



Issue : Vol. 2 - issue 1
Published : January 2005

Transnational Dispute Management

transnational-dispute-management.com

Case Summary - Salini Costruttori S.p.A. and Italstrade S.p.A.-v- The Hashemite Kingdom of Jordan (ICSID Case No. ARB/02/13) by J. Gaffney

About TDM

TDM (Transnational Dispute Management): Focussing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates,

Open to all to read and to contribute

Our aim is for TDM to become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

Please contact **Editor-in-Chief** Thomas Wälde at twwalde@aol.com if you would like to participate in this global network: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

Editor-in-Chief
Thomas W. Wälde
twwalde@aol.com
Professor & Jean-Monnet Chair
CEPMLP/Dundee and Principal
Thomas Wälde & Associates

© Copyright TDM 2004
TDM Cover v1.0

Case Summary

Salini Costruttori S.p.A. and Italstrade S.p.A.-v- The Hashemite Kingdom of Jordan (ICSID Case No. ARB/02/13)

John P. Gaffney *

1. Introduction

On 29 November 2004 an ICSID Tribunal gave its Decision on Jurisdiction in the above-referenced proceedings. The Tribunal considered the scope of its jurisdiction to hear contractual and treaty claims on the basis of a bilateral investment treaty concluded between Italy and Jordan. In doing so, it addressed a number of important matters, including the definition of “an entity of a State”, the extent to which a most favoured nation clause may apply to dispute resolution procedures,¹ the role of “umbrella clauses” in elevating contract claims to treaty claims,² and indeed its jurisdiction to hear contract claims and treaty claims and the relationship between the two types of claims.³ The Tribunal also tackled the issue of the extent to which parties are required at a jurisdictional stage to provide evidence to support their claims. The purpose of this note is to summarise the Decision and to briefly comment on some of the issues considered by the Tribunal.

2 Background

In November 1993, two Italian companies, Salini Costruttori S.p.A. and Italstrade S.p.A. (“Claimants”), were awarded the contract (“Contract”) for the construction of the Karameh Dam Project in Jordan. The Contract was signed between the Claimants (as Contractor) and the Ministry of Water and Irrigation – Jordan Valley Authority (as Employer). The work was completed in October 1997, as certified by the Engineer appointed by the Employer.

In April 1999, the Claimants submitted a draft final statement setting out the amount claimed to be due to them which was equivalent to approximately US\$28,000,000, net of interest and financing charges. In May 1999, the Engineer for the Respondent informed the Claimants that they were only entitled to the equivalent of US\$49,140. A series of meetings and exchanges of correspondence followed. On 20 February 2000, a meeting took place in Amman between the Italian Prime Minister and Minister for Foreign Trade, and the Jordanian Prime Minister and Minister of Water and Irrigation. It was alleged by the Claimants that the Jordanian Prime Minister agreed to endeavour to reach agreement with them on determining the amount owing to them, failing which any outstanding matter would be referred to arbitration pursuant to dispute resolution provisions of the Contract. Later that year the Claimants received a letter

* Partner, O’Flynn Exhams, Cork, Ireland.

¹ See generally J. Kurtz, “The MFN Standard and Foreign Investment: An Uneasy Fit?”, *Journal of World Investment and Trade* 2005.

² See generally T. Wälde, “The ‘Umbrella’ (or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration: A Comment on Original and Recent Cases”, *Arbitration International* 2005 (forthcoming).

³ See generally B. Cremades, “Clarifying the Relationship Between Contract and Treaty Claims in Investor – State Arbitrations” in: N. Horn (Ed.), *Investment Arbitration* (2004) (forthcoming).

asserting that the Employer was not prepared to make any further payments in excess of that amount certified by its Engineer.

By letter dated 12 December 2001, the Claimants advised Jordan (“Respondent”) that it was in breach of the Bilateral Investment Treaty (“BIT”) concluded between Italy and Jordan and that if no amicable settlement was reached, they would refer the dispute to ICSID for a final settlement, pursuant to Article 9(3)(b) of the BIT. The Claimants submitted a Request for Arbitration to ICSID, dated 8 August 2002, against the Respondent. A Tribunal was appointed comprising of H.E. Judge Gilbert Guillaume (Presiding Arbitrator), Mr. Bernardo Cremades, Sir Ian Sinclair (Arbitrators). It was agreed between the Tribunal and the parties that the matter of jurisdiction should be determined first.

3. Arguments by parties regarding jurisdiction

The Claimants argued in favour of jurisdiction of the Tribunal to hear their claims against the Respondent for payment under the Contract on the basis that the four conditions specified by Article 25(1) of the ICSID Convention were fulfilled.⁴

The Claimants based their claims for jurisdiction on the BIT, particularly Article 9(3) (a dispute resolution clause),⁵ Article 2 (an alleged, so-called “umbrella clause”),⁶ and

⁴ Article 25(1) provides that the prerequisites for jurisdiction are that: (i) the dispute is of a legal nature; (ii) the dispute arises directly out of an investment; (iii) the parties to the dispute are a Contracting State and a national or nationals of another Contracting State; (iv) the parties have expressed in writing their consent to submit the dispute to ICSID.

⁵ The relevant provisions of Article 9 read, as follows:

1. *Any disputes which may arise between one of the Contracting Parties and the investors of the other Contracting Party on investments, including disputes relating to the amount of compensation, shall be settled amicably, as far as possible.*

2. *In the case the investor and an entity of the Contracting Parties have stipulated an investment Agreement, the procedure foreseen in such investment Agreement shall apply.*⁵

3. *In the event that such dispute cannot be settled amicably within six months from the date of the written application for settlement, the investor in question may submit at his choice the dispute for settlement to:*

(a) *The Contracting Party’s Court having territorial jurisdiction;*

(b) *The International Centre for the Settlement of Investments Disputes (the Centre);*

[...]”

⁶ The relevant provisions of Article 2 read, as follows:

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

5. *Each Contracting Party or its designated Agency may stipulate with an investor of the other Contracting Party an investment agreement which would govern the specific legal relationship related to the investment of the investor concerned.*

Article 3 (a most favoured nation clause)⁷ (in combination with the Jordan-United States of America Bilateral Investment Treaty, which contained more favourable dispute resolution provisions than those contained in the BIT). On these bases of jurisdiction the Claimants alleged the Respondent had failed to honour its commitments under the Contract and, furthermore, its acts and omissions constituted a violation of several provisions of the BIT providing for, *inter alia*, the prohibition of unjustified or discriminatory measures, just and fair treatment of investments, and the compliance in good faith of all undertakings assumed with regard to each specific investor. It was claimed that such acts and omissions had an effect equivalent to expropriation under the BIT for which compensation was due.

The Respondent objected to jurisdiction on the grounds that it had not “consented in writing” within the meaning of Article 25(1). It argued that the claims concerned a contractual dispute and that Jordan and Italy had agreed pursuant to Article 9(2) of the BIT that contractual claims were to be governed by the dispute resolution procedures in the Contract, which did not provide for ICSID arbitration, insofar as the Contract could be regarded as an “investment Agreement” for the purpose of the BIT. Article 9(2) meant that Claimants could not rely on Article 9(3) to establish jurisdiction. Moreover, the Respondent argued that the Claimants could not rely on Article 3 to avail themselves a more advantageous dispute settlement provisions in bilateral investment treaties between Jordan and third states. Finally, the Respondent argued in the alternative that if the Tribunal found that the Claimant’s rights under the Contract were not an “investment” within the meaning of the BIT, it followed that the Contract was not an “investment Agreement” in the meaning of the BIT, the dispute did not therefore arise “directly out of an investment” and, accordingly, the Tribunal had no jurisdiction under Article 25(1) of the ICSID Convention.

4. Decision of the Tribunal

The Tribunal’s decision may be summarised under the following headings:

(a) Whether Article 9(2) of the BIT excluded the jurisdiction of the Tribunal

The Tribunal found that the Jordan Valley Authority (“JVA”), one of the signatories to the Contract, was an autonomous corporate body distinct legally and financially from the Respondent and was thus to be considered as “an entity of” the Respondent within the meaning of Article 9(2). The Tribunal also found that the Contract was signed by and on behalf of the JVA (as Employer) and was implemented as a JVA Contract. The Tribunal found that an “investment Agreement” was concluded between the JVA and the Claimants within the meaning of Article 9(2) and, therefore, the dispute settlement procedures stipulated in the Contract applied.

⁷ The relevant provisions of Article 3 read, as follows:

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

The Tribunal considered the arguments of the parties concerning the consequences to be drawn from such a conclusion. It considered in particular whether Article 9(2) served to exclude the jurisdiction of the Tribunal to hear contractual claims. The Tribunal concluded that all contractual claims were required under Article 9(2) to be submitted to the procedure stipulated in the Contract, which did not provide for ICSID arbitration.

The Tribunal also concluded that Article 9(2) did not deprive the Tribunal of jurisdiction under other provisions of the BIT to entertain treaty claims alleging breaches of the BIT.

(b) Applicability of Articles 9(1) and 9(3) to contractual claims

The Tribunal considered the arguments of the parties concerning whether Articles 9(1) and 9(3) should apply, not only to treaty claims, but also to any contractual claims arising between a Contracting Party and an investor of the other Contracting Party. In support of their arguments in favour of such an interpretation, the Claimants had relied on, *inter alia*, the decision of another ICSID Tribunal in *SGS –v- Philippines*.⁸ The Respondent opposed such arguments on the basis of an earlier decision of another ICSID Tribunal in *SGS –v- Pakistan*.⁹

The Tribunal noted that ICSID Tribunals had taken diverse positions on this issue, but observed that it did not arise in this instance. The Contract was entered into between the Claimants and an entity of the Respondent, which was legally distinct from that of the Respondent. Considering that Article 9(2) made it obligatory to refer disputes between the Claimants and an entity of the Respondent to the dispute settlement mechanisms provided for in the Contract, it thus excluded recourse to the procedure set forth in Article 9(3) for such disputes.

The Tribunal was not then required to decide on the issue of whether Articles 9(1) and 9(3), taken in isolation, could cover the contractual disputes at issue in this instance. Nonetheless, it did observe:

*“Now, one may doubt whether Articles 9(1) and 9(3) also cover breaches of a contract concluded in name between an investor and an entity other than a State Party, and the Tribunal observes that several ICSID tribunals have already handed down decisions against such extensions of jurisdiction.”*¹⁰

(c) Article 3 of the BIT as an alternative ground for jurisdiction

The Tribunal next considered whether the Claimant’s argument that Article 3 of the BIT, which contained a most favoured nation clause, could establish a subsidiary or alternative ground for ICSID jurisdiction over contractual claims. The Tribunal reviewed relevant jurisprudence, including the *Ambatielos*¹¹ and *Maffezini*¹² cases.

⁸ ICSID Case No. ARB/02/6

⁹ ICSID Case No. ARB/01/13

¹⁰ Paragraph 100. The decisions cited by the Tribunal included *Salini –v- Morocco* (ICSID Case No. ARB/00/06) and *Consortium RFCC –v- Morocco* (ICSID Case No. ARB/00/06).

¹¹ Judgement on the Merits of 19 May, 1963, I.C.J. Reports 1953, page 10.

The Tribunal noted that in each of these cases the most favoured nation clause referred to “all rights” contained in the agreement or to “all matters” subject to the agreement. In each case, the relevant Tribunal endeavoured to ascertain the intention of the parties by reference to, *inter alia*, the practice and policies adopted by the State parties in determining whether such a clause might extend to dispute settlement procedures.

The Tribunal distinguished the present case from the *Ambatielos* and *Maffezini* cases on the basis that Article 3 did not extend to “all rights” or “all matters”, as referenced in the most favoured nation clauses in those cases. Moreover, it noted that “Claimants had submitted nothing from which it *might* be established that the common intention of the Parties was to have the most favoured nation clause applied to dispute settlement”.¹³ Instead it found that Article 9(2) expressly excluded contractual disputes from ICSID jurisdiction. The Tribunal noted that Claimants did not cite any State practice of either Contracting State to support their claim. It therefore concluded that Article 3 did not apply insofar as disputes resolution clauses were concerned and, consequently, any contractual dispute between the Claimants and an entity of the Respondent must be settled in accordance with Article 9(2), which excluded ICSID jurisdiction.

(d) *Whether the alleged “umbrella clause” of the BIT conferred jurisdiction*

The Tribunal considered the arguments of the Claimants that Article 2(4) of the BIT, taken together with Articles 2(5) and 11(2), constituted an “umbrella clause” which transformed contractual undertakings in international law obligations.¹⁴ To support its claim in this respect, the Claimants relied on *SGS –v- Philippines* while the Respondent relied on *SGS –v- Pakistan* to argue against the interpretation advanced by the Claimants.

The Tribunal considered the conclusions of the ICSID Tribunals in each of these cases, but observed that Article 2(4) was couched in terms that were “appreciably different” from the provisions applied in the arbitral decisions cited by the parties.¹⁵ The Tribunal noted that this provision did not commit each party to observe any obligations or guarantee the observance of the commitments each had entered into with respect to the investments of investors of the other Contracting Party, as the Philippines and Pakistan had agreed to in the *SGS* cases. The provision only committed each Contracting Party “to create and maintain a legal framework apt to the guarantee the compliance of all undertakings assumed with regard to each specific investor.”¹⁶ In this respect, the Tribunal observed:

“Of course, each State Party to the BIT between Italy and Jordan remains bound by its contractual obligations. However, this undertaking was not reiterated in the BIT. Therefore, these obligations remain purely contractual

¹² ICSID Case No. ARB/97/7.

¹³ Paragraph 117.

¹⁴ See above for the provisions of Articles 2(4) and 2(5). Article 11(2) provided that “[i]n case the host Contracting Party has not applied such treatment ...and investors suffered damage as a consequence thereof, the investor shall be entitled to a compensation of such damages”.

¹⁵ Paragraph 126.

¹⁶ *Ibid.*

in nature and any disputes regarding the said obligations must be resolved in accordance with the dispute settlement procedures foreseen in the contract. Contrary to what the Claimants argue, this is not at all an absurd solution: the State Parties to the BIT are still bound by their Treaty obligations as well as their contract obligations, but the dispute settlement procedures in each case are different.”¹⁷

(e) Treaty claims

The Tribunal considered the objections to its jurisdiction presented by the Respondent against the treaty claims submitted by the Claimants. The Respondent had submitted that the Request for Arbitration disclosed no arguable case that there had been any violation of the BIT and that the essential basis of the Request concerned a contractual dispute, which was to be determined in accordance with the dispute settlement provisions of the Contract.

Having reviewed some relevant international jurisprudence,¹⁸ the Tribunal concluded that it should not address the merits of the claims, but must satisfy itself that it had jurisdiction over the dispute as presented. In conformity with such jurisprudence, the Tribunal sought to determine, in the present case, whether the facts alleged by the Claimants, if established, were capable of coming within those provisions of the BIT invoked by the Claimants.

The Tribunal noted that the Claimants asserted that the Respondent failed to comply with the provisions of Article 2(3) seemingly on the basis that all the contractual breaches for which they held the JVA responsible must be regarded as constituting an unjust and unfair treatment by the Respondent within the meaning of that provision of the BIT. The Tribunal recalled that it did not have jurisdiction in respect of the contractual breaches and could entertain them only if the alleged breaches were simultaneously to constitute breaches of the BIT. The Tribunal concluded that as the Claimants had only cited the relevant provision of the BIT and asserted that these had been violated while at the same time presenting little or no argument that the alleged facts were capable of falling within the provisions of Article 2(3) it had no jurisdiction to consider this first treaty claim.

The Tribunal then considered the second treaty claim advanced by the Claimants. The Claimants maintained that the Prime Minister of Jordan had expressly agreed that, in the absence of an agreement between the parties, any outstanding matter would be referred for final settlement to arbitration in accordance with the Contract. They submitted that this commitment had not been fulfilled.

¹⁷ Paragraph 127. The Tribunal also dismissed the Claimant’s arguments that Articles 2(5) and (11) would lead to an interpretation different to that adopted by the Tribunal.

¹⁸ *E.g.*, *Ambatielos, Merits, Judgment*, I.C.J. Reports 1953, p. 18.); and *Oil Platforms (Islamic Republic of Iran v. United States of America)*, I.C.J. Reports 1996, II, p. 810. 16-17.

The Tribunal noted that the Claimants did not assert that there had been a breach of contract; rather, they claimed that the Respondent reneged on an undertaking it had given, although it was not contractually bound to give it. While it noted that the files submitted by the Claimants were lacking in terms of both facts and law (including the alleged practice of Jordan as regards resort to arbitration) the Tribunal expressed the belief that it must not rule out from the outset that the alleged facts, if established, might constitute breaches of Articles 2(3) and 2(4) of the BIT. Accordingly, it did not agree to uphold the objection to jurisdiction by Jordan to this second treaty claim.

(f) *Jurisdiction ratione temporis*

The Tribunal finally considered the issue of its jurisdiction *ratione temporis* only with regard to the second treaty claim relating to the alleged commitment of the Respondent to submit the dispute to arbitration. It noted that Articles 9(1) and 9(3) of the BIT only covered disputes arising after the entry into force of the BIT, that is to say, 17 January 2000. Considering that the alleged commitment of the Prime Minister of Jordan to submit the dispute arose well after this date, the Tribunal found it had jurisdiction *ratione temporis* to hear the treaty claim brought on this point by the Claimants.

However, the Tribunal did note in passing that one must distinguish carefully between jurisdiction *ratione temporis* of an ICSID Tribunal and the applicability *ratione temporis* of the substantive obligations contained in BIT. In this respect, it noted that the BIT did not give substantive provisions of the Treaty retrospective effect and also noted the provisions of Article 28 of the Vienna Convention which provides that the provisions of a treaty do not bind a party in relation to any acts or facts which take place or any situation which ceased to exist before the date of entry into force of such treaty.¹⁹

5. Comments

The Tribunal's decision in *Salini –v- Jordan* makes a further contribution to the evolving ICSID jurisprudence on a number of important issues, the definition of “an entity of a State”, the extent to which a most favoured nation clause may apply to dispute resolution procedures, the role of “umbrella clauses” in elevating contract claims to treaty claims and indeed its jurisdiction to hear contract claims and treaty claims generally, and the extent to which parties are required at a jurisdictional stage to provide evidence to support their claims. The following comments are offered in respect of some of these interesting and important issues:

(a) *Jurisdiction of ICSID tribunals to hear purely contract claims*

While it distinguished the facts of this case from those in the *SGS –v- Philippines* and *SGS –v- Pakistan* (on the basis that the Contract was concluded with a legally distinct entity from that of the Jordanian State), one is left with the distinct impression that the

¹⁹ See *SGS –v- Philippines*; and *Mondev International Limited –v- United States of America* (2002) – 6 ICSID Reports 192.

Tribunal did not favour extending the jurisdiction of ICSID Tribunals to hear purely contractual claims on the basis of dispute resolution clauses in the relevant bilateral investment treaties. The Tribunal's remarks are, of course, *obiter* given that on the facts of the case it was not required to reach a conclusion on this issue. It is suggested nonetheless that ICSID Tribunals will continue to be reluctant, save in exceptional circumstances, to extend their jurisdiction to purely contractual claims. However, as Cremades (writing on a personal capacity) has observed (commenting on the earlier *Vivendi* case),²⁰ the fact that an ICSID Tribunal may not have jurisdiction over purely contractual claims does not preclude its obligation to conduct an analysis of the parties' rights and obligations under the relevant contract where this is necessary "as a means to [the] end" of determining treaty claims in respect of which it enjoys jurisdiction. In the present case, the Tribunal discharged this duty in considering whether any of the contractual claims advanced by the Claimants could constitute a treaty claim in respect of which it enjoyed jurisdiction.²¹

(b) *The role of "umbrella" clauses in elevating contract claims to treaty claims*

The Tribunal's decision, whilst distinguishing the facts of this case from the *SGS –v- Philippines* and *SGS –v- Pakistan* cases (on the basis of the language of the alleged "umbrella clause" was appreciably different from the provisions considered in those cases) would appear from the approach adopted by the Tribunal, indicates a willingness on the part of that Tribunal to consider the extension of its jurisdiction to purely contractual claims on the basis of an "umbrella clause" by which the relevant State party commits itself to observe its contractual obligations or to guarantee the observance of such commitments.

It is submitted that this approach is to be preferred with each bilateral investment treaty being considered on its own terms to establish whether the relevant State Party intended to "elevate" the observance of contractual commitments to investors to a binding treaty commitment. That being said, it is suggested that ICSID Tribunals should be cautious in extending their jurisdiction in such circumstances in the absence of clear and unequivocal evidence of the intention of the State party to elevate contractual claims in this manner. The likelihood is that many State parties to bilateral investment treaties containing such "umbrella clauses" never foresaw or intended the consequences of such clauses, as suggested, for example, in *SGS –v- Pakistan*.

In a recent and very comprehensive study of the "original intention" of the drafters of the "umbrella" or *pacta sunt servanda* clauses,²² Professor Wälde notes that such a clause was originally introduced:

"in order to internationalise the protection of investment [...] contracts with governments against abusive governmental abrogation and interference by both substantive rules [...] and access to non-national international jurisdiction [...] the clause was formulated to counter legal arguments advocated by host states [...] that such contracts are exclusively subject to domestic law and to jurisdiction by domestic courts."

²⁰ *Compania de Aguas del Aconquija S.A. and Vivendi Universal –v- Argentine Republic* ICSID case no. ARB/97/3, A Decision on Annulment of 3 July 2002.

²¹ Cremades, footnote 3 *supra* at page 4.

²² Wälde footnote 2 *supra*.

Noting that the context has changed since in “several significant aspects”, such as the widespread use of such “umbrella” clause in modern investment treaty practice, the greater complexity of investment-related arrangements (involving a number of state and non state and private parties) and the change in investment treaties from an exclusively inter-governmental model to a mixed model where private claimants have the right to initiate and conduct arbitral litigation, the same commentator proposes a solution to the problems presented by such clauses, such as the proliferation of normal contract disputes for which treaty tribunals are not prepared. Wälde proposes:

“If the core or centre of gravity of the dispute is not about the exercise of governmental powers or reliance on governmental prerogatives and natural advantages, but about “normal” contract disputes, then the BIT and the umbrella clause have no role. Such disputes fall under whatever jurisdiction exists. It is only when state courts exercise such jurisdiction in a way that breaches a BIT that BIT discipline comes again into play – relying, for example, on the “denial of justice” and “due process” principles. Investment disciplines are essentially about abusive of state powers against foreign investors. If there is no state power and no abuse involved, they have no role to play.”

This proposed solution would involve a two-tier method of rebuttable presumptions: the involvement of entities that are state-controlled would suggest *prima facie* that the relation is coloured by the involvement of government; and secondly, the alleged misconduct or breach must also involve more than merely normal contractual non-performance. Wälde believes this approach has significant practical advantages over the more “fundamentalist” positions chosen by the claimant in tribunals in the two SGS cases, such that the opening for “an infinite number of normal contractual disputes” would be better controlled, while at the same time “not interpreting away or emasculating” the “umbrella” clause such as to allow governments to in effect force contractors to waive treaty protection if they would not forego the contract. It remains to be seen whether this proposed solution of Wälde will be adopted or at least inform the deliberations of future ICSID Tribunals.

(c) *Parties’ choice of forum*

Subject to the possibility of “umbrella clauses” elevating contractual claims to the status of treaty claims, the Tribunal’s decision would appear to emphasise that the parties’ choice of forum for resolving contractual disputes is likely to prevail. Unless such provisions provide for ICSID arbitration, jurisdiction will not be conferred in respect of such claims on an ICSID Tribunal.

(d) *Application of MFN clause to dispute settlement procedures*

The Tribunal expresses its concerns regarding the extension of the most favoured nation clauses to dispute settlement procedures on the basis such clauses may lead to the risk “treaty shopping”. In deciding on its jurisdiction in this respect, the Tribunal clearly required evidence of the intention of the relevant State party (to have a most favoured nation provisions applied to dispute settlement) on the basis of both the wording of the relevant provision itself and the relevant policy and practice adopted by the State party with regard to the treatment of its own investors abroad. In doing

so, the Tribunal in the present case advocated and adopted a more critical analysis than that adopted in previous cases, such as *Maffezini*. As one commentator has noted that while the *Maffezini* Tribunal was correct in holding that procedural proceedings (unless expressly exempted) should form part of the matters covered by the most favoured national clause, “*the Tribunal should have more fully undertaken a meaningful analysis of whether the difference between the arbitral proceedings and those of domestic Spanish courts does in fact provide “less favourable treatment”*. *This neglect is emblematic of a troubling tendency in many arbitral awards to undertake a lengthy analysis of the facts without a meaningful and contextual dialogue of the legal issues underlying these broad standards.*”²³ If the concerns expressed by the Tribunal in the present case are shared by subsequent ICSID Tribunals, it is likely that the scope of most favoured nation clauses will be interpreted very restrictively save in the absence of clear evidence to the contrary from both the text of the relevant treaty and the policy and practice of the relevant State party.

(e) *Substantiation of claims at jurisdictional stage*

Finally, the Tribunal expresses a willingness to consider contractual claims as treaty claims (see the comments by Cremades *supra*) from the point of view of determining its jurisdiction provided that the investor provides sufficient information to sustain the assertion that the facts underlying the contractual claim are capable of falling within the provisions of the relevant treaty provision on which jurisdiction is asserted. The Tribunal did not consider itself bound, however, to go into the merits of the claim itself.²⁴ The Tribunal’s decision underlines the importance for parties and their legal representatives to take care at a jurisdictional stage to substantiate their claims by reference to the relevant facts, and where applicable, State practice, rather than making assertions of a general nature in arguing for (and indeed objecting to) jurisdiction.

²³ Kurtz, footnote 1 *supra*, at page 32.

²⁴ That being said, in the present case, the obiter remarks of the Tribunal, concerning the one treaty claim in respect of which it was satisfied it had jurisdiction, would appear to have contained a preliminary view on the merits of such a claim (on the basis of the applicability *ratione temporis* of the relevant provisions of the BIT).