scope of the ECHR, these decisions are not relevant in this case.

158. On the other hand, Lebanon is a party to the ICCPR, Article 14.1 which requires the right to a fair hearing:

All persons shall be equal before the courts and tribunals. In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law....

The right to a fair hearing entails a number of requirements, including the requirement that the procedure before the national tribunals be conducted expeditiously.⁴¹

159. Under the Optional Protocol to the ICCPR, a State may accept that individual persons file a complaint against the State before the ICCPR Commission, which then gives its opinion. However, Lebanon has not ratified this Protocol and thus cannot be summoned before the Commission. Nevertheless, the decisions of the Commission are relevant to interpret the scope of Article 14 of the ICCPR.

160. To assess whether court delays are in breach of the requirement of a fair hearing, the ICCPR Commission takes into account the complexity of the matter, whether the Claimants availed themselves of the possibilities of accelerating the proceedings, and whether the Claimants suffered from the delay. The ICCPR Commission thus decided that a two-and-a-half-year delay in the proceedings to annul an administrative order was acceptable.⁴² Likewise, a two-year period to obtain a judgment from an administrative tribunal against a dismissal was equally acceptable.⁴³ On the other hand, a delay of seven years to obtain a judgment for someone who asked to be reinstated in his position and an additional delay of two-and-a-half years to get this

⁴¹ See Commission ICCPR (1060/2002), *Deisl v. Austria*, A/59/40, vol. II (July 27, 2004) 283, para 11.2; Commission ICCPR (203/1986), *Munoz v. Peru*, A/44/40 (November 4, 1988) 200 at para. 11.3. Communication n° 441/1990, *Robert Casanovas v. France*, A/49/40 vol. II (July 19, 1994) at para. 7.3; Communication N° 238/1987, *Floresmilo Bolanos v. Ecuador*, at para. 8.4, Communication N° 207/ 1986, *Yves Moraël v. France*, at para. 9.3.

⁴² Commission ICCPR *Deisl v. Austria*, A/59/40, vol. II (July 27, 2004) 283, para 11.2.

⁴³ Communication N° 441/1990, *Robert Casanovas v. France*, A/49/40 vol. II (July 19, 1994) at para. 7.3.

judgment implemented was considered unacceptable.⁴⁴ Likewise, eleven years of proceedings to obtain a final judgment regarding custody of and access to the claimant's children was unreasonable.⁴⁵

161. Lebanon has argued that, when concluding the Contract, Toto was aware of the length of procedures before the *Conseil d'Etat*. The Tribunal is not impressed by this argument. Toto did not find itself in a bargaining position to refuse the jurisdiction of the Lebanese domestic courts. It is the obligation of Lebanon to make sure that its domestic courts function fairly and equitably, as required especially by Article 3.1 of the Treaty.

162. Lebanon also has invoked overcharged dockets to justify the delay. Although overcharged dockets may explain the fact that a decision in a civil matter was not rendered within a reasonable time, it does not excuse the delay.⁴⁶

163. In fact, whether justice is rendered within a reasonable delay depends on the circumstances and the context of the case.⁴⁷ Each lawsuit must be analyzed individually with regard to:

- the complexity of the matter;⁴⁸
- the need for celerity of decision;⁴⁹

⁴⁴ Commission ICCPR, *Munoz v. Peru*, A/44/40 (4 November 1988) 200 at para. 11.3; Cf. M. Nowak, "U.N. Covenant on Civil and Political Rights. ICCPR Commentary" (2nd revised edition), 322-323: "*Muñoz Hermoza v. Peru* ... Following discontinuance of criminal proceedings against him, he unsuccessfully fought for his reinstatement for ten years before various administrative and judicial authorities. The Committee held that the administrative proceedings lasting seven years constituted unreasonable delay and thus a violation of the right to a fair hearing under Article 14 (1)."

⁴⁵ Commission ICCRP *Fei v. Columbia* (514/1992), A/50/40 vol. II (April 4, 1995) 77 at para 8.4;

Cf. M. Nowak, "U.N. Covenant on Civil and Political Rights. CCPR Commentary" (2nd revised edition), 322-323: "In *Fei v. Columbia*, the Committee stressed that "the very nature of custody proceedings or proceedings concerning access of a divorced parent to his children requires that the issues complained of be adjudicated expeditiously."

⁴⁶ Anglo-Mexican Claims Commission, *El Oro Mining and Railway Co.*, quoted in Paulsson, *Denial of Justice in International Law*, 2007, p. 178.

⁴⁷ *Chevron-Texaco v. Ecuador*, Nr. 113

⁴⁸ The French *Conseil d'Etat* has decided that ECHR Article 6.1 and 13 were violated when a lower administrative court took seven and a half years to rule on "a request which did not present any particular difficulty."

- the diligence of claimant in prosecuting its case.⁵⁰

164. Moreover, a state can only be held liable for denial of justice when it has not remedied this denial domestically. As summarized by Jan Paulsson:

*States are held to an obligation to provide a fair and efficient system of justice, not to an undertaking that there will never be an instance of judicial misconduct. National responsibility for denial of justice occurs only when the system as a whole has been tested and the initial delict has remained uncorrected... The very definition of denial of justice encompasses the notion of exhaustion of local remedies. There can be no denial of justice before exhaustion.*⁵¹

165. It has to be admitted that in the present case there was indeed a very long delay between the closing of the debates in the two proceedings before the *Conseil d'Etat* in 2002 and the request by the *Conseil d'Etat* for submission of documents on 16 January 2008. In the eyes of the Tribunal, this in itself, however, does not constitute a breach of Article 3.1 of the Treaty. In February 2005, Lebanon's former Prime Minister, Rafic Hariri, was assassinated. This was followed by several terrorist bombings and assassinations that disrupted normal life in Lebanon. In summer 2006, a destructive war took place between Lebanon and Israel. In Mid-2007 there was severe internal fighting between the organization Fatah al-Islam and the Lebanese Army. In May 2008, another internal armed conflict exploded following a 17-month-long political crisis. These circumstances undoubtedly were not conducive to the functioning of Lebanon's judicial system and affected the proper functioning of Lebanese courts between 2002 and 2008.

166. In fact, as Lebanon points out, the two cases are presently advancing, as evidenced by the two decisions for document production from the *Conseil d'Etat* issued in January 2008.

⁴⁹ To decide whether the delay was unreasonable, *i.e.*, the complexity of the matter, the conduct of the parties in the course of the proceedings as well as the specific legitimate interest in celerity have to be evaluated.

⁵⁰ Ecuador alleged that Chevron had knowingly allowed the BIT breach to occur through their deliberate lack of diligence in prosecuting their Ecuadorean court cases. The Claimants have countered with evidence that they prosecuted their cases to the point where a decision could be rendered and with an argument that doing any more would have been futile. (*Chevron-Texaco v. Ecuador*, Nr. 145). In fact, the Claimants have done everything they could to advance proceedings. Ecuador indicated that they could have raised a number of procedural remedies. This will be decided in the merits phase (*Chevron-Texaco v. Ecuador*, Nr. 238).

⁵¹ Jan Paulsson, *Denial of justice in International Law*, 2007, p. 245-246.

167. More importantly, the Tribunal has not seen evidence that Toto made use of local remedies to speed up the proceedings before the *Conseil d'Etat*.⁵² Toto had the right to consult the case files at the *Conseil d'Etat* (Article 82 of the Law regulating the *Conseil d'Etat*). It could have shown diligence – but did not do so – and request the *Conseil d'Etat* to issue its report on the case or review the matter quickly. Lebanon cannot be blamed for its practice not to disclose the name of the Juge-Rapporteur to prevent direct contact between the parties and the Juge-Rapporteur. Nor did non-disclosure prevent Toto from using its right to submit a written request to the President of the *Conseil d'Etat*'s Chamber to cause prompt issuance of the decision of the Juge-Rapporteur.

168. The Tribunal has therefore not seen *prima facie* evidence that Toto itself has made use of the local remedies to shorten the procedural delays. In the absence of such evidence the Tribunal has no jurisdiction under Article 3.1 of the Treaty to decide whether the delays before the *Conseil d'Etat* were unfair and inequitable.

3. Lack of Transparency in the two lawsuits before the *Conseil d'Etat*

Toto's Position

169. Toto further argues that, since it has been unable to obtain information regarding the progress of the procedures before the *Conseil d'Etat* or to learn the name of the Magistrate in charge of the file, these two procedures are contrary to the fundamental right to transparency, another breach of the “fair and equitable treatment” standard contained in Article 3.1 of the Treaty.

170. According to Toto, transparency is a basic requirement in any judicial system. Toto refers in this context to *LG & E Energy Corp. v. Argentine Republic* and to *Tecmed v. The United*

⁵² In the absence of a specific regulated remedy in the law with respect to denial of justice in administrative courts, reference must be made to the Code of Civil Procedure (“CPC”) that, pursuant to Article 6 CPC, is the general procedural law, Article 4 CPC defines “denial of justice”: these provisions should apply to the *Conseil d'Etat* given that its governing law is silent in this regard.

Mexican States, which decided that the host State must “act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor...”⁵³

Lebanon's Position

171. Lebanon maintains that the procedures before the *Conseil d'Etat* do not lack transparency and denies that a claimant is entitled to know the name of the Juge-Rapporteur in charge of submitting a report to the *Conseil d'Etat*.

172. Besides, Toto apparently was nevertheless informed about the progress of the lawsuits, since it is aware that the file has been remitted to a Magistrate of the *Conseil d'Etat*.

Tribunal's Decision

173. On the basis of the facts submitted, the Tribunal does not find a *prima facie* lack of transparency in the proceedings before the *Conseil d'Etat* that would give it jurisdiction to decide whether these facts amount to a breach of Article 3.1 of the Treaty.

4. Other claims

174. Toto has brought forward other claims with regard to the Tribunal's jurisdiction under Article 3.1 of the Treaty such as the claim related to the failure to expropriate, the failure to remove Syrian troops and to protect legal possession, the claim related to erroneous instructions and design and the claim for the changes in its regulatory framework. Lebanon has raised objections to Toto's arguments.

175. The Tribunal confirms that erroneous instructions and design appear related to the standard duty in a construction contract, not involving use of sovereign authority or “*puissance publique*.” No sufficient *prima facie* evidence has been submitted to grant the Tribunal jurisdiction to decide whether they involve a breach of fair and equitable treatment as required under Article 3.1 of the Treaty.

⁵³ *LG&E Energy Corp. LG&E Capital Corp., LG&E International Inc. v. Argentine Republic* (hereafter “*LG&E v. Argentine*”), ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006, p. 235, para. 127; *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/02, Award, May 29, 2003, para. 154.

As for the failure to expropriate, the failure to remove Syrian troops and to protect legal possession, the changes in the regulatory framework, which -as already discussed- there is *prima facie* evidence that they may fall under the protection of Article 2.1 of the Treaty and under Article 3.1 of the Treaty if proven to be unfair and inequitable. Consequently the Tribunal has jurisdiction over such matters.

F. Breach of Article 4.2 Treaty: Indirect Expropriation

Toto's Position

176. Toto argues that the manner Lebanon acted can be considered as an indirect expropriation of Toto's investment, in violation of Article 4.2 of the Treaty, which assimilates "measures having the same nature or the same effect against investments" to expropriation and reads as follows:

Neither of the Contracting Parties shall take, either directly or indirectly, de jure or de facto, measures of expropriation, nationalisation or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest as established by law, on a non-discriminatory basis, under due process of law, and provided that provisions be made for effective and adequate compensation, according to the enforced national law without any kind of discrimination.

177. In addition Toto refers to paragraph 3 of the Protocol attached to the Treaty, which states with reference to Article 4.2:

Any measure undertaken by one of the Contracting Parties relating to an investment made by an investor of the other Contracting Party, which shall substantially diminish the value of the assets or create major obstacles to the activities or substantial prejudice to the value of the same asset as well as any other measure referred to in paragraph 2 of Article 4.

178. According to Toto, it invested, in addition to the US\$ 40 million that was the final value of the Project, an amount equivalent to US\$ 15 million for costs and charges incurred due to acts or omissions of Lebanon and for which Toto was not reimbursed. The fact that Toto had to invest an extra amount of US\$ 15 million, i.e., 37% of the Project's total amount, that was not

provided for in the Contract, “*substantially deprives the investment of economic value and is to be considered as an indirect expropriation as per Article 4.2 of the Treaty.*”

179. Moreover, the original duration of the Project was foreseen to be 18 months, but its completion took more than five years by Lebanon’s fault. In Toto’s view:

*By extending the time for completion, because of acts and measures adopted by the Respondent in addition to changing the institutional framework by decisions adopted by the Respondent through increasing taxes, closing quarries and other similar measures, the Respondent eroded the Claimant’s profits and deprived the investment of economical values which is equivalent to an indirect expropriation and constitutes breach of Article 4.2 of the Treaty*⁵⁴

180. For Toto, the fact that its two claims, submitted to the Lebanese *Conseil d’Etat*, have remained unsettled to this day and that the claims submitted to the CDR since 2001 have not only remained unsettled, but also unanswered, constitutes a further indirect expropriation.

Lebanon’s Position

181. Lebanon considers Toto’s contention to be unfounded. Its claims for an amount of US\$ 15 million for alleged additional costs and charges resulting from the performance of the contract were disputed and are still disputed as of today. The mere non-payment of a disputed amount cannot be considered as an indirect expropriation which takes away the claim. Lebanon referred in this context to the award in *SGS v. The Republic of Philippines*, where the Tribunal reasoned that “*whatever debt the Philippines may owe to SGS [the investor] still exists, whatever right to interest for late payment SGS had, it still has.*”⁵⁵ As long as the Philippines had not enacted a statute or decree to expropriate or annul the debt or otherwise attempted to expropriate, the debt continued to exist. Given that Toto’s claims are based on a mere refusal to pay and not on an allegation that the debt was in one way or another annulled by Lebanon, Toto’s alleged breach of non-payment cannot constitute an indirect expropriation under the Treaty.

⁵⁴ Request for Arbitration, p. 24, para. 5.3.3.

⁵⁵ ICSID Case n° ARB/02/6, *SGS v. Philippines*, para. 161.

Tribunal's Decision

182. To assess expropriation, the effect of the disputed measures on the investment is more important than the presence of a formal expropriation decree or the government's intention behind these measures,⁵⁶ which is no constitutive requirement for indirect expropriation.⁵⁷ Although an indirect and de facto expropriation does not transfer the title to property, it may have the same consequences as a formal expropriation.⁵⁸ For the Tribunal in *Metalclad*, an expropriation could also be :

*Covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.*⁵⁹

183. In order to be considered as an (indirect) expropriation, the government measures need to “effectively neutralize” the enjoyment of property.”⁶⁰ The measures should result in “*substantial effects of an intensity that reduces and/or removes the legitimate benefits [...] to an extent that they render their further possession useless.*”⁶¹ As was decided in *National Grid v. Argentina*, an expropriation requires a radical deprivation.⁶² Although the provision of the Treaty covers also measures of the same effect and nature as a formal expropriation, it does not lower the relevance of the effect to qualify measures as *de facto* expropriation.

184. For *Toto*, the additional costs, representing 37% of the total value of the investment, lead to a deprivation of economic value and constitute an indirect expropriation. However, this 37% is based solely on *Toto's* calculations. Moreover, no *prima facie* evidence has been submitted

⁵⁶ *Tippets, Abett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, The Government of the Islamic Republic of Iran* 6 Iran-USCTR 219, 225.

⁵⁷ *Siemens v. Argentina*, Award, February 6, 2007, ICSID Case No. ARB/02/8.

⁵⁸ *Petrobart Ltd v. The Kyrgyz Republic* (Award) SCC Arg 126/2003 (SCC/ECT, 2005, Danelius P, Bring & Smets).

⁵⁹ *Metalclad Corp v. Mexico* (Award) August 30, 2000, 5 ICSID Rep (2002) 457, para. 103.

⁶⁰ *CMS v. Argentina*, Award, May 12, 2005, 44 ILM (2005) 1205, para. 262, referring to the same wording in *Lauder v. Czech Republic*, Award, September 3, 2001, UNCITRAL (United States/ Czech Republic BIT) para. 200.

⁶¹ *RFCC v. Morocco*, Award, December 22, 2003, 20 ICSID Rev-FILJ (2005) 391, para. 69.

⁶² *National Grid P.L.C. v. Argentina* (UNCITRAL), November 3, 2008, published *in extenso* on the website of the American Society of International Law, <http://ita.law.uvic.ca/documents/NGvArgentina.pdf>.

that the activities and their remuneration, initially foreseen by Toto, were an adequate performance of Toto's contractual obligations and adequately covered the risk Toto had assumed, so that no additional works and costs were required to fulfill Toto's contractual obligations. Consequently, because the Tribunal is of the opinion that Toto has not offered *prima facie* proof that uncovered costs in the amount of 37% of the value of the project may constitute a deprivation of its rights on the investment, or a measure having the same effect, it has no jurisdiction to assess such facts under Article 4.2 of the Treaty.

185. Furthermore, even if Lebanon would have to pay additional costs for an amount up to 37% of the initial contract price and has failed to do so, this does not constitute an indirect expropriation, but a mere breach of contract. For the Tribunal, an indirect expropriation fundamentally requires a taking of property. As the Tribunal in *Waste Management* correctly stated: "an enterprise is not expropriated just because its debts are not paid or other contractual obligations are breached."⁶³ Referring to the authority's failure to make available land promised for the investment project, the arbitrators concluded: "a failure by a State to provide its own land to an enterprise for some purpose is not converted into an expropriation of the enterprise just because the failure involves a breach of contract."⁶⁴ Along similar lines, the *Azurix* Tribunal held that "contractual breaches by a State party or one of its instrumentalities would not normally constitute expropriation."⁶⁵ Further, relevant to the extent Toto's claims are based on regulatory changes made by Lebanon, the *Feldman v. Mexico* award held with regard to Article 1110 of the NAFTA Agreement that "not all regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is an expropriation."⁶⁶

⁶³ *Waste Management Inc v. United Mexican States* (2004) 43 ILM 967, (NAFTA/ICSID (AF)), 2004, Crawford P, Civiletti & Magallón Gómez) 995, 999, para. 160.

⁶⁴ *Ibid.* para. 159.

⁶⁵ *Azurix Corp. v. Argentine Republic* (Award) ICSID Case ARB/01/12 (ICSID, 2006, Rigo Sureda A, Lalonde & Martins).

⁶⁶ *Feldman v. Mexico* 7 ICSID Rep 341, 370 (NAFTA/ICSID (AF), 2002, Kerameus K, Covarrubias Bravo & Gantz).

186. After having given due consideration to all the arguments brought forward by the parties, the Tribunal concludes that in this case it has no jurisdiction under Article 4.2 of the Treaty.

G. Breach of Article 9.2 of the Treaty: Failure to Observe Obligations

Toto's Position

187. Toto claims that the Tribunal moreover has jurisdiction over what it considers to be Lebanon's breaches of Article 9.2 of the Treaty, i.e., the "observance of obligations" clause, which states: "[e]ach Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party." Article 9.2 is commonly called an "umbrella clause" as it may provide an "umbrella" to cover all obligations and bring them within the ambit of the treaty-protection.

Lebanon's Position

188. Lebanon submits that in the presence of an agreed contractual forum selection clause, the "observance of obligation clause" (Article 9.2 of the Treaty) does not elevate contract claims to treaty claims falling within the jurisdiction of ICSID.

Tribunal's Decision

189. The question that arises for this Tribunal, then, is what actions and/or omissions of Lebanon, if any, could constitute a violation of Article 9.2 and therefore fall within the scope of the Tribunal's jurisdiction.

190. The Tribunal will address this question keeping in mind that it already has determined that the CEPG and the CDR are considered to be public entities of the Republic of Lebanon ("*personnes morales de droit public*"). Indeed, it is only when Lebanon can be held liable for acts of the CEPG and the CDR, that the question becomes relevant.

191. Besides the specific commitments, contained in Articles 2 to 5 of the Treaty, in Article 9.2 of the Treaty, Lebanon has undertaken to "*observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party.*" Lebanon has thus undoubtedly assumed all its obligations as a sovereign authority under international law.

However, does Article 9.2 also imply that the Treaty obliges Lebanon to observe any and all obligations it has assumed with regard to Toto's investments in its territory, whatever their nature, including also ordinary contractual obligations assumed by the CEPG and the CDR?

192. To respond to such question, and determine the intent of the parties with respect to the scope of Article 9.2, it is relevant to review the standard wording of similar umbrella clauses in other investment treaties and to consider their interpretation by other Tribunals.

193. In some instances, it can be inferred from the wording of the umbrella clause that it encompasses obligations arising from the Treaty as well as obligations arising from the contract. The Tribunal in *S.G.S v. Philippines* had to interpret the following umbrella clause from the Bilateral Investment Treaty between the Philippines and the United Kingdom: “[e]ach party shall observe any obligation arising from a particular commitment it may have entered into with regards to specific investment.” (Article VII)

194. The Tribunal found that the parties' intent to cover all their contractual obligations, including ordinary contractual obligations that do not involve any use of “*puissance publique*” transpired from the wording of the contract, and particularly from the use of the terms “particular commitment” and “specific investment.” Consequently it held that it had jurisdiction with respect to contractual obligations by stating:⁶⁷ “*To summarize the Tribunal's conclusions on this point, Article X(2) makes it a breach of the BIT for the host state to fail to observe binding commitments including contractual commitments, which it has assumed with regard to specific investments [...]*”

195. Other umbrella clauses were drafted in more general terms and leave room for interpretation. For instance, the Investment Treaty between the United Kingdom and Peru states: “[e]ach contracting party shall observe any obligation it may have entered into with regard to investments of investors of the other contracting party.” (Article 3(1)). This clause is only slightly different in terms from Article 9.2 of the Investment Treaty between Lebanon and Italy: “[e]ach Contracting party shall observe any other obligation it has assumed with regards to investments in his territory by investors of other Contracting Party.”

⁶⁷ ICSID case no. ARB/02/6, Decision on jurisdiction dated January 29, 2004, paragraph 128.

196. These clauses, which must be interpreted in accordance with the objectives sought by the parties in line with the customary rules of interpretation of treaties in public international law, have been interpreted in different ways.

197. One interpretation held that such clauses are operative only when the parties have clearly expressed their intent to consider breaches of contract as breaches of the Treaty. This was the case of the Tribunal in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*.⁶⁸ The Tribunal had to interpret the umbrella clause in the Investment Treaty between Switzerland and Pakistan that states: “[e]ither contracting party shall constantly guarantee the observance of commitments it has entered into with respect to the investments of the investors of the contracting party” (Article 11). The Tribunal stated first its canon for interpretation: “A Treaty interpreter must of course seek to give effect to the object and purpose projected by that Article and by the BIT as a whole. That object and purpose must be ascertained, in the first instance, from the text itself of Article 11 and the rest of the BIT.” It found:

*[a]pplying these familiar norms of customary international law on Treaty interpretation, we do not find a convincing basis for accepting the Claimant’s contention that Article 11 of the BIT has had the effect of entitling a Contracting Party’s investor, like SGS, in the face of a valid forum selection contract clause, to “elevate” its claims grounded solely in a contract with another Contracting Party, like the PSI Agreement, to claims grounded on the Treaty, and accordingly to bring such contract claims to this Tribunal for resolution and decision.*⁶⁹

Because no evidence was submitted that the contracting parties intended to extend the scope of application of the umbrella clause, the Tribunal asserted that the clause was restricted to the liability of the State in pursuance of the substantial provisions of the Investment Treaty and could not be extended to the liability ensued from the contract.

198. Other Tribunals limited the protection of umbrella clauses to actions taken by the State in the exercise of its sovereign authority. This was the case of the decision of *El Paso Energy*

⁶⁸ ICSID case no. ARB/01/13, Decision dated August 6, 2003 on jurisdiction.

⁶⁹ Paragraph no. 165 of the Decision.

International Company v. Argentina,⁷⁰ that has categorically confirmed that the umbrella clause, even if drafted as broadly as possible, will only confer jurisdiction to the Tribunal on the basis of the Treaty when the State is acting in its capacity as a sovereign authority.

199. A third view considers that umbrella clauses transform all contractual claims into treaty claims. This was the case of the Decision in *Noble Ventures Inc. v. Romania*.⁷¹

200. A fourth view held that umbrella clauses may form the basis for treaty claims, without transforming contractual claims into treaty claims. Such view is described by Professor James Crawford who states

*Finally, there is the view that an umbrella clause is operative and may form the basis for a substantive treaty claim, but that it does not convert a contractual claim into a treaty claim. On the one hand it provides, or at least may provide, a basis for a treaty claim even if the BIT in question contains not generic claims clause; on the other hand, the umbrella clause does not change the proper law of the contract or its legal incidents, including provisions for dispute settlement.*⁷²

201. Taking into consideration the spirit and purpose of the Treaty in the matter at hand, the Tribunal espouses the fourth view. That view best conforms with the unqualified commitment assumed by Lebanon to comply with “any other obligation it has assumed” as well as with the fourth paragraph of the Preamble to the Treaty which confirms the importance of the “contractual protection” of investments – again without further qualification. Moreover, when the Treaty provides for submission of disputes to Lebanese courts in its Article 7.2.a, these national courts in any event will decide the dispute in accordance with national contract law. Article 7 does not provide for the application of international law by national courts as it does for the two other options: for claims submitted to ICSID arbitration (Article 7.2.b indirectly by referring to the ICSID Convention Article 41 of which is considered to provide for the application of international law; and for claims submitted to an *ad hoc* arbitral tribunal, directly by Article 7.3 of the Treaty).

⁷⁰ ICSID case no. ARB/03/15, Decision on jurisdiction dated April 27, 2006.

⁷¹ ICSID Case no. ARB/01/11, dated October 12, 2005, paras 46-62.

⁷² “*Treaty and Contract in investment Arbitration*”, *Arbitration International*, Vol. 24, no. 3 (2008), pp. 351-374.

202. Although Article 9.2 of the Treaty may be used as a mechanism for the enforcement of claims, it does not elevate pure contractual claims into treaty claims. The contractual claims remain based upon the contract; they are governed by the law of the contract and may be affected by the other provisions of the contract. In the case at hand that implies that they remain subject to the contractual jurisdiction clause and have to be submitted exclusively to the Lebanese courts for settlement. Because of this jurisdiction clause in favor of Lebanese courts, the Tribunal has no jurisdiction over the contractual claims arising from the contract referring disputes to Lebanese courts. As in the case of *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*,⁷³ the Tribunal does not see a reason in the case at hand and

*in the face of a valid forum selection contract clause, to “elevate” its claims grounded solely in a contract with another Contracting Party . . . to claims grounded on the Treaty, and accordingly to bring such contract claims to this Tribunal for resolution and decision.*⁷⁴

H. The Fork in the Road – Contractual Claims

203. The Treaty includes a so-called “fork-in-the-road” clause in Article 7.2:

If these consultations do not result in a solution within six months from the date of written request for settlement, the investor may submit the dispute, at his choice, for settlement to:

- (a) the competent court of the Contracting Party in the territory of which the investment has been made; or*
- (b) the International Center for the Settlement of Investment Disputes (ICSID) provided for by the Convention on the Settlement of Investment Disputes between States and Nationals of the other States, opened for signature at Washington, on March 18, 1965, in case both Contracting Parties have become members of this Convention; or*

⁷³ ICSID case no. ARB/01/13, Decision dated August 6, 2003 on jurisdiction.

⁷⁴ Paragraph no. 165 of the Decision.

- (c) *an ad hoc tribunal which, unless otherwise agreed by the Parties to the dispute, shall be established under the arbitration rules of the United Nations Commission of International Trade Law (UNCITRAL).*

The choice made as per subparagraphs a, b, and c herein above is final.

204. The Contract between the CEPG and Toto includes in Article V.01, paragraph 2 of the *Cahier des Charges Particulières - Cahier des Clauses Juridiques et Administratives*, the following dispute resolution clause: “[l]es tribunaux libanais sont seuls compétents pour régler les litiges au cours de l’exécution de l’adjudication ou en application du cahier des charges.”

On the basis of such jurisdiction clause, Toto has initiated two different proceedings before the Lebanese *Conseil d’Etat*.

Lebanon’s Position

205. Lebanon argues that the Tribunal lacks jurisdiction over the claims already submitted to the *Conseil d’Etat* because Article 7.2 of the Treaty gives the Claimant the option of submitting claims either to the host State’s domestic courts (*in casu Conseil d’Etat*) or to international arbitration (ICSID), but not to both. Even assuming *arguendo* that these claims amount to Treaty claims (which Lebanon firmly rejects, considering them to be purely contractual in nature), the fork-in-the-road clause would bar Toto from submitting these Treaty claims to ICSID.

206. For Lebanon, the claims submitted to both the *Conseil d’Etat* and ICSID have the same aim of obtaining compensation for extra costs incurred in the execution of the Contract. If the Tribunal were to decide that it has jurisdiction to hear this case, the parallel proceedings could result in “conflicting, contradictory and more importantly, unenforceable decisions.”

207. It would be “unreasonable” and “against the wording and spirit” of Article 7.2 of the Treaty to allow Toto to submit some of its claims to the *Conseil d’Etat* and some to ICSID. The fork-in-the-road principle, i.e., “*electa una via, non datur recursus ad alteram*,” belongs to the essence of the Treaty. Some ICSID awards have considered the principle as reflecting a public policy of the host State.

Toto's Position

208. For Toto, the claims brought before the Tribunal are different from those brought before the *Conseil d'Etat*: the cases pending before the *Conseil d'Etat* relate to breaches of the Contract, while the claims submitted before the Tribunal relate to breaches of the Treaty. The prejudice suffered because of the alleged breach of the Treaty is of a different nature and goes far beyond the two cases submitted to the *Conseil d'Etat*. As stated in *CMS v. Argentina*: “as contractual claims are different from Treaty claims, even if there had been or there currently was a recourse to the local courts from breach of contract, this would not have prevented submissions of the Treaty claims to arbitration.”⁷⁵

209. The fork-in-the-road clause of Article 7 can only bar submission of Treaty claims to an international forum if those claims have already been submitted to the domestic courts. In the present proceeding, Toto chose “without any hesitation” to submit its Treaty claims (failure to protect its investment and denial of justice) to an ICSID arbitration tribunal and it clearly stated its intention to do so in its letter to the Chairman of the CDR of June 30, 2004.

210. Toto's position is supported by *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic* and by *Vivendi v. Argentine Republic*. Moreover, as Panels in *M.C.I. Power Group L.G. and New Turbine v. Ecuador* and *Vivendi v. Argentine Republic* indicated: “having recourse to a domestic forum for breaches of contract does not involve exercising the right to choose an alternative under the BIT, unless the claim in the domestic forum is based on breach of the BIT.”

Tribunal's Decision

211. The fork-in-the road clause in Article 7 of the Treaty does not take away jurisdiction from the Tribunal over Treaty claims. In order for a fork-in-the-road clause to preclude claims from being considered by the Tribunal, the Tribunal has to consider whether the same claim is “on a different road,” i.e., that a claim with the same object, parties and cause of action, is

⁷⁵ *CMS Gas Transmission Company v. the Republic of Argentina* (Case No. ARB/01/8), Decision of the Tribunal on Objections to Jurisdiction of July 17, 2003, 42 ILM 800, para. 80. This case is quoted in *Azurix Corp. v. The Argentine Republic* (Case No. ARB/01/12), Decision on Jurisdiction, 8 December 2003, para. 89.

already brought before a different judicial forum. Contractual claims arising out of the Contract do not have the same cause of action as Treaty claims.

212. Consequently, the fact that Toto has brought two contract claims before the *Conseil d'Etat* does not restrict Toto's right to submit its Treaty claims to the Tribunal. This Tribunal hereby refers to *CMS v. Argentine*, also cited by Toto and to *Genin v. Estonia*, in which the Tribunal concluded: “[a]lthough certain aspects of the facts that gave rise to this dispute were also at issue in the Estonian litigation, the ‘investment dispute’ itself was not, and the Claimant should not therefore be banned from using the ICSID arbitration mechanism.”⁷⁶

I. Fork in the Road – Treaty Claims

213. Moreover the contractual jurisdiction clause, which has given rise to the proceedings before the *Conseil d'Etat*, cannot exclude the jurisdiction of the Tribunal for claims based upon Articles 2, 3 and 4 of the Treaty (see, e.g. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*;⁷⁷ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*.⁷⁸ As the ad hoc Committee in *Vivendi v. Argentina* has stated clearly:

*Where “the fundamental basis of the claim” is a Treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or its subdivisions cannot operate as a bar to the application of the Treaty standard. At most, it might be relevant - as municipal law will often be relevant - in assessing whether there has been a breach of the Treaty.*⁷⁹

214. The contractual jurisdiction clause and the Treaty jurisdiction clause are not mutually exclusive clauses. The contractual jurisdiction clause provided for in the Contract applies to actions and matters that are violations of the Contract; the Treaty jurisdiction clause applies to actions and matters that constitute violations of the substantive Treaty provisions even if the

⁷⁶ *Genin Eastern Credit Ltd. and AS Baltoil v. Republic of Estonia* (Award), 2001, 6 ICSID Rep 236, 292.

⁷⁷ ICSID case no. ARB/00/04, Decision dated 23 July 2001, para. 27.

⁷⁸ ICSID case no. ARB/01/13, Decision dated August 6, 2003 on jurisdiction, para. 54.

⁷⁹ ICSID case no. ARB/97/3, Decision dated July 3, 2002, para. 101..

same actions and matters may give rise to breach of contract.⁸⁰ It must also be noted that contractual claims founded on the investment contract do not have the same cause of action as the Treaty claims.

215. When the State acts in the context of the performance of the contract as a “*puissance publique*,” a violation of the Contract would also constitute a violation of the Treaty, and the Tribunal will have jurisdiction for disputes arising from such violations. When the State acts as an ordinary employer, the contractual jurisdiction clause will be fully operative, and the Tribunal will have no jurisdiction.

216. In *SGS v. Pakistan*, the Tribunal, having examined the effect of a dispute resolution clause, stated:

*from that description alone [of the factual subject matter], without more, we believe that no implication necessarily arises that both BIT and purely contractual claims are intended to be covered by the Contracting Parties in Article 9 [the dispute resolution clause]. Neither, accordingly, does an implication arise that the Article 9 dispute settlement mechanism would supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements [...] thus we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this Tribunal with jurisdiction over claims resting ex hypothesi exclusively on contract.*⁸¹

217. Based on the foregoing, it can be said that the Contract’s jurisdiction clause does not affect the Tribunal’s jurisdiction over Treaty claims since the Contract’s jurisdiction clause covers only contractual matters and does not extend to Treaty matters. In the presence of a

⁸⁰ Ibrahim Fadlallah comments in “*La distinction « Treaty claims – contract claims » et la compétence de l’arbitre Cirdi: faisons nous fausse route ?* », *Chronique Arbitrage et Investissements Internationaux – Gazette du Palais*, December 5 to 7, 2004, p. 3612, *et seq.*, as follows:

« II-La concurrence d’une clause attributive de juridiction dans le contrat :

Lorsque le contrat prévoit une clause attributive de juridiction à un arbitre étranger au Cirdi ou aux tribunaux étatiques, la jurisprudence dominante donne effet à cette clause au détriment de l’arbitre Cirdi. Mais elle limite la compétence du juge désigné aux litiges purement contractuels ».

It is in that sense that the Tribunal gave in *Joy Mining Machinery v. Egypt* ICSID ARB/03/11) full effect to the contractual jurisdiction clause for a dispute concerning an ordinary contractual obligation (performance bond) when there is no violation of the Treaty.

⁸¹ ICSID case no. ARB/01/13, Decision dated August 6, 2003 on jurisdiction, para no. 161.

contractual jurisdiction clause, the Tribunal will not have jurisdiction with respect to claims for actions that are only contract violations and are not at the same time Treaty violations. However, when such actions are breaches of the contract and also violations of the Treaty, the Tribunal will have jurisdiction notwithstanding the Contract's jurisdiction clause.

J. Stay of Proceedings.

Lebanon's Position

218. Lebanon finally has argued – with reference to *SGS v. Philippines*, that the Tribunal should in all events stay its proceedings to allow the *Conseil d'Etat*, the jurisdiction chosen in the Contract, to decide on disputes about the breaches of contract.

Toto's Position

219. Toto requested the Tribunal not to stay the proceedings as these proceedings concern breaches of the Treaty and not of the Contract.

Tribunal's Decision

220. The Tribunal deems it improper to stay its proceedings, which only concern breaches of the Treaty. It has indicated that it will not deal with the specific facts underlying the two claims submitted before the *Conseil d'Etat*. Besides, as no other contractual claims have presently been introduced, the settlement of these claims, if ever introduced before the *Conseil d'Etat*, could take a substantial period of time. Even for mere reasons of expediency, the Tribunal cannot suspend its proceedings for such a substantial period waiting for judgments which, although indirectly related to some facts which are also the basis of Treaty claims before this Tribunal, have a completely different scope and cause of action. In the event the Lebanese *Conseil d'Etat* will have to decide on the contract claims at a later moment, the Tribunal expects that the *Conseil d'Etat* will take into account this Tribunal's decision with regard to the Treaty claims, whenever this would be appropriate.

V. DECISION

IN VIEW OF THE ABOVE, THE TRIBUNAL HEREBY DECIDES AS FOLLOWS:

- 1) The *Conseil Exécutif des Grands Projets* and the *Council for Reconstruction and Development* are public legal entities whose actions are attributable to the Republic of Lebanon;
- 2) Toto's project meets the requirements to be considered as an "investment" under the Treaty as well as under the ICSID Convention;
- 3) The Tribunal has jurisdiction over the dispute *ratione temporis* under Article 7.2.b and Article 10 of the Treaty as the dispute has arisen on June 30, 2004, i.e., after the Treaty entered into force;
- 4) The Tribunal has jurisdiction to decide the dispute pursuant to the ICSID Convention, the ICSID Arbitration Rules and the Treaty rules;
- 5) Subject to the Tribunal's considerations, stated above, the Tribunal has jurisdiction to decide whether (i) the delay in expropriation, (ii) the failure to remove Syrian troops and (iii) the changes in the regulatory framework, constitute breaches of Article 2 and/or Article 3.1 of the Treaty;
- 6) The Tribunal has no jurisdiction with respect to the following claims:
 - a) Erroneous Instructions and Design as breaches of Article 2 and Article 3.1 of the Treaty;
 - b) Disruption of negotiations as breach of Article 3.1 of the Treaty;
 - c) Delays in two law suits before the *Conseil d'Etat* as breach of Article 3.1 of the Treaty;
 - d) Lack of Transparency in the proceedings before the *Conseil d'Etat* as breach of Article 3.1 of the Treaty; and

- e) Indirect expropriation as breach of Article 4.2 of the Treaty.
- 7) With regard to Article 9.2 of the Treaty, and in the presence of a jurisdiction clause in the Contract, the Tribunal has no jurisdiction with respect to breaches to the extent they are violations of the Contract;
- 8) The Tribunal has jurisdiction to decide over breaches of Articles 2, 3 and 4 of the Treaty, its jurisdiction thereover not being affected by Article 7.2 of the Treaty; and
- 9) The Tribunal deems it improper to stay the proceedings because of the proceedings already pending before the *Conseil d'Etat* as the Tribunal will not deal with matters covered by these proceedings.
- 10) The decision of the Tribunal with respect to the party who will bear the legal costs and the costs and expenses of the arbitration, and in what proportion, will be included in the final award.

[signed]

Mr. Alberto Feliciani
Arbitrator

[September 7, 2009]

Date: _____

[signed]

Mr. Fadi Moghaizel
Arbitrator

[September 5, 2009]

Date: _____

By signature of this decision Mr. Alberto Feliciani confirms that he voted in favor of Chapters I,II, III, and IV (limited to A,B,C,H,I,J) while he dissents in several respects on the other parts of the decision.

[signed]

Prof. Hans van Houtte
President

[September 8, 2009]

Date: _____