ICSID (INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES)

ICSID Case No. ARB/02/13

SALINI COSTRUTTORI S.P.A. AND ITALSTRADE S.P.A. V. HASHEMITE KINGDOM OF JORDAN

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AWARD

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31 January 2006

Tribunal:
Ian Sinclair (Appointed by the State)
Bernardo M. Cremades Sanz-Pastor (Appointed by the investor)
Gilbert Guillaume (President)

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A. Procedure

1 Procedure leading to Decision on Jurisdiction

1. On 12 August 2002, the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") received from Salini Costruttori S.p.A. and Italstrade S.p.A., both companies incorporated under the laws of Italy (the "Claimants"), a request for arbitration, dated 8 August 2002, against the Hashemite Kingdom of Jordan ("Jordan" or the "Respondent"). On 15 August 2002, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("the Institution Rules") acknowledged receipt of the request and on the same day transmitted a copy to the Hashemite Kingdom of Jordan and to its Embassy in Washington, DC.

2. On 30 September 2002, the Claimants filed a further submission concerning the Centre's jurisdiction over the dispute. The request was further supplemented by a letter of the Claimants dated 28 October 2002 responding to a letter from the Centre of 24 October 2002. The Centre also received several letters from the Secretary General of the Jordan Valley Authority, Ministry of Water and Irrigation, Jordan, urging that the request for arbitration not be registered for jurisdictional reasons. The Claimants also wrote to the Centre in response to those letters.

3. The request, as supplemented by the Claimants' letters of 30 September 2002, 28 October 2002 and 4 November 2002, was registered by the Centre on 7 November 2002, pursuant to Article 36(3) of the ICSID Convention. On the same day, the Secretary-General of ICSID, in accordance with Rule 7 of the Institution Rules, notified the Parties of the registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

4. Following that registration and invitation, the Respondent accepted a proposal by the Claimants that the Arbitral Tribunal be composed of three arbitrators, one appointed by each Party, and the third appointed by the two Party-appointed arbitrators.

5. The Claimants, by a letter of 20 January 2003, appointed Mr. Bernardo Cremades, a Spanish national, as arbitrator and the Respondent appointed Mr. Eric Schwartz, a national of the United States of America, as arbitrator. Counsel for the Claimants objected to the appointment of Mr. Schwartz, citing as a reason other cases involving one of the Claimants in which Mr. Schwartz had acted as opposing Counsel and noting that the appointment would be challenged if Mr. Schwartz were to accept. Both Mr. Cremades and Mr. Schwartz accepted their appointments.

6. Both Party-appointed arbitrators having failed to appoint a presiding arbitrator by the 14 February 2003 deadline agreed by the Parties, and more than 90 days having elapsed since the registration...
of the request for arbitration, the Claimants, by letter of 19 February 2003, requested the Chairman of the ICSID Administrative Council to appoint the presiding arbitrator, pursuant to Article 38 of the ICSID Convention.

7. On 10 March 2003, the Acting Chairman of the ICSID Administrative Council, in consultation with the Parties, appointed H.E. Judge Gilbert Guillaume of France as the presiding arbitrator and Judge Guillaume accepted his appointment.

8. All three arbitrators having accepted their appointments, the Centre, by a letter of 18 March 2003, informed the Parties of the constitution of the Tribunal, consisting of H.E. Judge Gilbert Guillaume, Mr. Bernardo Cremades and Mr. Eric Schwartz, and that the proceeding was deemed to have commenced on that day, pursuant to Rule 6(1) of the ICSID Arbitration Rules.

9. The first session of the Tribunal was scheduled to be held on 12 May 2003, but, on 8 April 2003, the Claimants filed a proposal for the disqualification of Mr. Eric Schwartz as an arbitrator pursuant to Article 57 of the ICSID Convention. The remainder of the proceeding was, therefore, pursuant to ICSID Arbitration Rule 9(6), suspended pending a decision on the proposal. Mr. Schwartz subsequently resigned his appointment and, on 28 May 2003, the Respondent appointed Sir Ian Sinclair, a national of the United Kingdom, to fill the vacancy created by the resignation of Mr. Schwartz. Upon the acceptance of the appointment by Sir Ian on 3 June 2003, the Tribunal was reconstituted and the proceeding was deemed to have recommenced on that date pursuant to ICSID Arbitration Rule 12.

10. The reconstituted Tribunal was presented with, and adopted, the agreement reached by the Parties on several issues of procedure at an informal meeting held in Paris on 12 May 2003. The Parties had agreed that the issue of jurisdiction should be determined first. The schedule for the submission of written pleadings on jurisdiction had also been agreed by the Parties.

11. The written submissions of the Parties on jurisdiction were filed in a timely manner as agreed by the Parties. The Respondent's Memorial on Jurisdiction was followed by the Claimants' Counter Memorial on Jurisdiction, followed by the Respondent's Reply and then the Claimants' Rejoinder.

12. In accordance with a schedule agreed after several exchanges of correspondence between the Tribunal and the Parties, and in consultation with the Centre, the hearing on jurisdiction was held at the offices of the World Bank in Paris, on 1 and 2 April 2004. The Parties were represented by their respective counsel who made presentations to the Tribunal. Present at the hearing were Members of the Tribunal: H.E. Judge Gilbert Guillaume, President, Mr. Bernardo Cremades and Sir Ian Sinclair, QC; Secretary of the Tribunal: Mr. Ucheora O. Onwuamaegbu of the ICSID Secretariat; Representatives of the Claimants: Professor Antonio Crivellaro (Counsel), Mr. Andrea Carlevaris (Counsel), Mr. Lorenzo Melchionda (Counsel), and Mr. Claudio Lautizi (Engineer, Salini Costruttori S.p.A.); and Representatives of the Respondent: Mr. Aiman Odeh (Counsel), Professor Philippe Sands, QC (Counsel), Ms. Nadine Khamis (Counsel) and an official of the Jordanian Embassy in Paris.

13. Following the hearing, Members of the Tribunal deliberated by various means of communication, including a meeting for deliberations in Paris on 24 May 2004.
14. On 29 November 2004, the Centre transmitted the Tribunal's Decision on Jurisdiction to the parties, with a corrected version being transmitted on 7 December 2004. Paragraph 179 of the Decision reads in part as follows:

"... the Tribunal unanimously:

(a) Decides that this Tribunal has jurisdiction over the Claimants' claims that Jordan, by refusing to accede to the Claimants' request to refer the dispute to arbitration pursuant to Article 67(3) of the Contract, breached Articles 2(3) and Article 2(4) of the Bilateral Investment Treaty concluded between Jordan and Italy on 21 July 1996;

(b) Decides that the Tribunal has no jurisdiction over the Claimants' other claims;

(c) Makes the necessary order for the continuation of the procedure pursuant to Arbitration rule 41(4); and

(d) Reserves all questions concerning the costs and expenses of the Tribunal and the costs of the Parties for subsequent determination."

15. A copy of the Tribunal's Decision on Jurisdiction is attached to the present Award as an integral part of such.

2 Procedure leading to award on merits

16. In the cover letter of 29 November 2004, transmitting the Decision on Jurisdiction to the Parties the Tribunal, through its Secretary, invited the Parties to confer and advise it of proposed dates and time limits for the further procedures in the case pursuant to ICSID Arbitration Rule 41(4).

17. By letter of 9 February 2005, the Claimants informed the Tribunal that they were "completing the examination of the file in order to check whether the available evidence allowed them to prosecute their case within the limits framed by the Tribunal with reasonable chances of success" and that they would revert to the Tribunal by the end of the month. By a letter of 22 March 2005, the Claimants requested the Tribunal to proceed to examine the merits of the case, and proposed that a period of about one month be allowed for the filing of each submission. The Claimants' further letter of 24 March 2005 communicated to the Tribunal an agreed schedule on which the Parties sought the Tribunal’s approval.

18. The Tribunal in its Procedural Order No. 1, of 6 April 2005, approved and set out time limits for submissions on the merits, as agreed by the Parties, as well as the dates for the hearing on the merits.

19. In line with the schedule agreed by the Parties and the Tribunal, the Claimants' Statement of Claim was filed on 9 May 2005; the Respondent filed its Counter Memorial on the merits on 13 June 2005; the Claimants filed their Reply on 5 July 2005; and the Respondent's Rejoinder was filed on 1 August 2005.

20. In a letter of 2 August 2005, the Respondent informed the Tribunal that it did not consider it
necessary that any witnesses attend the hearing, and the Claimants in their response dated 4 August 2005, while agreeing that the Tribunal may decide the case exclusively on the evidence so far provided, disagreed with the Respondent’s underlying reasoning for the absence of witnesses.

21. As agreed by the Parties, the hearing on the merits was held in Paris on 20 September 2005. The Parties were represented by their respective counsel who made presentations to the Tribunal. In attendance at the hearing were Members of the Tribunal: H.E. Judge Gilbert Guillaume, President, Mr. Bernardo Cremades and Sir Ian Sinclair, QC; Secretary to the Tribunal: Mr. Ucheora O. Onwumaegbu of the ICSID Secretariat; Representatives of the Claimants: Professor Antonio Crivellaro (Counsel), Mr. Andrea Carlevaris (Counsel), Mr. Lorenzo Melchionda (Counsel), and Mr. Richard Appuhn (Contracts Manager, Salini Costruttori S.p.A.); and Representatives of the Respondent: Mr. Aiman Odeh (Counsel), Professor Philippe Sands, QC (Counsel), Ms. Alison Macdonald (Counsel), and Ms. Nadine Khamis (Counsel). Full verbatim transcripts were made of the hearing and distributed to the Parties, as were cassettes of audio recording of the hearing.

22. Following the hearing, Members of the Tribunal deliberated by various means of communication, including a meeting in Paris on 21 September 2005; and on January 10, 2006, the Tribunal declared the proceeding closed pursuant to ICSID Arbitration Rule 38(1).

23. The Tribunal has taken into account all pleadings, documents and testimony in this case.

B. Submissions and arguments of the Parties

24. In their Statement of Claim dated 9 May 2005, Salini Costruttori S.p.A. and Italstrade S.p.A. recall that, on 15 November 2004, the Arbitral Tribunal decided that it “has jurisdiction over the Claimants’ claims that Jordan, by refusing to accede to the Claimants’ request to refer the dispute to arbitration pursuant to Article 67(3) of the Contract, breached Articles 2(3) and 2(4) of the Bilateral Investment Treaty concluded between Jordan and Italy on 21 July 1996” (see para 14 above). Within this framework, the Claimants contend that “Jordan has undertaken to submit the Claimants’ contractual claims to arbitration and subsequently failed to abide by such undertaking” and that this failure “amounts to a violation of the BIT” concluded between Italy and Jordan.

25. According to the Claimants, throughout the period 1997-1999, recourse to arbitration was an issue that was "kept open and constantly considered by the Jordanian Government." Then, in February 2000, a delegation of the Italian Government, including the Prime Minister, paid an official visit to Amman during which it met a delegation of the Jordanian Government headed by Prime Minister Abdur Ra’uf Rawabdeh. The Claimants stress that the settlement of the dispute was discussed during this meeting and submit that the Prime Minister of Jordan then "agreed to endeavour to reach an agreement on the amount still due by Jordan and, failing such agreement, to refer any outstanding matters to arbitration."

26. In support of this submission, the Claimants produce a declaration of Mr. Piero Fassino, former Italian Minister of Foreign Trade and a declaration of the former Italian Ambassador in Amman, Mr. Stefano Jedrkiewick, dated 27 April 2005, stating that during the meeting, “[t]he two sides agreed that the claims raised by the Italian firm ‘Salini’ against the Hashemite Kingdom of Jordan
shall be submitted to a procedure of arbitration according to the Jordanian law (and not according to the international law).” They add that the terms of the agreement were confirmed in the presence of his Majesty the King of Jordan. The Claimants also communicate to the Tribunal two letters from the Italian Ambassador to the Prime Minister of Jordan dated 10 May and 25 June 2000, recalling the agreement they had reached and asking for its implementation. The Claimants note that those two letters did not receive any answer by the Jordanian Government and conclude that "Jordan’s silence demonstrate, not only that the Jordanian Government had decided to disregard its international commitment,... but also that it could not deny the content of these letters”.

27. The Claimants add that "the only piece of evidence so far provided by Jordan allegedly denying the existence of an agreement to submit the dispute with the Claimants to arbitration is a statement by the former Prime Minister of Jordan" dated 21 July 2003 stating that during the meeting he only undertook to assist to amicably settle the dispute and “in the event that amicable settlement failed he would present this matter before the Council of Ministers.” The Claimants submit that this statement does not constitute reliable evidence. They stress in particular that it contradicts previous declarations of the former Prime Minister. They contend that Mr. Rawabdeh never brought the matter to the Council after the bilateral meeting of February 2000, and on 27 March 2000, he instructed the competent Minister to avoid arbitration without bringing the matter to the Council. The Claimants conclude that, “in February 2000, an international agreement was verbally concluded between the Governments of Italy and Jordan to the effect of referring the Claimants’ claims to arbitration” and that "the Respondent has not honoured this intergovernmental agreement."

28. The Claimants then submit that Jordan’s undertaking to arbitrate the dispute is binding. In this respect they stress that the commitment was undertaken by the Prime Minister himself, that it was intended to be binding and that no form requirement is prescribed. According to them the agreement thus reached prevails over the original provisions of the Contract. As a consequence prior approval of the arbitration by the Council of Ministers was no longer necessary.

29. The Claimants contend that, by reneging on its commitments, Jordan breached its obligation to ensure a "just and fair treatment" of the Claimants' investment, as provided in article 2(3) of the BIT. In this respect they invoke a number of arbitral awards and more specifically those in Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)97/1); Técnicas Medioambientales Tecmed S.A. v. United Mexican States (ICSID Case No. ARB(AF)00/2); and MTD Equity Sdn Bhd and MTD Chile S.A. v. Chile (ICSID Case No. ARB/01/7).

30. The Claimants also submit that Jordan violated its obligation "to create and maintain in its territory a legal framework apt to guarantee to investors... the compliance in good faith, of all undertakings assumed with regard to each specific investor” as provided in article 2(4) of the BIT. They stress that the commitment taken in February 2000 to go to arbitration must be viewed as an undertaking assumed with regard to a specific investor and is covered by article 2(4). Moreover, Jordan did not take the relevant decisions to implement the agreement and, on this ground too, violated article 2(4).

31. According to the Claimants, Jordan’s conduct "must also be viewed in the light of several other
provisions of the BIT, namely, articles 3(2), 9(2) and 11(1)."

32. In consideration of the above, the Claimants request the Arbitral Tribunal to declare "that, by refusing to implement the agreement reached in February 2000 with the Italian Government, Jordan has breached both the agreement and the BIT." They also seek an order from the Tribunal "ordering the Respondent to implement the February 2000 agreement forthwith without restrictions or obstacles." They finally ask that Jordan be ordered to pay to the Claimants' damages "to compensate the Claimants for the costs and expenses they have sustained in connection with the ICSID arbitration proceedings," in the amount to be later substantiated.

33. The Hashemite Kingdom of Jordan filed its Counter Memorial on 13 June 2005. It recalls that, under clause 67(3) of the contract concluded by the Jordan Valley Authority (JVA), "[a]ny dispute... shall be finally settled by reference to the competent Court of law in the Kingdom, unless both parties shall agree that the dispute shall be referred to arbitration. If the first party being a Government department or public Corporation or local authority, shall consider settlement of the dispute by arbitration, then, and in such case, the said party shall obtain the prior approval of the Council of Ministers of the Kingdom to proceed with the aforesaid settlement accordingly." The Respondent states that "this Clause envisages two steps: (1) agreement of both parties to arbitration (the parties being JVA and the Claimants) and (2) the approval of the Council of Ministers of the Kingdom." It adds that "[a]s a result of the persistence of the Claimants in raising their alleged grievances through various levels and diplomatic channels, this matter was raised before the Council of Ministers on two occasions, and referral to arbitration was refused by the Council of Ministers on each occasion."

34. The Respondent states that, contrary to what is alleged by the Claimants, "up until December 1998... the Government and authorities of Jordan consistently took the position that arbitration was never considered appropriate to settle this dispute." The Claimants were indeed informed on 17 December 1998 that the Council of Ministers had rejected their request for arbitration. However they persisted in their attempts and were "able to include their dispute on the agenda of the visit of an Italian governmental delegation to Jordan in February 2000."

35. The Respondent produces a statement relating to this visit emanating from the then Prime Minister of Jordan Mr. Abdul Ra'uf Rawabdeh and two statements from the then Jordanian Minister of Water and Irrigation Dr. Kamel Mahadin. The Respondent states that "after the visit of the Italian delegation" and in conformity with the commitments taken during that visit, "the Council of Ministers considered the matter," taking, inter alia, into consideration the positions previously taken by the Minister of Water and Irrigation and by the Minister of Finance. After discussion, the Council decided not to approve a reference of the matter to arbitration. Accordingly the Prime Minister, on 27 March 2000, sent a letter to the Minister of Water and Irrigation advising him of this decision. On his return from an official journey outside Jordan, Dr. Mahadin informed the Italian Authorities of the content of this letter and promised to look again into the matter. Consequently, on 1 May 2000, he wrote to the Prime Minister proposing a new attempt for settlement of the dispute through negotiation and arbitration. On 18 June 2000, "the Government resigned before having responded to Dr. Mahadin's letter of 1 May 2000 and to the Italian Ambassador's letter of 10 May 2000. The question was again raised by the Italian Ambassador on 21 June 2000. It was not found necessary within the new Government to reconsider the matter. Accordingly, JVA wrote a letter to the Claimants dated 28 August 2000 advising them of the Council of Ministers' decision not to refer the matter to arbitration". New attempts were made by the
36. Thus, according to the Respondent, “there was never any agreement to refer the matter to arbitration, whether by JVA or by the Kingdom of Jordan and... accordingly the Claimants’ claim fails on the facts.”

37. Moreover ”Jordan submits that, even if there was an agreement between the Prime Ministers of Jordan and Italy, which is denied, then:

   a) The terms of the alleged oral agreement are insufficiently clear or specific to show an intent that Jordan be bound to submit to arbitration.

   b) The alleged oral agreement was an inter-State agreement, so that any rights and obligations it may have created arose only between Jordan and Italy.

   c) The terms of the alleged oral agreement show no intention to create rights in any third party.

   d) The terms of the alleged agreement show no intention to create rights which may be related to or enforced under the BIT.

   e) It was clear to the Claimants at the time of the alleged oral agreement that any such agreement by the Prime Minister of Jordan should have to be ratified by the Council of Ministers, pursuant to clause 67(3) of the contract, and that never happened.”

38. The Respondent also contends that even if the alleged agreement was made in the terms stated by the Claimants (which is denied), there had been no violation of article 2(3) and 2(4) of the BIT. Furthermore it recalls that “since the Tribunal has limited the case to whether Jordan has breached articles 2(3) and 2(4)... there can be no question of finding a breach” of articles 3(2), 9(2) and 11(1). In any event recourse to those further articles does not assist the Claimants’ case.

39. In summary, Jordan submits that:

   (1) There was no agreement to refer the matter to arbitration.

   (2) Further or alternatively, even if there was such an agreement:

       a) It was an interstate agreement between Jordan and Italy, which created no rights for the Claimants, and upon which they cannot rely;

       b) The alleged failure to refer the matter to arbitration in light of the alleged agreement does not constitute a breach of Article 2(3) or Article 2(4) of the Bilateral Investment Treaty.

Accordingly, on the basis of the evidence and legal arguments presented in this Counter-Memorial, Jordan requests the Tribunal to adjudge and declare that:

   (1) The Claimants’ claim be dismissed.
(2) The Claimants be required to pay Jordan's costs in this matter and the costs of the Arbitral Tribunal.

40. On 5 July 2005, the Claimants filed their reply in which they maintain their position with respect to the discussions, which took place before February 2000. They also submit that "Jordan is incapable to establish that the Council of Ministers has re-deliberated after February 2000. This confirms that the need for such a re-deliberation was excluded or not mentioned in the February 2000 inter State agreement and this further confirms that the Italian witnesses tell the truth". Moreover the letters of 27 March, 2000 and 28 April 2000 do not refer to any resolution of the Council of the Ministers taken after February 2000. In this respect Mr. Rawabdeh's supplementary affidavit attached to the Counter-Memorial "is unsupported by any evidence and does not substantiate the Respondent's case at all." Dr. Mahadin's statement also produced by Jordan is "incorrect and on the whole, unreliable." A bilateral agreement to submit the case to arbitration has been concluded between Italy and Jordan during the February 2000 meeting.

41. The Claimants submit that they are the beneficiaries of this agreement and that they are entitled to rely on the undertaking then given by Jordan. According to them, the terms of the agreement are extremely clear and specific. Moreover the agreement is "self standing" and has become the exclusive source of Jordan's obligation to refer the dispute with the Claimants to arbitration. "Subsidiarily, even assuming that the source of such obligation is still to be found in article 67(3)(b) [of the contract], the actual modalities in which Jordan's consent was given, i.e., through its Prime Minister and in the context of an intergovernmental agreement, produced the same effect as the approval by the Council of Ministers originally foreseen. In both cases, submission to, and approval by, the Council of Ministers has become irrelevant."

42. The Claimants also maintain that Jordan's conduct constitutes a violation of articles 2(3), 2(4), 3(4), 9(2) and 11(1) of the BIT.

43. In conclusion, the Claimants request an award:

(a) declaring that an agreement was reached in February 2000 between Jordan and Italy to the effect of deferring to arbitration the Claimants' claim;
(b) declaring that Jordan has refused to implement this agreement with no valid justification;
(c) declaring that the breach of the February 2000 agreement amounts to a breach of the BIT;
(d) ordering Jordan to implement the February 2000 agreement;
(e) ordering Jordan to pay to the Claimants the damages illustrated in Chapter V of the Statement of Claim, i.e. the costs they have sustained in the ICSID proceedings, in the amounts which will be specified and proved by the Claimants either prior to or after the hearing of September 2005 in consideration of the costs of the litigation activities which will be incurred up to that time.

44. On 1 August 2005, the Respondent filed its Rejoinder in which it expresses the wish "to correct a number of factual inaccuracies in the Claimants' Reply" and "to respond to certain of the Claimants'
factual omissions”. It maintains that the Council of Ministers of Jordan met between the February 2000 meeting and the letter of the Prime Minister dated March 27, 2000, and did not agree to refer the matter to arbitration.

45. Jordan further submits that the Claimants cannot rely on the alleged agreement and that there has been no violation of the BIT.

46. Finally Jordan reiterates its submission as presented in its Counter-Memorial.

47. At the oral hearing, on 20 September 2005, the Claimants reiterated and developed their arguments as formulated in their written memorials. They stressed the importance of the letters sent by the Italian Ambassador in Amman on 10 May and 25 June 2000 to the Prime Minister of Jordan as proof of the agreement reached in February 2000 to submit the dispute to arbitration. They recalled that those letters received no answer and that Jordan has been unable to establish that the matter was discussed after the February meeting by the Council of Ministers. They submitted that the Jordanian thesis is incompatible with the correspondence exchanged at the time. They contended that Jordan flouted its obligation to submit the dispute to arbitration and thus violated both general international law and the BIT concluded between Italy and Jordan, in particular in its articles 2(3), 2(4), 3(2), 9 and 11(1).

48. In response, the Respondent observed that the Claimants have the burden of proving the facts and establishing the law and have failed to do it. They noted that, in letters emanating in 2005 from the Italian authorities, there is no mention of the alleged agreement of February 2000. They submitted that, even assuming that the Claimants’ factual allegations were correct there had been no violation of the BIT in particular in its articles 2(3) and 2(4). They added that the Tribunal has no jurisdiction over the other provisions of the BIT. Finally, they argued that all the costs of the Tribunal and all of Jordan’s costs in preparing this phase of the proceedings should be borne by the Claimants.

49. In their second round of oral presentation, the Claimants added that their reference to some new provisions of the BIT could not be considered as new claims, but must be regarded as ancillary or additional claims as contemplated by Article 46 of the ICSID Convention and Rule 40 of the Arbitration Rules. They contested the interpretation given by the Claimants to the 2005 letters. They asked the Tribunal in any event to reject the request of the Claimants relating to the costs.

50. In its second round of oral presentation, the Respondent maintained its previous arguments and submissions.

51. The Tribunal will first consider the facts of the case in order to decide whether, as alleged by the Claimants, an oral agreement was concluded in February 2000 between Italy and Jordan under which the two sides agreed that the claims raised by Salini Costruttori S.p.A. against Jordan were to be submitted to arbitration. If so, the Tribunal will then consider whether, as contended by the Claimants, Jordan refused to implement such an agreement and thus breached its international obligations.

C. Undisputed Facts
52. The Tribunal recalls that, on 4 November 1993, a contract was signed between the Claimants and the Ministry of Water and Irrigation/Jordan Valley Authority for the "Construction of the Karameh Dam Project." Under clause 67.3 of the General Conditions of the contract:

"Any dispute in respect of which:

(a) the decision, if any, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and

(b) amicable settlement has not been reached within the period stated in Sub-Clause 67.2

shall be finally settled by reference to the competent Court of law in the Kingdom, unless both parties shall agree that the dispute be referred to arbitration.

If the First Party, being a government, department or public corporation or local authority, shall consider settlement of the dispute by arbitration; then, and in such case, the said party shall obtain the prior approval of the Council of Ministers of the Kingdom to proceed with the aforesaid settlement accordingly.

(c) Upon reference of any dispute to arbitration, the arbitrator(s) shall have power to open, revise and review any decision, certification or evaluation of the Engineer, provided that nothing of the foregoing shall disqualify the Engineer from being called as a witness and giving evidence before the arbitrator(s) on any matter relevant to the dispute referred to the arbitrator(s).

(d) No reference to litigation or arbitration may be commenced before the completion of the works and the issue of the Taking-Over certificate."

53. The work was completed in October 1997. The parties disagreed however on the amount to be paid to the contractor and, on 7 August 1997, Salini Costruttori S.p.A. sent to Dr. Munther Haddadin, Minister of Water and Irrigation of Jordan, a summary of the "outstanding claims and disputes as to 30 July 1997 as well as a summary of those yet to be submitted."¹ Salini recalled that the Jordan Valley Authority and the Claimants "formed a committee, at a technical level, in order to try to reach an amicable settlement." It added that no agreement had yet been reached, asked for the personal intervention of the Minister and, in case such an amicable settlement should not prove feasible," requested him to "consider the recourse to arbitration as per clause 67.3" of the contract. In the following months, discussions went on between the Claimants and the JVA. Four of the claims were fully settled and one partially settled. The other claims were rejected.

54. By letter dated 29 June 1998 ², Dr. Haddadin informed the Prime Minister of Jordan of the situation and let him know that, in spite of the decisions taken, "Dr. Salini continues to visit Jordanian officials and requests arbitration." He stated that all the company's rights were settled and added "we see no justifying reason at all to go to arbitration, and Dr. Salini has the full right to resort to the Courts." He concluded by asking the Prime Minister to provide him "with the appropriate guidance." Apparently this letter had no immediate answer. Mr. Hani Al Mulki having succeeded

¹ Exhibit R124 attached to the Counter-Memorial of Jordan
² Exhibit R111
Dr. Haddadin as Minister of Water and Irrigation, the Claimants wrote him on 25 September 1998 asking again "to refer the dispute to arbitration" and "to seek the prior approval of the Council of Ministers of the Kingdom of Jordan to proceed accordingly." On 12 October 1998, the Minister transmitted this request to the Prime Minister. On the occasion of that transmission, he recalled the letter of his predecessor of 29 June 1998 and asked again "for advice."

By letter dated 7 November 1998, the Prime Minister informed the Minister of Water and Irrigation/Jordan Valley Authority that he "cannot see anything that justifies referring the matter to arbitration. The Company must resort to the judiciary according to the provisions of the contract if it so wishes". The Secretary General of the JVA accordingly wrote to Salini Costruttori S.p.A. on 17 December 1998. He referred "to various discussions and correspondences" relating to the Karameh Dam Project particularly to Salini's letter dated 7 August 1997 asking for arbitration. He informed the Claimants "that the Council of Ministers has rejected the arbitration as a provision for settlement" of the claims.

Some weeks after the accession of King Abdullah II to the Throne of Jordan, Salini Costruttori S.p.A. on 15 April 1997, sent a letter to the new King drawing his attention to its "on-going dispute with the JVA and the Minister of Water and Irrigation concerning the Karameh Dam Project." On 19 August, this letter was forwarded by the Royal Court to the Prime Minister in order to examine it and provide the Court with his opinion "to enable it to secure a reply." On 5 September the Prime Minister sent that correspondence to the Minister of Water and Irrigation requesting his opinion on the request for arbitration.

On 12 October 1999, the new Minister, Dr. Kamel Mahadin, answered the Prime Minister. He recalled that "the contractor must refer the dispute to the official Jordanian Courts." However, he also mentioned "the interference of the Italian Ambassador in this matter several times and by the contractor addressing letters to the highest official authorities in the Kingdom, warning of the signs of a political crisis between Jordan and the government of the Italy". "In order to avoid any potential crisis", he said that "there was no objection to accepting the principle of arbitration, provided that the Consulting Engineer is a main member that participates in the arbitration team on behalf of the JVA." On 2 November, the Minister informed Salini that he recommended arbitration to the Prime Minister.

In the meantime on 20 October, the Prime Minister had communicated Salini's letter and the recommendation of the Minister of Water and Irrigation to the Minister of Finance. On 20 December, the Ministry of Water and Irrigation forwarded to the Ministry of Finance the
documents requested by the Treasury for the study of the question and on 24 February 2000,\textsuperscript{14} the Minister of Finance answered the Prime Minister's letter. In this answer, he recalled that recourse to arbitration would necessitate the approval of the Council of Ministers. He also noted that "Salini Company will not agree to have the consulting Engineer on the board of arbitration, as he has already given his decision on the subject." He finally stressed the perils of arbitration and concluded that "Salini Company can resort to Court to claim its rights."

Some days before the signature of this letter the Prime Minister of Italy Mr. Massimo d'Alema had paid an official visit to the Prime Minister of Jordan, Mr. Abdur-Ra'uf Rawabdeh. The dispute between the Claimants and JVA was included on the agenda of the meeting which took place 20 - 21 February 2000. Mr. Piero Fassino, Italian Minister of Foreign Trade, Mr. Stefano Jedrkiewicz, Italian Ambassador to Amman and Dr. Mahadin, Jordanian Minister of Water and Irrigation attended that meeting.

According to the Claimants, an agreement was then reached between the two Prime Ministers to "submit the contractual dispute between the Claimants and the JVA to arbitration, unless amicably settled within a few weeks."\textsuperscript{15} According to the Respondent the Prime Minister of Jordan only committed himself "to assist in attempts to settle the dispute between Claimants and JVA amicably and, in the event that amicable discussions failed," to "present this matter to the Council of Ministers, who would decide on whether to refer this matter to arbitration."\textsuperscript{16}

On 7 March 2002,\textsuperscript{17} Dr. Salini sent a letter to Dr. Mahadin, Minister of Water and Irrigation, in which he stated that, on 1st February, he was informed by the Italian Minister for Foreign Trade of "the decision of the Jordanian Government... to solve the question in arbitration, by three arbitrators, one nominated by each of the parties, plus a third one to act as President nominated by the said two arbitrators". In that letter the Claimants declare themselves ready to start this procedure.

On 27 March 2000,\textsuperscript{18} the Prime Minister of Jordan sent a letter to the Minister of Water and Irrigation referring to the request made by Salini to King Abdullah II and to the various exchanges of correspondence within the Jordanian Government relating to that request. In that letter the Prime Minister endorsed the position taken by the Minister of Finance against arbitration and in favour of resort to the judiciary. It is not disputed that the Minister of Water and Irrigation was then absent from Amman and it is the Acting Minister who instructed the Secretary General of the JVA to inform the Company to "resort to the Courts." On 2 April 2000 the Dams Manager of the JVA was in turn instructed to prepare the reply.

In the meantime however, Dr. Mahadin had come back from his official journey abroad. According to his statement to the Tribunal, he was then contacted by the Italian Ambassador and he informed him orally of the decision taken on the Jordanian side not to refer the matter to arbitration. In the same statement, Dr. Mahadin adds that he promised the Ambassador to try to re-open the matter. He then had a conversation with the Prime Minister on the subject and in a letter to him dated 1st

\textsuperscript{14} Exhibit R141
\textsuperscript{15} Claimant's statement of claim 9 May 2005 para 6
\textsuperscript{16} Counter Memorial, para 34
\textsuperscript{17} Exhibit C14
\textsuperscript{18} Exhibit R119
May 2000, he suggested in the interest of the relations between Jordan and Italy, to try again to reach a compromise with Salini and, if no solution could be reached, to resort to arbitration "under conditions to be specified by JVA".

64. The Italian Ambassador, on 10th May, also sent a letter to the Prime Minister in which he stated that an agreement "was reached" between the two Prime Ministers in February to submit Salini’s claims to a procedure of arbitration "according to Jordanian law (and not according to international law)”. The Ambassador added that Salini "has since then confirmed its full acceptance of an arbitration procedure according to the Jordanian law" and he asked the Jordanian authorities to act accordingly.

65. A change of Government occurred soon after and the Italian Ambassador on 25 June 2000 renewed his request to the new Prime Minister. On 28 June, the Claimants wrote to the new Minister of Water and Irrigation for the same purpose.

66. On 28 August 2000, the Secretary General of the JVA answered that last letter stating that:

"You were informed by our letter dated 17 December 1998, that our Council of Ministers had rejected the arbitration as a provision of settlement of your claims. We have examined your request under the provision of clause 67.3 of the condition of the contract and you are informed that the dispute can be referred to litigation.”

67. On 12 December 2001, Salini Italstrade - Joint Venture sent a letter to the Minister of Water and Irrigation and the Secretary General of the JVA recalling the "undertaking" of February 2000 and stating that "if no action is taken by your Ministry" the dispute shall be submitted to ICSID. Mr. El Nasser, Minister of Water and Irrigation, by letter of 24 January 2002, answered in recalling that "[i]n accordance with sub-clause 67.3(b), the Council of Minister of the Kingdom of Jordan has numerous rejected the arbitration as a provision for the settlement of the dispute in question".

68. The question was raised again by the Claimants and the Italian Embassy in Amman by further correspondence which there is no need to mention here.

69. It is thus established that the Claimants asked on numerous instances that their dispute with JVA be referred to arbitration. They wrote to this effect to the King of Jordan himself, to the Prime Minister and to the Minister of Water and Irrigation. This request was systematically renewed at each change of Government or Minister. It received on several occasions the active support of the Italian Authorities. The first written request communicated to the Tribunal is dated 7 August 1997. On 17 December 1998, the Claimants were informed that this request had been rejected by the Council of Ministers. On 15 April 1999, they draw the attention of the King to their dispute. The study of this request by the competent Jordanian Ministers was not completed when the Prime

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19 Exhibit R143
20 Attachment No. 1 to the Witness Statement of the Italian Ambassador
21 Attachment No. 2 to the Witness Statement of the Italian Ambassador
22 Exhibit R16
23 Exhibit R121
24 Exhibit R145
25 Exhibit R124
Minister of Italy and Jordan met in February 2000. The dispute between the Claimants and JVA was put on the agenda of that meeting at the request of the Italian authorities. As already stated, the parties disagree on what was decided during the meeting. It is that disagreement that the Tribunal will now consider.

D. **Burden of proof**

70. It is a well established principle of law that it is for a claimant to prove the facts on which it relies in support of his claim - "Actori incumbat probatio".

71. This principle has been recognized in international law more than one century ago by arbitral tribunals. Thus in 1872, such a Tribunal stated that "On doit suivre comme règle générale de solution, le principe de jurisprudence consacré par la législation de tous les pays, qu'il appartient au réclamant de faire la preuve de sa prétention" (Queen's case Brade v. Sweden and Norway - 26 March 1872. La Pradelle et Politis - R.A.I. Tome II p. 708).

72. The Permanent Court of International Justice and the International Court of Justice applied this principle in many cases and the Court stated explicitly in 1984 in the case concerning military and paramilitary activities in and against Nicaragua that "it is the litigant seeking to establish a fact who bears the burden of proving it". (ICJ Reports - 1984 p. 437 paragraph 101).

73. In recent years, this principle has also been applied several times by arbitral tribunals in Inter-State disputes (see for instance the Heathrow Airport User Charges case, 1992, 102-International legal materials, p. 216). It has also been applied in commercial arbitration, in particular within ICSID (Soabi v. Senegal - Award 25 February 1988 - 2 ICSID Reports, 270; AAPL v. Sri Lanka- Award 27 June 1990, 4 ICSID Reports, 272; Tradex v. Albania, Award 29 April 1999, 14 ICSID Review - Foreign Investment Law Journal, 197, 219, 221 (1999). Some arbitral tribunals have even considered that the principle is a fundamental concept of the international legal community (see Laurence Craig, William W. Park and Jan Paulsson - International Chamber of Commerce Arbitration - 3rd Edition p. 646 paragraph 35.02 (XI) with the relevant references). Finally, it has been incorporated in basic instruments such as article 24(1) of the UNCITRAL Arbitration Rules or Article 24(1) of the Statute of the Iran - United States Claims Tribunal.

74. Courts and Tribunals have more specifically applied this principle in cases in which a claimant relies on the existence of a custom or a treaty which is denied by the other party. Thus in the Asylum Case, Colombia invoked a regional or local custom peculiar to Latin -American States relating to diplomatic asylum. The International Court of Justice decided that "[t]he party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party". Then, after having studied the evidence submitted by Colombia, the Court concluded that the Claimant had not proved the existence of such a custom (ICJ - Asylum Case - Colombia v. Peru -judgment of 20th November 1950 - ICJ Reports pp. 276 and 277).

Similarly in a case relating to the determination of a maritime boundary (Guinea Bissau v. Senegal), the Arbitral Tribunal decided that a state which bases its claims on the existence of an agreement...
has to prove it (Arbitral Award 30 July 1989 - Revue générale de droit international public - 1990 pp. 229-230).

75. The Tribunal sees no reason not to apply the same rule in the present case. The Claimants allege that an agreement has been concluded between Italy and Jordan in February 2000 in order to submit the dispute between them and JVA to arbitration. They have to prove the existence of such an agreement.

E. Oral Agreement

76. In this respect the Tribunal must note from the outset that the Claimants rely not on a written but on an oral agreement. It observes that international agreements between states are generally concluded in writing and that the 1969 Vienna Convention on the Law of Treaties only covers this type of agreement. However, there are no specific requirements of form in public international law for the existence of an agreement. Thus the International Court of Justice observed in the Aegean Sea case "that it knows of no rule of international law which might preclude a joint communiqué [issued by two Prime Ministers] from constituting an international agreement to submit a dispute to arbitration or judicial settlement." (Aegean Sea Continental Shelf Case - Greece v. Turkey, 19 December 1978, ICJ Reports - 1978 p. 39 paragraph 96). This jurisprudence has since been confirmed several times (Maritime and territorial dispute between Qatar and Bahrain (jurisdiction -ICJ Reports 1994 p. 112 paragraph 25; arbitration between Newfoundland and Labrador and Nova Scotia concerning the limits of their shore areas - Award of the Tribunal in the first phase - 17 May 2001 - paragraph 3.15).

77. All authorities thus accept the possibility for states to conclude international agreements orally (see for instance Daillier et Pellet - Droit international public LGDJ, 7th Edition, p. 120; Joe Verhoeven - Droit international public - Larcier p. 376; Mac Nair the Law of Treaties, 1961 p. 7 to 10; Oppenheim's International Law, 9th Edition, paragraph 585; Sir Humphrey Waldock, Report to the International law Commission, Document A/CN o 4/144 - 26 March 1962 p. 40 and 204 to 207). However, all authorities also stress that states rarely conclude oral agreements and the few examples which are generally given are commitments taken in previous centuries, such as the treaty of alliance concluded on oath in 1697 at Pillau between Peter the Great of Russia and Frederic III, Elector of Brandenburg (Martens I paragraph 112; see also Basdevant - La conclusion et la rédaction des traités p. 553).

78. Furthermore, if there are no specific requirements of form in international law for the existence of interstate agreements, such agreements are only binding upon the parties if they intended to create legal relations between themselves. A number of agreements between states are merely statements of commonly held principles or objectives and are not intended to create legal obligations. Several examples could be given in this respect from the Charter of the Atlantic to the Final Act of the Helsinki Conference of 1975 establishing the Organization for Security and Cooperation in Europe (OSCE). Thus in the Aegean Sea Continental Shelf case, the International Court of Justice decided that the joint communiqué invoked by Greece "was not intended to, and did not, constitute an immediate commitment by the Greek and Turkish Prime Ministers, on behalf of their respective Governments, to accept unconditionally the unilateral submission of the dispute to the Court" and
"does not furnish a valid basis for establishing the Court's jurisdiction" (Aegean Sea Continental Shelf - Greece v. Turkey 19 December 1978 - ICJ Reports 1978 p. 44 paragraph 107). Similarly the Arbitral Tribunal in the Heathrow Airport User Charges case found that a memorandum of understanding between the United States and the United Kingdom relating to the 1977 US-UK Air Services Agreement was not a source of independent legal rights and duties (UKMIL, LXIII British Yearbook of International Law 1992 p. 712 and American Journal of International Law 1994 p. 738). In the arbitration regarding the Iron Rhine Railway the Arbitral Tribunal also noted that, as a matter of international law, a memorandum of understanding of 28 March 2000 between the competent Ministers of Belgium and The Netherlands was not a binding instrument. (Award, 24 March 2005, paragraph 156). However in those last two cases, the Tribunals considered those memoranda, as far as the parties had given effect to them, as part of their common practice.

79. The same considerations apply to oral agreements which in most cases are not binding agreements. The jurisprudence in this respect is rather scarce, but one may mention at least two cases in which arbitral tribunals arrived at the conclusion that the alleged agreements had no binding character (Arbitral Award rendered on 17 August 1889 between Germany and Great Britain with respect to the Island of Lamu - La Fontaine - 335-340: Coussirat Coustère et Eisemann - Repertory of International Arbitral Jurisprudence - Volume I paragraphs 1056-1057; Arbitral Award rendered on 10 January 1927 by the Romanian -Hungarian - Mixed Arbitral Tribunal - ibidem Volume II paragraph 2052; see also Edoardo Vitta - La Validité des traités internationaux, Biblotheca Visseriana, 1940, pages 216 to 221).

80. Thus, it is to the Claimants in the present case, to prove that a legally binding agreement was concluded orally between the two Prime Ministers of Italy and Jordan creating the obligation for Jordan to submit the dispute to arbitration.

F. Evidence Provided

81. To this end, the Claimants produce a declaration signed in Rome on May 6, 2005 by Mr. Piero Fassino, former Minister of Foreign Trade of Italy, which states that during the February 2000 meeting "the issue relating to the dispute which involved the Italian companies Salini and Italstrade, on the one side, and the Jordanian Government, on the other side, over the construction of the Karameh Dam, was also discussed. During the above mentioned meeting, the Prime Minister Mr. Rawabdeh himself expressed the consent of the Jordanian Government to submit the dispute to arbitration. The features of the arbitral proceedings were also discussed, and it was agreed that the procedure would have been conducted in accordance with Jordanian law, and that one arbitrator should have been appointed by the Italian companies, the second arbitrator by the Jordanian Government, and the chairman of the arbitral Tribunal should have been appointed by the two party appointed arbitrators."

Mr. Fassino adds that: "[a]s soon as the meeting was concluded, I informed Salini's representatives of the outcome of the meeting and of the agreement reached on the procedure."

26 Exhibit C 30
The Claimants also produce a declaration dated 27 April 2005 signed by Mr. Stefano Jedrkiewicz, who was Ambassador of Italy in Amman from 30 September 1999 to 30 April 2004. Mr. Jedrkiewicz states that, on 10 May and 25 June 2000, he sent two letters to the Prime Minister of Jordan referring to "the verbal agreement reached between the Italian and the Jordanian authorities on the occasion of an official visit of the President of the Council of Ministers of Italy to Jordan (February 21-22, 2000). Such agreement was reached during the meeting between the Jordanian Delegation and the Italian Delegation, respectively led by the Jordanian Prime Minister and the Italian President of the Council of Ministers, the undersigned being a member of the Italian Delegation. The two sides agreed that the claims raised by the Italian firm "Salini" against the Hashemite Kingdom of Jordan "shall be submitted to a procedure of arbitration according to the Jordanian law (and not according to international law). The terms of this agreement were confirmed in the presence of His Majesty the King." (quote from the two letters sent by the Ambassador to the then Prime Minister of Jordan dated 10 May and 25 June 2000).

Mr. Jedrkiewicz adds that he "does not remember that he received any official written reply to the effect of denying or qualifying the existence of the agreement as described in the above mentioned letters." (copies of which are attached to his declaration).

In support of its position, Jordan, for its part, produced a statement by the then Jordanian Prime Minister, Mr. Abdur-Ra'uf Rawabdeh dated 21 July 2003 which reads as follows:

"1. From 4 March 1999 until 18 June 2000, I held the position of Prime Minister of the Hashemite Kingdom of Jordan.

2. I recall that a meeting took place in Amman in early 2000 between the Italian Prime Minister and the Italian Minister of Foreign Trade on the one side and myself and the then Minister of Water and Irrigation on the other side. In that meeting, I, in my above-mentioned capacity, indicated that I would undertake the following:

a. To assist in attempts to amicably settle the dispute between the two Italian companies (Salini-Italstrade Joint Venture) and the Jordanian Ministry of Water and Irrigation, and

b. In the event that the amicable settlement failed that I would present this matter before the Council of Ministers, which was the competent authority to consider whether or not to approve the referral of any dispute to arbitration. I also indicated that I would inform the Council of Ministers of the desire of the Joint Venture to refer this matter to arbitration. I did not indicate a view as to whether or not I would support such a referral to arbitration, or whether or not the Council of Ministers would indeed make such a referral.

3. When this dispute was discussed before the Council of Ministers, it reached the conclusion that all outstanding claims of the Joint Venture had been duly and properly handled by the Engineer, Sir Alexander Gibb and Partners, which is known to be a very reputable engineering company. Also, it was found that the Jordanian Ministry of Water and Irrigation

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27 Exhibit C 29
28 Exhibit R 118.
had complied with all the decisions made by the said engineer as per its contractual obligations. Therefore, the Council of Ministers reached the conclusion that it would not be appropriate to refer the dispute to arbitration and decided that the Jordanian Courts should continue to be the competent authority to hear any dispute between the parties.

4. Consequently, I sent the letter numbered 59/11/3/3639 dated 27 March 2000 attached hereto, to the Jordanian Minister of Water and Irrigation to advise him that if the Joint Venture insisted on its claims it could refer them to the Jordanian Courts.”

In a supplementary statement dated 4 June 2005, Mr. Abdur-Ra’uf Rawabdeh adds that:

"During the February 2000 meeting between the Jordanian delegation and the Italian delegation, I do not recall that there was any discussion as to the details or the procedures of the arbitration process in the event that it was decided by the Council of Ministers to refer the dispute to arbitration. All I recall was that it was stated that in the event that approval to arbitration was granted by the Council of Ministers (as required by the Contract) this arbitration would be local arbitration. Furthermore, I do not recall, during my term as Prime Minister of Jordan, that I ever discussed details such as the constitution of an arbitral panel or other similar matters."

"I recall that, after the meeting of the two delegations, I, together with some members of the Jordanian government, accompanied some members of the Italian delegation on a Courtesy visit to meet with His Majesty King Abdullah II. During this meeting the King was briefed on the topics that were discussed between the two delegations. I do not recall that any details were discussed before His Majesty."

The Respondent further produces a statement by Dr. Kamel Mahadin, the Minister of Water and Irrigation which, in its relevant part, reads as follows:

1. "A meeting took place in February 2000 between an Italian delegation headed by the Italian Prime Minister on the one side and a Jordanian delegation headed by the Jordanian Prime Minister on the other side. I, together with other members of the Jordanian government, attended the meeting. I recall that in that meeting the joint venture dispute was discussed in addition to other matters.

2. I recall that during the said meeting the Jordanian Prime Minister agreed to ask the relevant authorities to try to amicably settle the dispute between the joint venture and the Jordan Valley Authority.

3. Upon the insistence of the Italian delegation to the referral to arbitration, I recall that the Jordanian Prime Minister stated that he would present this matter before the Council of Ministers in the event that the amicable negotiations failed. I recall that there was no promise or undertaking on the part of the Jordanian Prime Minister to refer the dispute to arbitration.

29 Exhibit R 146
30 Exhibit R 142
Both delegations were aware of the requirements of the Contract.

4. Furthermore, in the meeting, it was mentioned that in the event that the Council of Ministers would agree to refer the dispute to arbitration, such arbitration would be local arbitration and not international arbitration. I do not recall whether there was any discussion on the procedure of the arbitration process but, to the best of my knowledge, any arbitral panel in Jordan usually consists of three arbitrators, one appointed by each side and the chairman appointment by the joint agreement of both arbitrators.

5. Some time in March 2000, while I was on an official trip outside Jordan, the Council of Ministers considered the dispute of the joint venture with the Jordan Valley Authority and decided not to accept referral of same to arbitration. This came to my attention after my return.

6. Shortly after, I was contacted by the Italian Ambassador and I informed him verbally of the Council of Ministers decision not to refer this matter to arbitration and that they insisted that the joint venture raised their claims before the Jordanian Courts. I also promised him that I would try to re-open this matter before the Council of Ministers.”

Dr. Mahadin then recalls that on 1 May 2000, he sent a letter to the Prime Minister expressing the view that a new initiative should be taken "to try to amicably settle this dispute and, if not, to refer the matter to arbitration according to the terms put forward by the JVA." He adds that the Cabinet resigned on 18 June 2000 and that there was thus no chance to re-discuss the matter before the Council of Ministers.

G. Appreciation of the evidence by the tribunal

86. The tribunal first observes that no written agreed document (such as an approved minute or even a press communiqué) has been established on the occasion of the meeting in order to record the decisions orally taken. The situation in this respect is different from the one which prevailed in the Aegean Sea case (see paragraph 76 above) or in some other disputes. For instance with respect to an alleged agreement concluded between China and Japan in 1905. (See the Lynton Commission Report mentioned in Edoardo Vitta-op.cit.p.220).

87. Moreover, no unilateral record of the meeting emanating from Jordan or Italy has been produced to the Tribunal and the situation in this regard is different from what it was in the Eastern Greenland case, where Mr. Ihren, Minister for Foreign Affairs of Norway "recorded his conversation with the Danish representative in a minute, the accuracy of which has not been disputed by the Danish Government." (Legal status of Eastern Greenland - Denmark v. Norway 5 April 1933 PCIJ - Series A/B No. 53 p. 36).

88. In the present case, the Tribunal has at its disposal declarations emanating from the Minister of Foreign Trade of Italy and the Italian Ambassador in Amman and from the Prime Minister of Jordan and the Jordanian Minister of Water and Irrigation, who all participated in the February meeting and testifying on what they recall as having been decided. The Claimants rely on the first set of declarations and on the letters sent by the Ambassador of Italy to the Minister of Water and...
Irrigation on 10 May and 25 June 2000. The Respondent contests the accuracy of those statements and letters.

90. The Parties agree that a meeting took place in Amman in February 2000 between an Italian delegation headed by the Prime Minister of Italy and a Jordanian delegation headed by the Prime Minister of Jordan. They also agree that the dispute between the Claimants and JVA was on the agenda of that meeting and was then considered.

91. However they disagree on the decision taken. According to the declarations emanating from the Jordanian authorities, the Prime Minister of Jordan first committed himself to "assist in attempts to amicably settle the dispute". No mention of such an effort to try to settle the dispute on an amicable basis is made in the exchange of correspondence of 2000 or in the declarations emanating now from the Italian authorities.

92. According to this last set of documents, the two sides agreed that the claims raised by Salini against Jordan "shall be submitted to a procedure of arbitration according to the Jordanian law"; and it was further agreed that there would be one arbitrator appointed by the Italian companies, one by the Jordanian Government and the Chairman of the Tribunal by the two party-appointed arbitrators. This is denied in the statements of the Jordanian officials. According to them, the Prime Minister of Jordan only committed himself "in the event that amicable settlement failed" to present the matter before the Council of Ministers "which was the competent authority to consider whether or not to approve the referral of any dispute to arbitration." They add that the Council of Ministers discussed the matter and reached the conclusion that it would not be appropriate to take such action.

93. The Claimants however submit that those last statements are incompatible with the conduct of Jordan immediately after the February meeting. They observe that there is no mention of any deliberation of the Council of Ministers of Jordan having taken place in February or March 2000, either in the letter of the Prime Minister of 27 March 2000 to the Minister of Water and Irrigation, or in the letter of 28 August 2000 of the Secretary General of the JVA to the Claimants. They add that Jordan has not provided evidence of any such deliberation. They conclude that there had been no deliberation of the Council of Ministers at that time. This would confirm "[t]hat the need for such redeliberation was excluded, or not mentioned in the February 2000 interstate agreement" and this would further confirm that the Italian witness was telling the truth.

94. The Claimants also recall that according to his declaration, the Italian Ambassador did not receive "any officially written reply to the effect of denying or qualifying the existence of the agreement" to go to arbitration. "The fact that the Ambassador's letters of 10 May and 25 June were left unanswered demonstrates that Jordan could not deny... the existence of an immediately binding agreement" to go to arbitration.

95. The Tribunal observes that silence may mean agreement or disagreement. It may also happen that no conclusion should be drawn from silence. The situation in Roman law in this respect remains controversial (see Guido Donatuti - Il silenzio come manifestationone di volonta - studi in onore di Pietro Bonfante - Vol. IV p. 461 - Milan). In medieval canonic law, the rule was "Qui tacet consentire videtur." In modern domestic laws the situation is quite different from one country to another, and it may even vary according to the matter.

95. In public international law, the consequences to be drawn from silence have been examined
mainly with respect to the creation or extinction of rights (see Jacques Bentz Le silence comme manifestation de volonté en droit international public - Revue Générale de droit international public, 1963 p. 44 to 91; MacGibbon, Customary international law and acquiescence, British Yearbook of International Law, 1957 p 115). It appears that those consequences may be different in each case, taking into account the circumstances of the case (see in particular the Island of Palmas case - 4 April 1928 - Reports of the international Arbitral Awards of the United Nations - Volume II p. 843; International Court of Justice -Fisheries case - United Kingdom v. Norway - 18 December 1951 - ICJ Reports 1951 p. 138).

96. In the present case, it is true that there is no mention, in the letters emanating from the Jordanian side after the February 2000 meeting, of any new decision of the Council of Ministers. It is equally true that Jordan did not provide the Tribunal with documents of the time establishing the existence of such a deliberation. However, the Tribunal cannot conclude from those facts that, during the meeting, the Prime Minister of Jordan agreed to submit the dispute to arbitration without referring the matter to the Council of Ministers, as foreseen in the contract.

97. As alleged by the Claimants, it is also true that the two letters of the Italian Ambassador of 10 May and 25 June 2000 did not receive any "official written answer". However, this does not mean that there was no contact during that period between the persons concerned. On 7 March 2000, the Claimants wrote to the Minister of Water and Irrigation inviting the decision, which according to Italy, had been taken during the February meeting. On 27 March 2000, the Prime Minister informed the Minister of Water and Irrigation that the dispute was to be submitted to the Jordanian Courts. This came to the knowledge of the Minister, Dr. Mahadin, sometime later on his return from a journey abroad. Dr. Mahadin, in his declaration to the Tribunal states that he was then contacted by the Italian Ambassador and that he informed him verbally of the decision thus taken. But he adds that he also promised the Ambassador to try to reopen the matter. This is not denied by the Ambassador who, in his statement, only mentions the fact that he had no "officially written reply" to the letters he sent later to the Jordanian authorities. Dr. Mahadin told the Tribunal that after this contact with the Italian Ambassador, he had a conversation with his Prime Minister on the subject. Then he sent him a letter on 1 May 2000 stating again that he was in favour of arbitration under certain conditions. Some days later, on 10 May 2000, the Italian Ambassador who was most probably informed of the intention, if not of the action taken by the Minister, also sent a letter to the Prime Minister relying on the commitments, which according to him, had been taken by Jordan in February. After the change of Government, both the Ambassador and the Claimants renewed their request. The Claimants’ one was rejected by the Secretary General of the JVA on 28 August 2000. The Ambassador’s letter seems to have remained unanswered.

98. In these circumstances, the fact that the two letters of the Ambassador did not receive any official written answer does not imply that Jordan accepted the position expressed by the Ambassador with respect to the decisions taken during the February meeting and that an oral agreement had then been concluded to go to arbitration.

99. To sum up, the Tribunal is facing a situation in which the unilateral declarations or letters submitted to it give a completely different picture of the result of the meeting between the two Prime Ministers. The Tribunal recalls, that it is for the Claimants to prove the facts on which they rely; in other words the Claimants must prove the existence, the content and the binding character of the alleged agreement (see para 80 above). Such a proof does not result from the unilateral documents provided by the Claimants, the accuracy of which is denied by the Respondent. It does
not result either from the silence kept by Jordan on certain points (see para 98 above).

100. The Claimants thus fail to prove that a binding agreement had been orally concluded in February 2000 between the Prime Minister of Italy and the Prime Minister of Jordan to submit the dispute between Salini Costruttori S.p.A. and JVA to arbitration. As a consequence it is not necessary to consider what were the obligations of Jordan under various provisions of the BIT, and whether those provisions would have been violated in case it would have been proved that Jordan committed itself to go to arbitration and did not do so. The submissions of the Claimants must in any event be rejected.

H. Costs

101. The Respondent submits that the Jordanian side has been put to very considerable expense in the present phase of the proceedings by a claim which is “entirely unmeritorious.” In its last submission, the Respondent therefore asks that “all the costs of the Tribunal... and all of Jordan's costs in preparing this phase of the proceedings should be borne by the Claimants.” For their part, the Claimants stress that they acted and behaved in good faith and invite Tribunal to be “fair and equitable” and to reject the submissions of Jordan on that point.

102. Article 61 (2) of the ICSID Convention provides that the Tribunal shall decide how and by whom the costs of the proceedings, including the expenses incurred by the parties, the fees and expenses of the members of the Tribunal and the charge for the use of the facilities of the Centre shall be paid. This Article confers a discretionary power on the Tribunal (Mine v. Guinea - Decision on Annulment - 22 December 1989 - 4. ICSID Report 109). Moreover, ICSID Tribunals and more generally International Arbitral Tribunals, have not followed a uniform practice with respect to the award of costs and fees (see Gotonda - Awarding costs and attorney's fees in International Commercial Arbitration - Michigan Journal of International law - 1-25 (199) and Christoph M. Schreuer, the ICSID Convention, pp. 1220 to 1232).

103. In the present case, the Claimants did not prove that, during the meeting of February 2000, an oral binding agreement had been concluded between the Prime Ministers of Italy and Jordan to submit the dispute between Salini Costruttori S.p.A. and JVA to arbitration. However, nor is it clear that during that meeting it was only agreed to try to settle the dispute by negotiation and failing such a settlement, to submit the question of arbitration to the Council of Ministers. In fact, the Tribunal has not been able to determine what decision, if any, had been taken by the two Prime Ministers. It is because the burden of proof is on the Claimants that their claim is to be rejected.

104. In those circumstances and in the exercise of its discretion, after taking into account all pertinent factors, the Tribunal decides that each side shall bear its own expenses for the proceedings and that the two sides shall bear equally the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre. Since the parties have each made equal advance payments to ICSID, the Tribunal need not award the payment of any amount on account of such fees, expenses and charges.

31 Record of the oral hearing p. 150.
I. Decision

105. For the foregoing reasons, the Tribunal unanimously:

(a) dismisses the claim submitted by Salini Costruttori S.p.A. and Italstrade S.p.A. against the Hashemite Kingdom of Jordan in its memorial of 9 May 2005;

(b) dismisses the claim relating to fees, expenses and charges presented by the Hashemite Kingdom of Jordan.

Sir Ian Sinclair appends a separate Declaration relating to the cost of proceedings in this case.