International Centre for Settlement of Investment Disputes
1818 H Street, N.W., Washington, D.C. 20433, U.S.A.
Telephone: (202) 458-1534 Faxes: (202) 522-2615 / (202) 522-2027
Website: http://www.worldbank.org/icsid

CERTIFICATE

Desert Line Projects LLC

v.

The Republic of Yemen

(ICSID Case No. ARB/05/17)

I hereby certify that the attached is a true copy of the Award of the Arbitral Tribunal, dated February 6, 2008, rendered in the above case.

Ana Palacio
Secretary-General

Washington, D.C., February 6, 2008

Date of Dispatch to the Parties: February 6, 2008

International Centre for Settlement of Investment Disputes
Washington, D.C.

ICSID Case No. ARB/05/17

Desert Line Projects LLC v. The Republic of Yemen

AWARD

Members of the Tribunal:

Professor Pierre Tercier, President
Professor Jan Paulsson, Arbitrator
Professor Ahmed S. El-Kosheri, Arbitrator

Secretary of the Tribunal:
Ms. Milanka Kostadinova

In the arbitration proceeding between

DESERT LINE PROJECTS L.L.C

Claimant and Counterrespondent

Represented by

Mr. Hamid G. Gharavi, Salans, 9, rue Boissy d'Anglas, 75008 Paris, France; and Mr. Raed Fathallah, Attorney-at-Law, Paris, France

and

THE REPUBLIC OF YEMEN

Respondent and Counterclaimant

Represented by

H.E. Dr. Rashed Al Rassas, Minister of Legal Affairs, Sana'a, the Republic of Yemen; and Mr. Rodman R. Bundy, Esq., Ms. Loretta Malintoppi and Mr. Charles Claypoole, Eversheds Frere Cholmeley, 8, Place d'Iéna, 75116 Paris, France

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Abbreviations

- **Claim. 2 Aug. 2005** Claimant's "Request for Arbitration" of 2 August 2005
- **Claim. 30 June 2006**: Claimant's Memorial of 30 June 2006
- **Resp. 16 Oct. 2006**: Respondent's "Objections to jurisdiction" of 16 October 2006
- **Resp. 15 Jan. 2007**: Respondent's "Counter Memorial" of 15 January 2007
- **Claim. 19 March 2007**: Claimant's "Reply Memorial" of 19 March 2007
- **Resp. 14 May 2007**: Respondent's "Rejoinder" of 14 May 2007
- **Claim. 1 June 2007**: Claimant's "Additional Exhibits" of 1 June 2007
- **Resp. 6 July 2007**: Respondent's "Yemen's submission on the new documents submitted by DLP on 1 June 2007 and on costs" of 6 July 2007
- **Claim. 23 July 2007**: Claimant's "Comments on the new documents submitted on 6 July 2007 by Respondent" of 23 July 2007
- **Resp. 31 July 2007**: Respondent's "Comments on DLP's submission dated 23 July 2007" of 31 July 2006
- **Exh. C-**[…]: Exhibit to the Claimant's Request of Arbitration
- **Exh. CM-**[…]: Exhibit to the Claimant's Memorial and Reply Memorial
- **Exh. CLA-**[…]: Exhibit to the Claimant's legal authorities
- **Exh. ROJ-**[…]: Exhibit to the Respondent's Objections to jurisdiction
- **Exh. RCM-**[…] Exhibit to the Respondent's Counter Memorial
- **Exh. RR-**[…] Exhibit to the Respondent's Rejoinder

A. SUMMARY OF FACTS

The following summary of facts does not purport to be exhaustive. When necessary, Part B of this award will include further discussion of issues of fact of particular importance to points of decision.

I. The Parties

1. **The Claimant** (and Counterrespondent), Desert Line Projects L.L.C. (hereafter also referred to as "DLP") is a limited liability construction company organized under the laws of the Sultanate of Oman with its registered office at Airport Road, Al Auzaiba, P.O. Box 1880 Ruwi, Postal Code 112, Sultanate of Oman. Its chairman and chief executive officer is Sheikh Ahmed Farid Mohammed Al Aulaqi.

2. **The Respondent** (and Counterclaimant) is the Republic of Yemen (hereinafter referred to as "Yemen"). Its Head of State is its President, H.E. Field Marshal Ali Abdullah Saleh.

II. Factual Background

3. In 1997, the Claimant began the construction of asphalt roads in Yemen (Claim. 30 June 2006, no. 16).

4. In early 1999 the President of Yemen conceived a project to develop asphalt road connections, in the interior of the country as well as with neighbouring countries (Claim. 30 June 2006, no. 19).

5. During this period, in pursuit of this project, the President of Yemen invited the Claimant to build a number of asphalt roads, and to start work based on an oral agreement prior to the signature of a complete set of contracts (hereinafter referred to as the "Contracts") (Claim. 2 Aug. 2005, no. 18 and 19). The Contracts followed the model of a short principal text in Arabic followed by detailed bills of quantities in English.

6. On 20 June 1999 the Parties concluded a contract (hereinafter referred to as "Contract 1") for the construction of the Aroom - Fougeait road, with an estimated length of 55 km (Claim. 2 Aug. 2005, no. 20(1); Claim. 30 June 2006, no. 21(1); Exh. CM-12; Resp. 16 Oct. 2006, no. 3.8(1)).

7. On 22 June 1999 the Parties concluded a contract (hereinafter referred to as "Contract 2") for the construction of Phase I of the Al-Ghaida internal roads (Claim. 2 Aug. 2005; no. 20(2); Claim. 30 June 2006, no. 21(2); Exh. CM-13; Resp. 16 Oct. 2006, no. 3.8(2)).

8. On 21 February 2000 the Parties concluded a contract (hereinafter referred to as "Contract 3") for the construction of 200 km of the Tareem – Thamoud – Shuhun road

(Claim. 2 Aug. 2005, no. 20(3); Claim. 30 June 2006, no. 21(3), Exh. CM-17 and 33; Resp. 16 Oct. 2006, no. 3.8(3)).

9. On the same day the Parties concluded a contract (hereinafter referred to as "Contract 4") for the construction of 205 km of the Harad – Sa'ada road (Claim. 2 Aug. 2005, no. 20(4), Claim. 30 June 2006, no. 21(4), Exh. CM-19; Resp. 16 Oct. 2006, no. 3.8(4)).

10. On 14 March 2000 the Parties concluded a contract (hereinafter referred to as "Contract 5") for the construction of 19 km of Phase II of the Al-Ghaida internal roads (Claim. 2 Aug. 2005, no. 20(5), Claim. 30 June 2006, no. 21(5), Exh. CM-21; Resp. 16 Oct. 2006, no. 3.8(5)).

11. On 12 July 2000 the Parties concluded a contract (hereinafter referred to as "Contract 6") for the construction of 120 km of the Al Mahweet – Al Qanawis road (Claim. 2 Aug. 2005, no. 20(6), Claim. 30 June 2006, no. 21(6), Exh. CM-22; Resp. 16 Oct. 2006, no. 3.8(6)).

12. On 24 December 2001 the Claimant issued two bank guarantees in the amount of YR 850 million in favour of Yemen and in relation with the Contracts (Claim. 30 June 2006, no. 287; Exh. CM-39 and CM-40).

13. On 3 March 2002 the Parties concluded a contract (in the form of instructions by the Minister of Construction countersigned by the Claimant) for the construction of an internal road in the Shuhun – Thamoud region (Exh. CM-41).

14. On 25 September 2002 the Parties concluded a contract (hereinafter referred to as "Contract 7") for the construction of 40.5 km of the Fatq - Hawf road (Claim. 2 Aug. 2005, no. 20(7), Claim. 30 June 2006, no. 21(7), Exh. CM-42; Resp. 16 Oct. 2006, no. 3.8(7)).

15. Between 15 November 2002 and December 2003 the Claimant and its chairman, Mr Ahmed Farid, sold a number of properties in Oman in order to honour debts toward third parties, and transferred substantial funds to Yemen for this purpose (Claim. 30 June 2006,no. 49)

16. By late 2003 the Claimant had completed all construction works except for outstanding works under Contract 4 and Contract 6 (Claim. 30 June 2006, no. 44).

17. On 10 November 2003 the Respondent issued Minutes of Agreement purporting to record the amount of work executed pursuant to the Contracts. The Claimant asserted that this amount was incorrect (Claim. 2 Aug. 2005, no. 44; Claim. 30 June 2006, no. 52; Exh. CM-44).

18. On 5 January 2004 the Claimant wrote to the Yemeni Minister of Public Works, requesting payment of amounts due under the threat of suspending works (Claim. 30 June 2006, no. 62; Exh. CM-50).

19. On 6 March 2004 works were interrupted at the Al Mahweet – Al Qanawis site by a subcontractor and 15 armed individuals, demanding payment of outstanding invoices

and threatening the Claimant's personnel (Claim. 30 June 2006, no. 71; Exh. CM-57; Resp. 16 Oct. 2006, no. 3.13).

20. On 18 March 2004 Sheikh Mouthir El Chazil, a member of the local council at Al Mahweet, and individuals of his tribe "confronted" the Claimant's personnel at the Al Mahweet – Al Qanawis site, demanding to traverse the working site and opening fire with automatic weapons (Claim. 30 June 2006, no. 72; Exh. CM-61). The Claimant immediately wrote to the President of Yemen to request protection and security "to protect lives" (Exh. CM-60).

21. On 17 April 2004 the Claimant brought an action against the Respondent before the Yemeni Commercial Court, requesting the release of the bank guarantees, the payment of outstanding amounts and the reimbursement of guarantee amounts retained (Claim. 30 June 2006, no. 73; Exh. CM-69).

22. On the same day, the Claimant reiterated its warning to the effect that it was contemplating suspension of the works under Contract 4 and Contract 6 and removal of its equipment from the sites by 3 May 2004 (Claim. 30 June 2006, no. 74; Exh. CM-62 and CM-63).

23. On 2 May 2004 the Claimant wrote to the President of Yemen, offering to complete work on the Al Mahweet – Al Qanawis segment while withdrawing from the Harad – Sa'ada and El Tour sites (Claim. 30 June 2006, no. 77; Exh. CM-68).

24. The President of Yemen replied by a hand-written notation on the first page of the Claimant's letter as follows: "*Perform the works and don't worry; your rights will be paid pursuant to the evaluation of the executed works by a third technical neutral party*" (Claim. 30 June 2006, no. 78; Exh. CM-68).

25. On 19 May 2004 the Claimant interrupted the work at Al Mahweet – Al Qanawis and Harad – Sa'ada sites (Claim. 2 Aug. 2005, no. 49; Claim. 30 June 2006, no. 79).

26. On 23 May 2004 the Claimant wrote to the President to complain about the prevention of evacuation of the equipment by armed forces dispatched by the Minister of the Interior (Claim. 30 June 2006, no. 86; Exh. CM-77).

27. On the same day Brigadier Awadh Mohammed Farid, Chief of Staff and Commander of the Central Military Region at the Ministry of Defence of Yemen, wrote a letter to the President of Yemen advising him to lift the "siege" (*el Hisar* in Arabic) of the Claimant's personnel and equipment and to resolve the conflict amicably (Claim. 30 June 2006, no. 87; Exh. CM-78).

28. On 3 June 2004 the President of Yemen informed the Claimant notably that it was instructed to complete the Al Qanawis – Al Mahweet road; that it was authorized to move its excess equipment to Al Ubir Al Wadeia and Oman, and that its "executed" works would be evaluated by British and Jordanian companies on the basis of "the price average in light of time and place considerations while taking into account the technical terms and specifications as well as the region's attributes" (Claim. 2 Aug. 2007, no. 52; Claim. 30 June 2006, no. 88; Exh. CM-81).

29. On 26 June 2004 the Parties - the Claimant being represented by its Chairman, the Respondent being represented by the Minister of Public Works and Highways - executed an Arbitration Agreement (hereinafter referred to as "the Yemeni Arbitration Agreement") whereby (English translation of the Arabic version):

> 1. *"The two parties give full power to the contractor Abdul Haq Said (SABA Company for Contraction) and Mr. Ahmed Mohammed Al Asbahi (Al Asbahi Office for Contracting) to act as arbitrators for purposes of reviewing and evaluating the works executed and the claims presented by Desert Line Projects L.L.C.;*
>
> 2. *Neither party may challenge this power;*
>
> 3. *The arbitrators' award shall be deemed final and no party may reject their award, for any reason whatsoever, in view of resolving the disputes between the parties;*
>
> 4. *The Arbitrators have the right to request the assistance of a third party of their choice, including a third arbitrator, to be the deciding vote*
>
> 5. *The second party undertakes to withdraw the proceedings brought before the courts upon signing this Agreement."*
>
> (Claim. 2 Aug. 2005, no. 53; Claim. 30 June 2006, no. 89; Exh. CM-84 = Exh. RCM-11; Resp. 16 Oct. 2006, no. 3.14)

30. Within the following six weeks, these arbitral proceedings (hereinafter referred to as "the Yemeni Arbitration Proceedings") were conducted and an award rendered; the Award contains no description whatsoever of the procedural history.

31. On 9 August 2004 the two arbitrators (hereinafter referred to as "the Yemeni Arbitral Tribunal") issued their Award (hereafter referred to as the "Yemeni Arbitral Award") concluding that:

> *"First:*
> *Based on Desert Line Projects' claims and on the instructions of His Excellency the President of the Republic (May God save him) for the application of the price average in light of time and place considerations, the Claimant, Desert Line Projects, is entitled to the following amount for the construction of road projects in the Republic*

Eighteen Billion Four Hundred Forty Seven Million Eight Hundred Fifty Seven Thousand and Five Hundred Rials	*YR 18,447,857,500* [approximately USD 100,000,000].

> *Second:*
> *Based on the findings of this award, the Claimant is entitled to the following amount for some additional costs:*

One Billion Five Hundred Twenty Million Six	*YR 1,520,620,929*

Hundred Twenty Thousand Nine Hundred and Twenty Nine Rials	[approximately 8,000,000]. USD

Third:
The legally required guarantees shall be conserved until Desert Line Projects cures the defects and maintains the roads executed in the eastern region in accordance with the above stated technical specifications and methods. With respect to the Al Mahweet Al Qanawis project, the maintenance period is calculated as per the contract's terms.

Fourth:
Desert Line Projects shall be paid in accordance with the terms of the Award after deduction of the amounts already paid to the Company for the aforementioned roads.

Fifth:
This Award has been issued on:
Monday, twenty second of Jumad Al Akher / 1425 (H)
Corresponding to the ninth of August 2004 [...]."
(Claim. 2 Aug. 2005, no. 57; Claim. 30 June 2006, no. 95 to 97; Exh. CM-88; Resp. 16 Oct. 2006, no. 3.16)

32. Between 16 August 2004 and 20 October 2004 the Claimant wrote several times to the Respondent and to the Yemeni Arbitral Tribunal to complain about some clerical and calculation mistakes in the Yemeni Arbitral Award (Claim. 2 Aug. 2005, no. 62; Claim. 30 June 2006, no. 108 and 109; Exh. CM-89, CM-94, CM-97, CM-101, CM-103; Resp. 16 Oct. 2006, no. 3.79; Resp. 15 Jan. 2007, no. 3.12).

33. On 28 August 2004 an altercation took place at the Al Mahweet – Al Qanawis site between the Claimant's personnel and the Yemeni army, which resulted in the arrest of three of the Claimant's personnel (Claim. 30 June 2006, no. 114; Exh. CM-91).

34. On 31 August 2004 the three arrested members of the Claimant's personnel were released (Claim. 30 June 2006, no. 114; Claim. 19 March 2007, no. 97).

35. On 11 September 2004 the Prime Minister wrote to the Yemeni President stating that the Yemeni Arbitral Award was:

"... final and binding on both parties ...

The Award has demonstrated that Desert Line Projects is entitled to an [...] *overdue balance amount of YR 7,109,773,520. Therefore, the guarantees held at the banks should be released as a first step, and then, as a second step, the final balance due pursuant to this Award should be paid.*

Please review and instruct accordingly."

(Exh. CM-96).

36. On 22 September 2004 the Respondent applied to Yemeni courts for the annulment of the Yemeni Arbitral Award. The grounds advanced by the Respondent included the invalidity of the Yemeni Arbitration Agreement and the violation of the Respondent's due process rights (Resp. 15 Jan. 2007, no. 2.7; Claim. 19 March 2007, no. 104).

37. On 25 September 2004 a summons was issued by the Sana'a Court of Appeal to the Claimant, instructing it to appear to answer an action brought by the Respondent's Ministry of Public Works and Highways seeking the annulment of the Yemeni Arbitral Award (Claim. 30 June 2006, no. 116; Exh. CM-100; Claim. 19 March 2007, no. 104).

38. Between 2 September 2004 and 7 December 2004 the Claimant complained to the Respondent about "*harassment, threat and theft*" committed by armed groups and requested its protection (Claim. 30 June 2006, no. 117; Exh. CM-95, CM-104, CM-106, CM-110, CM-111, CM-112, CM-116, CM-118, CM-125).

39. In October 2004 the Respondent communicated a proposal for an agreement, offering the Claimant the amount of YR 3,524,326,966 as a final settlement of the dispute and allowing it to repatriate its equipment to Oman (Claim. 2 Aug. 2005, no. 69; Claim. 30 June 2006, no. 122; Resp. 15 Jan. 2007, no. 2.8).

40. Between 20 October 2004 and 8 December 2004 the Claimant wrote several times to the Respondent complaining about the "*arbitrary conditions*", the "*injustice and unfairness*" of the proposed settlement (Claim. 30 June 2006, no. 252; Exh. CM-103, CM-113, CM-119, CM-120; CM-121).

41. On 1 December 2004 the Claimant's Chairman and the President of Yemen exchanged letters about the proposed settlement. The Yemeni President peremptorily advised the Claimant to "*take what the ministerial commission has decided as it is in* [the Claimant's] *interest. As for the* [Yemeni Arbitral Tribunal], *they do not know how to evaluate the works*" (Claim. 30 June 2006, no. 130 to 132; Claim. 19 March 2007, no. 112; Exh. CM-113; Resp. 15 Jan. 2007, no. 2.9).

42. On 22 December 2004 the Claimant filed an application with the Yemen Court, opposing the Respondent's request that the Yemeni Arbitral Award be nullified and seeking its enforcement (Resp. 15 Jan. 2007, no. 2.10; Resp. 15 Jan. 2007, no. 3.20).

43. On the same day the Claimant signed the agreement which had been under discussion since sometime before 20 October (hereinafter referred to as the "Settlement Agreement") (Claim. 2 Aug. 2005, no. 72; Claim. 30 June 2006, no. 138; Exh. CM-124; Resp. 16 Oct. 2006, no. 3.69).

44. On 28 December 2004 the Sana'a Court of Appeal endorsed the Settlement Agreement following an application by the Claimant (Resp. 15 Jan. 2007, no. 2.24; Exh. RCM-8).

45. On 29 December 2004, the Respondent authorized the Central Bank of Yemen to pay into the Claimant's account with the Arab Bank the amount of YR 3,524,326,966 pursuant to the Settlement Agreement (Resp. 15 Jan. 2005, no. 2.29; Exh. RCM-9).

46. On 31 December 2004 the bank released the two guarantees issued by the Claimant in favour of Yemen (Claim. 30 June 2006, no. 289; Resp. 15 Jan. 2007, no. 5.25).

47. Between 10 January 2005 and 7 May 2005 the Claimant wrote several letters to the Respondent in order to challenge the validity of the Settlement Agreement and request payment of what the Claimant considered to be the true outstanding amounts under the Yemeni Arbitral Award as corrected for alleged errors (Claim. 30 June 2006, no. 140; Exh. CM-128, CM-131, CM-136, CM-138, CM-141, CM-142; Resp. 16 Oct. 2006, no. 3.44 to 3.48; Resp. 15 Jan. 2007, no. 2.32 and 2.33).

48. On 16 May 2005 the Claimant communicated to the Respondent its rescission of the Settlement Agreement and its intention to seek ICSID arbitration (Claim. 2 Aug. 2005, no. 75; Claim. 19 March 2007, no. 33; Exh. C-53).

49. On 2 July 2005 the Claimant was authorized to repatriate excess equipment to Oman (Claim. 30 June 2006, no. 141; Exh. CM-144; Resp. 16 Oct. 2006, no. 3.38).

III. The Arbitral Proceedings

50. On 2 August 2005 the Claimant filed a Request for Arbitration before the International Centre for Settlement of Investment Disputes (hereinafter referred to as "ICSID" or the "Centre") whereby it asked that the Arbitral Tribunal to be constituted (Claim. 2 Aug. 2005, no. 90):

"Declare that Respondent has breached the Bilateral Treaty and/or international law, and accordingly order Respondent to:

(i) Pay Claimant fair and equitable compensation for Claimant's works under the Contracts in an amount not less than the highest of the following two amounts:

(a) YR 3,585,446,554 (i.e., approximately USD 19,400,000) outstanding under the award to which should be added an amount to be determined for the obvious clerical errors adverse to Claimant that were made therein; or

(b) The estimated amount advanced by Respondent to foreign government or institutions, or amounts actually received by Respondent from foreign government or institutions in aid, for the Contracts – estimates and amounts which Respondent is requested to disclose in this arbitration;

(ii) Pay Claimant damages in an amount to be determined for the losses sustained by Claimant as a result of Respondent's breaches that deprived Claimant of its rights over the management, use, enjoyment and transfer of its machinery, equipment and vehicles since 2004;

(iii) Pay Claimant damages in an amount to be determined for loss of business opportunities, loss of reputation and other losses sustained by Claimant as a result of Respondent's breaches;

(iv) *Reimburse Claimant amounts Claimant was forced to pay to Respondent as a result of Respondent's breaches;*

(v) *Pay Claimant amounts for any outstanding claims resulting out of the 8 Contracts which were not settled under the Award;*

(vi) *Pay Claimant damages in an amount to be determined for losses sustained by Claimant on related projects as a result of Respondent's breaches;*

(vii) *Pay Claimant interest, including compounded interest, on all of the above amounts: and*

(viii) *Immediately end its unfair, inequitable, illegal and/or discriminatory measures against DLP."*

51. On 6 January 2006 the Arbitral Tribunal was fully constituted in accordance with Rule 6(1) of the Arbitration Rules of the Centre, the Claimant having appointed Professor Jan Paulsson as the first Arbitrator, the Respondent having appointed Professor Ahmed El-Kosheri as the second Arbitrator, and by their agreement the Parties having designated Professor Pierre Tercier as President of the Arbitral Tribunal.

52. On 8 March 2006 the first session of the Arbitral Tribunal was held in Paris to decide various procedural matters (Minutes of the first session of the Arbitral Tribunal).

53. On 16 March 2006 the Arbitral Tribunal issued its "Procedural Order No. 1" concerning witness statements, providing in particular that:

"a) *The witness statements shall be submitted by the Parties together with their second exchange of briefs;*

b) *If requested, the Arbitral Tribunal may authorize the Claimant to submit supplementary witness statements in response to the witness statements submitted by the Respondent in its Rejoinder, should it consider the Claimant's request sufficiently grounded."*

54. On 18 April 2006 Procedural Order No. 1 was amended in accordance with observations made by the Parties without altering the substance of the decision.

55. On 22 May 2006 the Claimant submitted a "Request for Documents" whereby it reiterated its demand that the Respondent produce several contractual, official and internal documents, which it considered necessary to the presentation of the case.

56. On 14 June 2006 the Claimant wrote to the Arbitral Tribunal asking for an extension of time and reiterating its demand for the production of documents.

57. On 19 June 2006 the Arbitral Tribunal issued its "Procedural Order No. 2" whereby it decided:

"a) *That the Claimant's request for production of documents of May 22, 2006 is premature at this stage of the proceedings;*

b) That the Arbitral Tribunal will examine this request or any amended version of it after the first exchange of briefs;

c) That the time limit for the Claimant to file its Memorial is now June 30, 2006, instead of June 23, 2006;

d) That the subsequent time limits for the Parties to file their briefs are amended accordingly, i.e.:

- 16 Oct. 2006: The Respondent to file its Counter-Memorial (instead of 9 Oct. 2006)
- 16 Dec. 2006: The Claimant to file its Reply (instead of 9 Dec. 2006)
- 16 Feb. 2007: The Respondent to file its Rejoinder (instead of 9 Feb. 2007)."

58. On 30 June 2006 the Claimant filed its "Memorial" by which it requested the Arbitral Tribunal to grant the following relief:

"(i) Declare that Respondent has breached its obligations toward Claimant under the Bilateral Treaty and/or international law;

(ii) Declare the Settlement Agreement null and void and/or rescinded;

(iii) Order Respondent to pay Claimant compensation for Claimant's outstanding rights under the Contracts in an amount provisionally quantified between OR 36,657,000 and OR 36,782,238 or alternatively compensation for Claimant's outstanding rights under the Award, corrections included, in the amount of OR 34,122,290 as August 9, 2004;

(iv) Order Respondent to pay Claimant damages quantified at OR 30,731 for the late release by Yemen of DLP's two bank guarantees;

(v) Order Respondent to pay Claimant damages quantified at OR 4,171,935 for the illegal blocking by Yemen of DLP's equipments from August 9, 2004 to July 2, 2005;

(vi) Order Respondent to pay Claimant damages quantified at OR 8,308,000 for the loss of business opportunities sustained by DLP from 2002 to 2005 in Oman and Yemen;

(vii) Order Respondent to pay Claimant damages quantified at OR 7,117,050 for the loss sustained by DLP as a result of its inability to exercise the buy back option under the Agreement to repurchase the Property;

(viii) Order Respondent to pay Claimant moral damages quantified at OR 40,000,000;

(ix) Order Respondent to pay Claimant interest on all of the above amounts at the rate of 7% corresponding to DLP's borrowings in Oman from the date the

above amounts were due until the date of the effective payment thereof by Yemen; and

(x) Order Respondent to pay Claimant all arbitration, legal and related including counsel fees sustained by DLP in connection with this arbitration."

59. On 16 October 2006 the Respondent filed an "Objection to Jurisdiction Memorial" by which it requested the Arbitral Tribunal to grant the following relief:

"(i) The issue of jurisdiction is to be addressed and decided as a preliminary question;

(ii) DLP's claims are dismissed because the Tribunal lacks jurisdiction over all such claims; and

(iii) Yemen is to be awarded its reasonable costs, including legal fees and the fees and expenses of the Tribunal and the ICSID Secretariat, as will be quantified at the appropriate time, incurred as consequence of having to respond to the claims brought by DLP in these proceedings."

60. On 22 November 2006 the Arbitral Tribunal issued its "Procedural Order No. 3" whereby it decided:

"a) That in the circumstances of the case, as they are now before the Tribunal, and without prejudice to the determination of any question of jurisdiction, the objections to jurisdiction shall be joined to the merits of the dispute;

b) That the time limit for the Respondent to file its Counter Memorial is now December 8, 2006;

c) That the subsequent time limits for the Parties to file their written pleadings are amended accordingly, as follows:

- February 2, 2007: The Claimant to file its Reply (instead of December 16, 2006)
- March 30, 2007: The Respondent to file its Rejoinder (instead of February 16, 2006)."

61. On 23 November 2006 the Respondent objected to the time limits that had been fixed in Procedural Order No. 3 for its Counter Memorial, and requested an extension of six weeks.

62. On 24 November 2006 the Claimant requested that the Tribunal reject the Respondent's request.

63. On 30 November 2006 the Arbitral Tribunal issued its "Procedural Order No. 4" whereby it decided:

"a) That the Respondent's request for an extension of the time limit is partly accepted. The time limit for the Respondent to file its Counter memorial is now January 15, 2007 instead of October 16, 2006;

b) That the subsequent time limits for the Parties to file their written pleadings are amended accordingly, as follows:

- March 12, 2007: The Claimant to file its Reply (instead of December 16, 2006)
- May 7, 2007: The Respondent to file its Rejoinder (instead of February 16, 2007)

c) That new dates have to be found for the hearings; The Parties are invited to indicate by Monday December 11, 2006 at the latest, in writing, what dates from the attached list of dates would be convenient to their representatives for fixing by the Tribunal of new dates for the oral hearings."

64. On 15 January 2007 the Respondent filed its "Counter-Memorial" whereby it requested the Arbitral Tribunal to make an award to the effect that:

"(i) DLP's claims are dismissed because the Tribunal lacks jurisdiction under Article 1(1) and Article 11 of the Yemen-Oman Treaty;

(ii) In the event that the Tribunal decides that it has jurisdiction over some or all of DLP's claims, those claims are rejected on the merits because they have been previously settled pursuant to the Arbitral Award of 9 August 2004, the Parties' Settlement Agreement of 22 December 2004 and/or the Yemen Court of Appeal's endorsement of that Settlement Agreement as an enforcement of the Arbitral Award on 28 December 2004;

(iii) To the extent the tribunal exercises jurisdiction in this case, Yemen is entitled to damages by way of counterclaim resulting from (i) DLP's breach of its undertakings subscribed to in the Settlement Agreement; and (ii) damages and/or set off for DLP's unfulfilled construction obligations and its obligation to maintain the bank guarantees;

(iv) *Yemen is to be awarded its reasonable costs, including legal fees and costs, and expenses of the Tribunal and the ICSID Secretariat, as will be quantified at the end of the proceedings, incurred as a consequence of having to respond ti the unfounded claims brought by DLP in these proceedings."*

65. On 19 March 2007 the Claimant filed its "Reply Memorial" whereby it reiterated its prayers for relief and asked the Arbitral Tribunal to "*dismiss all of Respondent's counterclaims or, alternatively, allow a set-off in the amount of YR 72,000,000, representing the amount of DLP's outstanding works as of August 9, 2004.*"

66. On 14 May 2007 the Respondent filed its Rejoinder whereby it reiterated its prior requests for relief.

67. On 15 May 2007 the Arbitral Tribunal issued its "Procedural Order No. 5" whereby it decided to suspend the Claimant's request to order the oral hearing of the Yemeni President and Prime Minister and to decide on this matter during or after the hearing of June 2007 and after having heard the counsels of the Parties.

68. On 23 May 2007 the Arbitral Tribunal issued its "Procedural Order No. 6" on the organisation of the witness hearings to take place in June 2007.

69. On 1 June 2007 the Claimant submitted four additional exhibits to the Arbitral Tribunal (CM-182, CM-183, CM-184 and CM-185).

70. On 5 and 6 June 2007 witness hearings took place with the Arbitral Tribunal and the Parties in Paris. They were devoted to the examination of Messrs Saleh bin Ahmed Bin Farid Al Aulaqi, Peter Hoare, Wissam Khalaf Abdallah Nessari, James G. Scott and Khalid Ansari, all called by the Claimant. The Arbitral Tribunal accepted the new Claimant's exhibits and accorded one month to the Respondent to comment on these documents. By the end of the hearings, the Claimant no longer maintained its request for production of documents and witnesses.

71. On 6 July 2007 the Respondent commented on the documents filed by the Claimant on 1 June 2007. Additionally, the Respondent submitted three additional exhibits to the Arbitral Tribunal (Exh. RR-7, RR-8 and RR-9) in rebuttal to the four additional exhibits filed by the Claimant on 1 June 2007. Finally, the Respondent presented its statement of costs, pursuant to the Arbitral Tribunal's instructions given at the hearing of 5 and 6 June 2007.

72. On 8 July 2007 the Claimant also submitted its statements of costs.

73. On 23 July 2007 the Claimant submitted written comments into the record on the last three documents (Exh. RR-7, RR-8 and RR-9) introduced by the Respondent on 6 July 2007.

74. On 31 July 2007 the Respondent commented on the Claimant's submission dated 23 July 2007 regarding Exhibits RR-7, RR-8 and RR-9.

75. On 18 September 2007 the Arbitral Tribunal closed the proceedings. The arbitrators are satisfied that both parties had ample opportunities to present their case in written and oral form.

B. LEGAL CONSIDERATIONS

I. Generally

1. The Proceedings and the Constitution of the Arbitral Tribunal

76. The Claimant initiated the present arbitration proceedings on 2 August 2005 (see above no. 50). The Request for Arbitration was registered by ICSID on 30 September 2005. The Arbitral Tribunal was constituted on 6 January 2006 (see above no. 51). The Parties did not raise any objections to the appointment of its members.

77. The proceedings were conducted in accordance with the ICSID Arbitration Rules as amended and effective January 1, 2003. Procedural Order of 22 November 2006 (see above no. 60) decided that the proceedings would not be bifurcated between the questions related to jurisdiction and those related to the merits.

78. On 4 and 5 June 2007, the Arbitral Tribunal heard the witnesses and experts presented by the Claimant (see above no. 70). The Respondent did not request the hearing of any witness or expert. During the hearing, the Claimant withdrew its request that the Yemeni President and Prime Minister be summoned as witnesses (Transcript, 6 June 2007, p. 172, no. 16).

79. During this hearing, the Arbitral Tribunal decided to accept new documents (Exhibits CM-182 to 185) that were submitted by the Claimant on 1 June 2007 for the purpose of rebutting allegations contained in the Respondent's last written submission. At the same time, the Arbitral Tribunal granted one month to the Respondent to comment on those documents (see above no. 71, Transcript, 6 June 2007, p. 10, no. 20 and p. 177, no. 21).

80. At the close of the hearing, both Parties expressly declared that they had no reservation with respect to the Arbitral Tribunal's procedural decisions (Transcript 6 June 2007, p. 179, no. 19).

2. Final Positions of the Parties and Structure of the Award

81. Pursuant to their last submissions, the positions of the Parties are as follows:

a) The Claimant requests that the Arbitral Tribunal's award:

"*(i) Declare that Respondent has breached its obligations toward Claimant under the Bilateral Treaty and/or international law;*

(ii) Declare the Settlement Agreement null and void and/or rescinded;

(iii) Order Respondent to pay Claimant compensation for (a) Claimant's outstanding rights under the Contracts in an amount provisionally quantified at OR 36,657,000 or alternatively OR 36,782,238 or, alternatively, (b) Claimant's outstanding rights under the Award, including corrections, in the amount of OR 34,122,290 as of August 9, 2004;

(iv) Order Respondent to pay Claimant damages quantified at OR 30,731 for the late release by Yemen of DLP's two bank guarantees;

(v) Order Respondent to pay Claimant damages quantified at OR 4,171,935 for the illegal blocking by Yemen of DLP's equipments from August 9, 2004 to July 2, 2005;

(vi) Order Respondent to pay Claimant damages quantified at OR 8,308,000 for the loss of business opportunities sustained by DLP from 2002 to 2005 in Oman and Yemen;

(vii) Order Respondent to pay Claimant damages quantified at OR 7,117,050 for the loss sustained by DLP as a result of its inability to exercise the buy-back option under the Agreement to repurchase the Property;

(viii) Order Respondent to pay Claimant moral damages quantified at OR 40,000,000;

(ix) Order Respondent to pay Claimant interest on all of the above amounts at the rate of 7% corresponding to DLP's borrowings in Oman from the date the above amounts were due until the date of the effective payment thereof by Yemen;

(x) Dismiss all of Respondent's counterclaims or, alternatively, allow a set-off in the amount of YR 72,000,000, representing the amount of DLP's outstanding works as of August 9, 2004;

(xi) Order Respondent to pay Claimant all arbitration, legal and related including counsel fees sustained by DLP in connection with this arbitration."

(Claim. 19 March 2007, no. 221).

b) The Respondent requests the Arbitral Tribunal to adjudge and declare that:

"(i) DLP's claims are dismissed because the Tribunal lacks jurisdiction under Article 1(1) and Article 11 of the Yemen-Oman Treaty;

(ii) In the event that the Tribunal decides that it has jurisdiction over some or all of DLP's claims, those claims are rejected on the merits;

(iii) The relief sought by DLP consequently is rejected in its entirety because Yemen has not breached any obligation owed to DLP under the Treaty;

(iv) To the extent the tribunal exercises jurisdiction, Yemen is entitled by way of counterclaim to (a) damages resulting from DLP's breach of its undertakings subscribed to in the Settlement Agreement; and (b) damages and/or set off for DLP's unfulfilled obligations decided in the Arbitral Award, including damages for DLP's unfulfilled construction obligations and its obligation to maintain the bank guarantees.

(v) Yemen is to be awarded its reasonable costs, including legal fees and costs, along with expenses it has incurred with respect to the Tribunal and the ICSID Secretariat, as will be quantified at the end of the proceedings, incurred as a consequence of having to respond to the unfounded claims brought by DLP in these proceedings."

(Resp. 14 May 2007, p. 116).

82. Accordingly, the Arbitral Tribunal will deal with the questions before it:

- Does the Arbitral Tribunal have jurisdiction over this dispute? (see below II)
- If so, did the Respondent violate its obligations under the BIT? (see below III.1, III.2 and III.3)
- Are the Respondent's counterclaims well founded? (see below III.4)

- To the extent any claims or counterclaims are upheld, what damages should be awarded? (see below III.V)
- In any case, how should the costs incurred in the present arbitration proceedings be allocated? (see below IV).

II. The Jurisdiction of the Arbitral Tribunal

1. In General

83. This arbitration has three jurisdictional pillars, namely Article 25 of the ICSID Convention, which makes ICSID arbitration accessible to qualified parties which have consented thereto with respect to "any legal disputes arising directly out of an investment;" the Yemen-Oman BIT, upon which the Claimant relies as the manifestation of the Respondent's consent with respect to this dispute; and para. 12 of the Request for Arbitration, by which the Claimant manifested its own consent.

84. No issue arises with respect to the first and last of these three elements. The Respondent rather seeks dismissal of the claims, as stated in its final written Submissions (Resp. 14 May 2007, p. 116): "because the Tribunal lacks jurisdiction under Article 1(1) and Article 11 of the Yemen-Oman Treaty."

85. The Claimant notified the Respondent of the existence of this dispute in a series of written communications:

- 10 January 2005 to the Minister of Public Works (Exh. C-45);
- 26 February 2005 to the President of the Republic (Exh. C-46);
- 29 March 2005 to the President of the Republic (Exh. C-49);
- 8 April 2005 to the President of the Republic (Exh. C-50);
- 7 May 2005 to the President of the Republic (Exh. C-52).

In one of these communications, the Claimant expressed to the President the hope that the Respondent's failure to respect the Claimant's "entitlements" would not force it "to initiate legal proceedings before relevant entities," including the World Bank (Exh. C-49).

86. Not only did the Respondent not question the Claimant's reference to the "World Bank;" it failed to answer in any way.

87. Any doubt that the Claimant was giving notice of possible ICSID arbitration under the BIT was put to rest in a letter from the law firm Salans of 16 May 2005 on behalf of the Claimant (Exh. C-53), in which the Claimant explicitly invoked Article 11 of the BIT and gave notice that failing amicable resolution it would proceed to ICSID arbitration.

88. On 15 June 2006 (Exh. C-54), the law firm Eversheds answered Salans on behalf of the Respondent, asserting that the dispute had been finally settled and therefore did not exist. This letter did not otherwise question the Claimant's entitlement to ICSID arbitration.

89. On the occasion of the first session before the Arbitral Tribunal on 8 March 2006, the Claimant pressed the Respondent to indicate whether it intended to make jurisdictional objections, and if so to do so as early as possible.

90. In the event, the Respondent waited until the last day of the time fixed for the filing of its Counter-Memorial (namely 16 October 2006) when, instead of a Counter-Memorial it filed a 79-page document entitled "Objections to Jurisdiction" along with two volumes of exhibits.

91. Under Article 41 of the ICSID Rules, "any" objection to jurisdiction "shall be made as early as possible." That Article also provides that the objection shall be filed with ICSID "no later than the expiration of the time limit filed for the filing of the counter-memorial."

2. Under Art. 1 of the BIT

a) The Issue

92. The Respondent argues that the Claimant's alleged investment was never "accepted" by it and that no investment certificate was issued, both being requirements under Article 1(1) of the BIT, which (in the English translation on which both parties relied) reads as follows:

The term "Investment" shall mean every kind of assets owned and invested by an investor of one Contracting Party, in the territory of the other Contracting Party, and that is accepted, by the host Party, as an investment according to its laws and regulations, and for which an investment certificate is issued.

The term "Investment" includes in particular, though not exclusively:

a. Movable and immovable property as well as other guarantees pertaining to it such as mortgages, preferred debts and other liens.

b. Securities, stocks, shares and company's bonds.

c. Debts as well as service of debt deriving from a contract related to the investment.

d. Intellectual and industrial property rights and intangible elements relating to commercial assets such as trademarks, copyrights, designs, goodwill, etc. used in a licensed investment.

e. Concessions conferred according to the host country's applicable laws including rights to extract, exploit and search for natural resources that give its beneficiaries an appearance of legitimacy during the licensed period.

b) The Parties' Contentions in Summary

93. With respect to the Respondent's argument that the Government never "accepted" the Claimant's investment so as to qualify it for coverage under the BIT, the principal strands of its reasons may be summarized as follows (Resp. 16 Oct. 2006, no. 2.1-2.54; Resp. 14 May 2007, no. 1.4-1.34):

(a) even if the Government may have accepted the Claimant's project, this did not equate with an acceptance of an investment for the purposes of the BIT in accordance with applicable laws and regulations (Resp. 16 Oct. 2006, no. 2.6); nor did it create an estoppel preventing Yemen from insisting on the requisites of the BIT (Resp. 14 May 2004, no. 1.31);

(b) although implementation of the Claimant's project may have commenced prior to the entry into force of the BIT, the Treaty is nonetheless applicable and requires that the investment be "accepted" (Resp. 16 Oct. 2006, no. 2.34 *et seq.*);

(c) failure to register under Yemeni Investment Law No. 22 of 1991 as amended in 1997 and 2002 (hereinafter referred to as the "YIL") did not render the Claimant's activities unlawful *per se*, but disqualified it from invoking the BIT (Resp. 14 May 2007, no. 1.4 *et seq.*);

(d) the position taken by the Respondent is based on the plain language of the BIT; it cannot be criticized as unduly formalistic or lacking in good faith (Resp. 14 May 2007, no. 1.4 *et seq.*);

(e) there is no requirement that both contracting States (Oman and Yemen) must have congruent laws and regulations pertaining to investments; the BIT does not prevent Yemen from having requirements different from those of Oman (Resp. 14 May 2007, no. 1.27 *et seq.*);

(f) the Respondent's interpretation of Article 1(1) is neither absurd nor unreasonable in terms of Art. 31 of the Vienna Convention of the Law of Treaties.

94. The Claimant counters that:

(a) Art. 1(1) does not refer to the YIL; if the Contracting States had wanted to define the meaning of "laws and regulations" by reference to the YIL, they would have done so expressly (Claim. 19 March 2007, no. 18);

(b) the Respondent's interpretation of Art. 1(1) is contrary to international law and practice, which do not refer to local law requirements in order to define the meaning of "investment" in bilateral treaties, but seek rather to determine the intentions of the States-Party; local law requirements should be considered

only insofar as they determine the legality of the investment (Claim. 19 March 2007, no. 19);

(c) the Respondent's interpretation of Art. 1(1) conflates the distinct objectives sought by the YIL and the BIT, whereas the YIL and Art. 1(1) of the BIT aim to satisfy different concerns and purposes;

(d) the Claimant's investment does not fall within the scope of the YIL (Claim. 19 March 2007, no. 23 *et seq.*), which regulates only investments licensed under its provisions, as opposed to all investments in Yemen.

95. With respect to its contention that the Claimant cannot invoke the benefits of the BIT due to its failure to procure an "investment certificate," the principal strands of the Respondent's reasons are that:

(a) even if the Government may have accepted the Claimant's project, this acceptance did not equate with a *de facto* certificate (Resp. 16 Oct. 2006, no. 2.6);

(b) Art. 33 of the YIL makes clear that certificates are to be issued by the Yemeni General Investment Authority (Resp. 16 Oct. 2006, no. 2.13 *et seq.*; Resp. 14 May 2007, no. 1.22); and the Arabic word *shahada* in Art. 1(1) of the BIT, translated as "certificate," is the same as that used in the YIL (Transcript, 5 June 2007, p. 85);

(c) although implementation of the Claimant's project may have commenced prior to the entry into force of the BIT, the BIT is nonetheless applicable to qualifying investments made prior to its entry in force and the 2002 YIL permitted the Claimant to register its activities and secure the certificate (Resp. 16 Oct., no. 2.34 *et seq.*);

(d) the MFN clause of the BIT (Article 5) cannot neutralise the express intention of the Contracting States as reflected in Article 1(1); moreover, the *lex specialis* of Article 1(1) should take precedence over the *lex generalis* of Article 5 (Resp. 16 Oct. 2006, no. 2.40 *et seq.*; Resp. 14 May 2007, no. 1.24 *et seq.*;

(e) there was no waiver or estoppel with respect to this requirement; approval of the project is not equivalent to fulfilment of a requisite to qualify under the BIT (Resp. 14 May 2007, no. 1.31);

(f) arguments (d), (e), and (f) in Paragraph 93 apply with respect to this matter as well.

96. The Claimant counters that:

(a) there is no warrant to affirm that the "investment certificate" mentioned in Art. 1(1) of the BIT refers to the license required for certain particular purposes by the YIL; nor does the YIL refer to any authority exclusively tasked with issuing such a certificate; nor does Art. 1(1) refer to the General Investment

Authority or indeed to any other specific government department (Claim. 19 March 2007, no. 33-35);

(b) to deny the claim for want of a formal certificate would violate the MFN clause of the BIT, since identical claims under other BITs would not be required to pass such a test (Claim. 19 March 2007, no. 36);

(c) the Omani Investment Law allows investors to obtain an "exemption from license requirements by virtue of special contracts with the Government;" it could not have been intended that Yemeni investors in Oman would be treated better than Omani investors in Yemen (Claim. 19 March 2007, no. 37; Exh. CLA-62);

(d) insisting on a formal "certificate" under Art. 1(1) of the BIT would lead to the absurd result that an investment promoted and supported by the Head of State would not be protected under the BIT, but an investment of far lesser magnitude would receive such protection because it had gone through "a subcommittee of the executive branch" (Claim. 19 March 2007, no. 38);

(e) since the Claimant in fact made its investment at the request and with the approval of the President and the Cabinet, on which the Claimant relied, it should be deemed either to be in possession of the equivalent of a certificate, or be entitled to hold the Respondent to a waiver or estoppel;

(f) if there is doubt as to the interpretation of the word "certificate" in Art. 1(1), it should be interpreted in favor of investor protection and ICSID jurisdiction (Claim. 19 March 2007, no. 50).

c) The Arbitral Tribunal's Analysis

97. As recalled above, "any" objection to jurisdiction is required by the ICSID Rules to be made "as early as possible" (see para. 91). It is difficult to accept that the Respondent's two simple objections, based on the alleged absence of two elements which should have been manifest to the Government (namely the failure of acceptance of the investment and the absence of the particular certificate which it alleges must have been delivered by the General Investment Authority) could not have been made in the first half of 2005 when the Claimant indicated its intention of pursuing ICSID arbitration, especially since the Respondent alleges that each of these elements wholly precludes the Claimant's access to ICSID. The fact that objections shall be filed with ICSID "no later" than the deadline for the Counter-Memorial does not mean that the Respondent was not bound to raise them before that date, if such objections were or ought to have been already manifest, in view of the "as early as possible" requirement in the first sentence of Article 41.

98. The Arbitral Tribunal will nevertheless examine and dispose of the objections. It observes preliminarily that it is dealing with a certified English translation of the BIT presented by the Claimant (Exh. C-1). The Respondent has made no objection to the translation. Both parties have presented their arguments in English by reference to that English text. The Respondent has not adduced any expert evidence of Yemeni law to assist the Arbitral Tribunal in its understanding of the key concepts of "accepted" and

"certificate." The Respondent has not sought to show that these concepts have any special meaning in Yemeni law that might deviate from the plain-language purport of the terms "accepted" and "certificate." Nor has the Respondent called a single witness to explain the factual circumstances relevant to the understandings between the Claimant and the many high officials who were concerned with the conception, negotiation, and performance of the Claimant's project. Given its position as author of the objection, the Respondent must accept the consequences of its forensic choices.

99. The objection to the effect that the Claimant's investment was never "accepted by [the Respondent] as an investment according to its laws and regulations" is as unpersuasive as it is unattractive.

100. The preamble of the BIT (which under the customary-law rules codified in the Vienna Convention of the Law of Treaties may legitimately be taken into account in construing the terms of the BIT) defines the objectives of the two States, in signing the BIT, as follows:

Desiring to intensify the economic cooperation between the two sisterly countries and to serve their mutual interests.

Confirming their desire to create and maintain favourable conditions for capital investments by investors of one of the Contracting parties in the territory of the other Contracting Party.

Acknowledging that offering mutual promotion and protection of such investments, on the basis of investment laws and regulations in force in both countries and on the basis of this Agreement, will contribute in stimulating investment ventures which will foster the prosperity of both Contracting Parties. ...

101. The "mutual promotion and protection" is envisaged as effected "on the basis of" laws, regulations, and the BIT itself. It is thus not described as *restricted* by the laws, the regulations or the BIT, but rather the contrary – as *founded* on those normative sources. They are a support, not an impediment.

102. The phrase "according to its laws and regulations" in Art. 1(1) may syntactically be considered to qualify either of the two words *accepted* or *investment*. The Respondent insists that some mechanism of acceptance must be found for an investment to be in compliance with Yemeni laws and regulations. That argument has not been demonstrated to the Arbitral Tribunal's satisfaction. Nor have the arbitrators been shown any Yemeni definition of "investment" which would override the definitions of the BIT itself. Such an intellectual construct would seem to defeat the very purposes of the BIT, and must be rejected.

103. It is self-evident that a BIT concluded in 1998 could, if the States-Party had intended to give more specific content to the notion of "according to its laws and regulations," have referred to the YIL, which was first enacted in 1991. It does not. Even if it had, the Arbitral Tribunal has not been directed to any explicit provision in the YIL that would require a particular form in which an investment must be "accepted," or to preclude that the highest organs of the State choose their own manner of "acceptance"

irrespective of procedures devised for subordinate departments like the General Investment Authority.

104. In State practice in the BIT area, the phrase "according to its laws and regulations" is quite familiar. Moreover, it has been well traversed by arbitral precedents, notably *Inceysa* (*Inceysa v. Republic of El Salvador*, ICSID Case No. ARB/03/26, 2 August 2006) and *Fraport* (*Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, 16 August 2007) which make clear that such references are intended to ensure the legality of the investment by excluding investments made in breach of fundamental principles of the host State's law, e.g. by fraudulent misrepresentations or the dissimulation of true ownership. No such illegality has been alleged, let alone proved, in this case. As another ICSID tribunal put it with regard to the there applicable Algeria-Italy BIT:

> *the mention in the text of conformity to laws and regulations in vigour does not constitute a formal acknowledgement of the notion of investment as understood in Algerian law in a restrictive fashion, but rather, adopting a classic and wholly justified formulation, the loss of protection suffered by any investments made in violation of fundamental governing principles.* (*LESI SpA et Astaldi SpA v. Algeria*, para. 83 (12 July 2006; translated from French).)

105. Under these circumstances the Respondent has not come close to satisfying the Arbitral Tribunal that the Claimant made an investment which was either inconsistent with Yemeni laws or regulations or failed to achieve acceptance by the Respondent. The contrary is established by overwhelming evidence of the lengthy dealings between the Parties at the highest level, namely the President of the Republic, the Prime Minister, the Minister of Finance, and the Minister of Public Works.

106. As far as concerns the issue of the certificate, the threshold inquiry is whether Article 1(1) corresponds to mere formalism or to some material objective. The Arbitral Tribunal has no hesitation in opting for the second alternative. A purely formal requirement would by definition advance no real interest of either signatory State; to the contrary, it would constitute an artificial trap depriving investors of the very protection the BIT was intended to provide. Such an idea must give way – in the absence of an explicit and compelling demonstration to the contrary – when there is, as we shall see, an obvious substantive justification for the requirement under general international law, which forms the context in which the BIT is called upon to operate.

107. It is striking with regard to this limb of the Respondent's objection that the notion of "investment certificate," as opposed to that of "accepted," is not qualified by the words "according to its laws and regulations." This means that the certificate requirement falls to be interpreted and understood in a general sense, in light of the objectives of the BIT. This exercise of interpretation is usefully informed by well-established practice in the field of investment protection, especially given that the BIT, dated 1998, is relatively recent and was thus concluded against the backdrop of two decades of proliferation of such instruments.

108. Some States sign BITs without any regard to the *ex ante* identification of investors who may be covered by the treaty in question. This option ensures broader coverage, and may be thought to maximize the stimulation of investment flows between the two

countries. Others require that investors wishing to be protected must identify themselves, on the footing that only specifically approved investments will give rise to benefits under the relevant treaty. This is a different approach, but it too has a legitimate policy rationale, in the sense that the Governments of such States evidently wish to exercise a qualitative control on the types of investments which are indeed to be promoted and protected.

109. Yemen and Oman opted for the second model. In so doing, there is no evidence that they had in mind some specific or indispensable formality. (No *travaux* of the BIT were produced in these proceedings.) The word "certificate" is not self-defining. The Arbitral Tribunal cannot accept that it has a "plain and ordinary meaning" in the sense of Article 31(1) of the Vienna Convention as urged by the Respondent here. Counsel for Yemen, in his oral submissions, used this phrase repetitively, indeed at one point three times in six lines of the Transcript (5 June 2007, p. 84), concluding that the requirement of the certificate "could not be clearer." This degree of insistence fails to mask irreductible difficulty. Indeed, if an imperative formality were intended to be required, it would have been appropriate, if not indispensable, to identify the type of document required in each of the two countries and to identify the issuing department, or at least direct the attention of readers of the Treaty – prospective investors – to the proposition that the precise nature of the required certificates is to be determined by "specific regulations in force from time to time."

110. To illustrate, well-known examples of such specificity include, *inter alia*, the multilateral ASEAN Agreement of 1987, Article II(1) of which provides that the treaty's protections apply only to investments "registered by the host country;" and Indonesia's BITs with (for example) the UK (1977), Australia (1993) and Chile (1999), all of which speak, in regard to investments in Indonesia, of "admission in accordance with the Law No 1 of 1967 concerning foreign investment and any law amending of replacing it."

111. Absent such indications, the only reasonable conclusion is that the Treaty contemplates the substantive *certification* that the investment has indeed been *accepted* for the purposes of Article 1(1).

112. The Respondent's repeated reliance on the case of *Gruslin v. Malaysia*, ICSID award, 27 November 2000, 5 ICSID REPORTS 483, is therefore misplaced (*see, e.g.*, Resp. 16 Oct. 2006, nos. 2.29 *et seq.* and 2.54). The claimant in that case did fail to establish ICSID jurisdiction, but he could hardly have been in a more different situation than the Claimant here. Mr Gruslin alleged that he had invested $2.3 million in a mutual fund in Luxemburg which in turn purchased shares on the Kuala Lumpur Stock Exchange (KLSE). His grievance was that the Malaysian Government had reduced the value of his investment by imposing exchange controls, which had a deleterious effect on the KLSE, which in turn reduced the value of Mr Gruslin's portfolio. The BIT in that case covered only investments that had been classified as "approved projects" by the "appropriate Ministry." Quite clearly the fact that a Belgian individual makes a purchase of securities in Luxemburg which in turn reflects a portfolio partially acquired on the KLSE will not be such an "approved project" – indeed the event will be entirely unknown to any Malaysian official. This is evidently very different from the position of the Claimant in this case.

113. In their monograph, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (Oxford Univ. Press, 2007), Messrs. McLachlan, Shore & Weiniger affirm as follows, at p. 181:

In many investment treaties the definition of 'investment' includes a requirement that the categories of assets admitted as 'investments' must be made 'in accordance with the laws and regulations of the said party'. The plain meaning of this phrase is that investments which would be illegal upon the territory of the host State are disqualified from the protection of the BIT. Attempts by respondent States to broaden the matters encompassed by this phrase have failed.

114. Among the awards they cite as examples of this restricted view is *Tokios Tokelès v. Ukraine*, which the authors describe as follows, at p. 182:

Ukraine attempted to deny the Tribunal's jurisdiction because of various technical defects in the manner in which the investment had been registered under Ukrainian law. The Tribunal was unwilling to withdraw the protection of the BIT on the basis of such defects saying that 'to exclude an investment on the basis of such minor errors would be inconsistent with the objects and purpose of the Treaty'.

115. Other examples given to similar effect include *Salini v. Morocco* (at p. 181), *Inceysa v. El Salvador* (at p. 182), *Yaung Chi Oo Trading v. Myanmar* (at p. 194), *Middle East Cement v. Egypt* (at p. 195) and *Metalpar v. Argentina* (at pp. 195-6).

116. The Arbitral Tribunal does not accept that a particular certificate from the Yemen General Investment Authority was necessary to bring the Claimant's investment under the ambit of the BIT. But even if that had been the case, as the *Fraport* award put it, at para. 396:

When the question is whether the investment is made in accordance with the law of the host state, considerable arguments may be made in favour of construing jurisdiction ratione materiae *in a more liberal way which is generous to the investor. In some circumstances, the law in question of the host state may not be entirely clear and mistakes may be made in good faith.*

In *Fraport*, the relevant BIT referred to investments "accepted in accordance with respective laws and regulations of either Contracting State," i.e. language substantively equivalent to that found in the BIT here.

117. Such leniency would be appropriate in this case, as is confirmed when one puts the hypothetical question: is the likelihood that the investor would have received a certificate if he had believed it was necessary and requested it? The answer is overwhelmingly affirmative, both because of the general endorsement of the investment at the highest level of the State, and in light of the extension of YIL benefits by the *ad hoc* decision communicated by the Vice Prime Minister.

118. Yet more surabundantly, even if this conclusion too were incorrect, the Arbitral Tribunal has no hesitation in concluding, in light of the mass of uncontradicted written and oral evidence in this case, that the Respondent waived the certificate requirement, and is estopped from relying on it to defeat jurisdiction. The Respondent has not

alleged any violation of its laws by the Claimant; indeed it nearly concedes positive compliance when it acknowledges that "failure" to obtain "acceptance [or an] investment certificate … did not render DLP's activities illegal *per se*." (Res. 16 Oct. 2006, 2.18.) The effective certification of the investment is unambiguous in a number of written communications, perhaps most strikingly in the Prime Minister's memorandum of 21 February 2000 addressed jointly to the Ministers of Finance, Planning, and Public Works, which refers to "the meeting that we headed [presided] in your presence … and to what has been agreed," listing in detail elements of the transaction, and concluding:

Given the strategic importance of the two projects, as they link important and large frontier regions, and given that the company's offer, after taking into account the above-mentioned remarks, is deemed appropriate, the Ministry of Construction, Housing and Urban Planning must implement all the above-mentioned remarks, sign the agreements and start the execution works.

119. It would be extraordinary in these circumstances for the Respondent to argue that while other projects of a fractional magnitude, considered at sub-ministerial level of government, would be given protection under the BIT; whereas a project involving hundreds of millions of dollars, considerable technical and indeed security risks, as well as the mobilization of vast resources from the very country which had co-signed the BIT, leading to objectives of national strategic importance in terms of commercial and social integration, security, and cross-border flows of goods and services, should be deprived of protection due to the failure to have obtained some unspecified stamped or signed form from a governmental subdivision. As for the Claimant's detrimental reliance on the assurances from the highest organs of State, they are obvious and indeed uncontradicted. It would be preposterous in the circumstances to require or expect the Head of State or the Prime Minister to issue formalistic qualifications to their encouragements and approvals, such as explicitly referring to the BIT (or even technical regulations of Yemeni law); when they welcomed and approved the Claimant's investment, they did so with all that it entailed. It would offend the most elementary notions of good faith, and insulting to the Head of State, to imagine that he offered his assurances and acceptance with his fingers crossed, as it were, making a reservation to the effect "that we welcome you, but will not extend to you the benefits of our BIT with your country."

120. Addressing the precise issue of estoppel, the ICSID tribunal in *Fraport* wrote (at para. 346): "Principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law." This comment applies *a fortiori* when the alleged problem is not violation of law, but merely – as here – the failure to accomplish a formality foreseen by law, and not even required by it except as a condition of obtaining benefits unconnected with those of the BIT itself.

121. The Arbitral Tribunal's conclusions with respect to both the "acceptance" and the "certificate" issues are significantly bolstered by the consideration that the BIT is not *ejusdem generis* with the YIL, and therefore has no natural obedience to the dictates or qualifications of the latter. The YIL promotes investments from any foreign sources by granting privileges and tax and customs incentives, subject to licenses issued

according to the provisions of that Law. The BIT creates an entirely separate legal regime, applicable in Yemen only to Omani investors, and does not necessarily concern such matters as taxation or import duties, which an Omani investor might well forego without thereby waiving the protections of the BIT. The YIL does not purport to regulate all investments in Yemen, but only those whose promoters wish to benefit by license from its specific advantages, which are not coterminous with those of the BIT.

122. At any rate, when the Claimant in this case determined that it needed specific approval to achieve certain tax and duty exemptions, it wrote to the President to observe that it apparently did not benefit from the YIL and requested that he grant it those benefits (CM 27). This happened, in the form of an instruction from the Vice-President to the Prime Minister in these terms: "Brother Prime Minister, Please instruct that Desert Line Projects' equipment be exempted from customs duties and other taxes" (CM 166). This does not per se prove that the Claimant was entitled to claim the benefit of the BIT, but it certainly makes nonsense out of any suggestion that its investment was in any sense deficient under the YIL. Moreover, a similar instruction from the Vice Prime Minister to the Minister of Foreign Affairs indicated that DLP "should be treated similarly to the German company (Walther) with respect to the exemptions" (CM 27), thus in substance acknowledging the principle of equal treatment enshrined in Art. 5 of the BIT.

123. Given the Arbitral Tribunal's conclusion with respect to Art. 1 of the BIT, it is unnecessary to consider the arguments pertaining to the Claimant's alleged entitlements by virtue of the MFN provision contained in Art. 5 of the BIT.

3. Under Art. 11 of the BIT

a) The Issue

124. The Respondent asserts that even if the Claimant were to demonstrate that it met the conditions set out in Art. 1(1) of the BIT, the Arbitral Tribunal still lacks jurisdiction over the claims by virtue of Art. 11 of the BIT, which contains a "fork in the road" provision requiring an investor to submit its dispute in one selected forum alone. According to the Respondent, the Claimant submitted the dispute to the Yemeni Arbitral Tribunal which rendered a final and binding award. The Yemeni Arbitral Award thus has a *res judicata* effect which precludes the Claimant's claim under the BIT.

125. Art. 11 of the BIT reads as follows:

"*Article 11: Settlement of Investment Disputes*

1) If an investment dispute arises between any of the Contracting Parties and an investor of the other Contracting Party, the Contracting Party and the investor of the other Contracting Party shall try to settle amicably.

2) If the Contracting Party and the investor are unable to reach an agreement within six months from the date of submission of the written request to

negotiate amicably, the dispute shall be resolved through one of the following means, at the investor's choice:

a) The competent court of the host Contracting Party.

b) A special arbitral committee, in accordance with the arbitrations laws of the host Contracting Party.

c) The Arab Investment Court established pursuant to the terms of the Unified Agreement for the Investment of Arab Capital in the Arab States.

d) Arbitration at the International Centre for the Settlement of Investment Disputes for conciliation and arbitration, established pursuant to the Washington Convention dated March 18, 1965 regarding the settlement of investment disputes between states and nationals of other states, if or whenever the two Contracting States become parties to this convention.

3) Arbitral decisions are deemed final and binding on both parties to the dispute and each Contracting Party undertakes to enforce those decisions."

b) The Parties' Contentions in Summary

126. The main strands of the Respondent's argument, presented in greatly abbreviated form, are as follows:

(a) Art. 11 of the BIT permits an investor to submit its dispute only to one of the mutually exclusive dispute settlement options set out in Art. 11(2) of the BIT. The Claimant submitted its dispute to binding arbitration in accordance with the Yemeni law, as contemplated in Art. 11(2)(b) of the BIT. Under Art. 11(3) of the BIT, the Yemeni Arbitral Award is final and binding and has a *res judicata* effect, precluding the Claimant from attempting to re-litigate the same underlying dispute in the present proceedings before the Arbitral Tribunal (Resp. 16 Oct. 2006, no. 3.2 and 3.5 *et seq.*; Resp. 14 May 2007, no. 1.35 *et seq.*);

(b) the Arbitral Tribunal does not have jurisdiction to act as an enforcement mechanism for the Yemeni Arbitral Award, or to act as an appellate body to correct the mistakes or errors of the Yemeni Arbitral Tribunal (Resp. 16 Oct. 2006, no. 3.3 and 3.21 *et seq.*);

(c) the dispute resolved by the Yemeni Arbitral Award is identical to this one; the essential basis of the claims submitted in each case is identical if one compares the nature of the relief claimed by the Claimant (payments outstanding under the Contracts and under the Yemeni Arbitral Award) and if one considers that the dispute that the Claimant wished to negotiate amicably with the Respondent as a pre-condition to resorting to ISCID arbitration concerned the amounts that had been awarded by the Yemeni Arbitral Tribunal as well as certain additional amounts that had not been awarded by it as a result of a

mistake or an error (Resp. 16 Oct. 2006, no. 3.26 *et seq.* and 5.1 *et seq.*; Resp. 14 May 2007, no. 1.44 *et seq.*);

(d) the Claimant's allegation that it suffered a denial of justice has no basis since the Yemeni Arbitral Award was the result of proper procedures (Resp. 16 Oct. 2006, no. 3.4 and 3.73 *et seq.*; Resp. 14 May 2007, no. 1.49 *et seq.*); this is at any rate an issue which the Arbitral Tribunal should not decide, because (i) the actions of the Yemeni Arbitral Tribunal were not actions attributable to the Yemeni Government; (ii) the Claimant failed to raise objections in the course of the Yemeni Arbitral Proceedings; and because the Claimant failed to exhaust all possible Yemeni means of challenge to the Yemeni Arbitral Award as required if it considered that the Yemeni Arbitral Proceedings had been carried out improperly or that it had suffered a denial of justice (Resp. 16 Oct. 2006, no. 3.4 and 3.56 *et seq.*; Resp. 14 May 2007, no. 1.48);

(e) Art. 11(2) of the BIT makes it clear that the dispute resolution alternatives set out thereunder may be invoked only if the Parties did not reach agreement. In this case, the Parties did reach an agreement – *i.e.* the Settlement Agreement – pursuant to which all claims of whatever kind against the Respondent were settled, including the claims under the BIT relating to the period before the date of the Settlement Agreement, *i.e.* 22 December 2004. Therefore, the only possible claim that the Claimant advances for the period after the Settlement Agreement is the late release of its equipment, a purely contractual matter and not a conceivable breach of the BIT (Resp. 14 May 2007, no. 1.35 *et seq.*)

127. The Claimant counters that:

(a) Art. 11 of the BIT is not properly to be deemed a "fork in the road" provision (Claim. 3 March 2007, no. 54);

(b) even if Art. 11 established a fork in the road, the jurisdiction of the Arbitral Tribunal for the present dispute could not be challenged since the causes of action and the parties were not identical (Claim. 3 March 2007, no. 55 *et seq.*);

(c) the proceedings brought before the Yemeni Arbitral Tribunal were commenced pursuant to a specific arbitration agreement entered into between the Claimant and the Yemeni Ministry of Public Works on 26 June 2004, relating to the alleged breach by the Ministry of its obligations under the Contracts; whereas the present arbitration was brought pursuant to the BIT against the Respondent, and relates to its alleged violation of the substantive standards of the BIT. Proceedings involving claims sounding in domestic law do not foreclose the pursuit of claims based on treaties, especially where the Claimant invokes facts having occurred subsequently to the Yemeni Arbitral Award;

(d) even if it were imagined that the Claimant had chosen Yemeni local arbitration as the means to resolve the initial dispute under the BIT, the Claimant would still be authorized to initiate the present arbitration proceedings for denial of justice in connection with that local arbitration;

(e) the Respondent, not the Claimant, refused to abide by the Yemeni Arbitral Award; the handwritten note of the Yemeni President on the letter of 1st December 2004 instructed the Claimant: *"[t]ake what the ministerial commission has decided as it is in your interest. As for the arbitral tribunal, they do not know how to evaluate the works*" (Exh. CM-113);

(f) as to the Yemeni Arbitral Award, none of the three conditions of *res judicata* are fulfilled: (i) the proceedings do not concern the same parties; (ii) they were not based on the same causes of action; and (iii) the requested relief was not the same (Claim. 3 March 2007, no. 64 *et seq.*);

(g) the Respondent's attempt to enlist the Settlement Agreement as a part of its argument in this connection does not withstand scrutiny, since the Claimant is precisely challenging the Settlement Agreement, affirming that it is null and void because of duress and threat as well as because of gross disparity, or that the Claimant is entitled to its rescission as a result of the Respondent's failure to perform the obligations contained under the Settlement Agreement, especially the one stipulated in Art. 6 thereof (Claim. 3 March 2007, no. 72 *et seq.*)

c) The Position of the Arbitral Tribunal

128. Under this heading, the Respondent objects to the Arbitral Tribunal's examination of the claims in this case on the grounds that by electing to proceed in the Yemeni Arbitration the Claimant chose a "fork in the road" which precluded subsequent initiation of ICSID proceedings. The parties disagree as to whether the BIT indeed defines such consequences of election. For its part, the Arbitral Tribunal believes that this issue is more properly classified as one of admissibility rather than jurisdiction; its premise is that an ICSID tribunal having jurisdiction should nevertheless decline to exercise it due to circumstances which that ICSID tribunal has the authority to examine.

129. As to the burden of proof with respect to the Respondent's jurisdictional objection, the Arbitral Tribunal – like many others – adopts the test proffered by Judge Higgins in her separate opinion in the *Oil Platforms Case* (Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America), 1996 ICJ Reports 803, at 810). To answer the question, "what is the test by which the Court is to make its findings?" in face of a preliminary objection to its jurisdiction on grounds that a party's claims do not fall under the treaty invoked, Judge Higgins cited the *Mavrommatis Case* (*Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A. No. 2, p. 16), in which the Permanent Court of International Justice held that in the absence of any test set forth in the applicable international instrument or in the rules governing the Court itself, the Court was "at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law" (para. 28 of the separate opinion). Judge Higgins continued:

The only way in which, in the present case, it can be determined whether the claims of [claimant] are sufficiently plausibly based upon the 1955 Treaty is to accept pro tem

the facts as alleged by [claimant] to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes, that is to say, to see if on the basis of Iran's claim of fact there could occur a violation of one or more of them. (para. 32.)

130. Stated in another way, the principle Judge Higgins proposed was the following:

The Court should ... see if, on the facts as alleged by [claimant], the [respondent's] actions complained of might violate the Treaty articles ... Nothing in this approach puts at risk the obligation of the Court to keep separate the jurisdictional and merits phases ... and to protect the integrity of the proceedings on the merits ... what is for the merits, (and which remains pristine and untouched by this approach to the jurisdictional issue) is to determine what exactly the facts are, whether as finally determined they do sustain a violation of ... [the treaty] and if so, whether there is a defence to that violation ... In short it is at the merits that one sees "whether there really has been a breach". (para. 34.)

131. This approach has subsequently been followed by several international arbitration tribunals deciding jurisdictional objections by a respondent state against a claimant investor, including *Methanex v. USA*, *SGS v. Philippines*, *Salini v. Jordan*, and *Plama v. Bulgaria*. In *Salini v. Jordan* (Salini *Costruttori SpA and Italstrade SpA v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction of 29 November 2004), for example, the tribunal decided that it was up to the claimant to present its own case as it saw fit; that, in doing so, the claimant was to show that the alleged facts on which it relied were capable of falling within the provisions of the applicable treaty (paras. 131 *et seq.*); and that:

In considering issues of jurisdiction, courts and tribunals do not go into the merits of the case without sufficient prior debate. In conformity with this jurisprudence, the Tribunal will accordingly seek to determine whether the facts alleged by the Claimant in this case, if established, are capable of coming within those provisions of the BIT which have been invoked. (para. 151.)

132. This approach to jurisdictional issues will guide the Arbitral Tribunal's consideration here.

133. The issue under Art. 11 of the BIT may in fact be dealt with expeditiously after noting that it is subsumed under a broader issue, namely the validity of the Yemeni Arbitral Award. Each Party is conceptually mistaken: the Respondent in seeking to deny jurisdiction on the grounds that the Yemeni Arbitral Award has disposed of the claim; the Claimant in suggesting that the purported invalidity of the Settlement Agreement would *ipso jure* entitle it to attack the Yemeni Arbitral Award.

134. Since as seen above issues of jurisdiction and admissibility are examined on the hypothesis that the relevant claims are factually founded in principle, the claim may still be defeated at the merits stage if they are not proven. Here, the Claimant asserts precisely that the Yemeni Arbitral Award is not entitled to international recognition due to its alleged defects as measured by the international standard of the BIT. At any rate, the Claimant considers that the Settlement Agreement itself was concluded in circumstances that amounted to an international delict under the BIT; this was not a claim that could conceivably have been before the Yemeni arbitrators, both because

they had no mission to decide such an international claim and – irrefutably – because the event complained of had simply not occurred while they were in exercise.

135. By reference to an extensive narrative of facts and an equally extensive array of legal authorities, the Claimant has alleged that the Respondent's conduct, both in the course of the Yemeni Arbitration and its aftermath of attempted correction, and in the context of the negotiation and conclusion of the Settlement Agreement, was violative of material provisions of the BIT, in particular the proscription under Art. 3 of unfair and inequitable treatment or legally unjustified measures, such that the Yemeni Arbitral Award and the Settlement Agreement are both disentitled from international effect with financial consequences to be established at the international level.

136. Thus, although the economic essence of the claims in both the local and these international arbitral proceedings is to seek compensation for construction works performed under the Contracts, and compensation for damages incurred during and after the execution of the Contracts, the Yemeni Arbitration and the present arbitral proceedings were brought pursuant to fundamentally different causes of action. The claims before ICSID are not said to arise under the terms of the Contracts. The Claimant alleges that it has been deprived from of procedural rights by the Respondent's interference with the proper conduct of the Yemeni Arbitration, the subsequent aborted correction and enforcement phases, and the allegedly coercive negotiation and signature of the Settlement Agreement; this amounted to the deprivation of its fundamental rights under the BIT. There can be therefore no *res judicata* effect.

137. The Claimant initiated the Yemeni Arbitration for the enforcement of its private rights under the Contracts. At no time was the violation of substantive standards of the BIT claimed in the Yemeni Arbitration. This matter was never alleged and therefore never dealt with by the Yemeni Arbitral Tribunal. The Yemeni Arbitration was commenced pursuant to the Yemeni Arbitration Agreement, and the claims there asserted were fundamentally distinct from the claims related to the violation of the BIT by the Respondent.

138. In sum, the settlement of the Claimant's contractual claims in the Yemeni Arbitration does not bar the Arbitral Tribunal from having jurisdiction in the present case, since the claims formulated by the Claimant here are capable of constituting violations of the BIT if they are upheld.

4. Conclusion

139. ***The Arbitral Tribunal has jurisdiction over the present dispute.***

III. The Merits

1. Generally

140. The Claimant requests that the Arbitral Tribunal orders the Respondent to pay amounts between OR 93,750,006.00 and OR 96,409,954.00 and to dismiss all of the Respondent's counterclaims or, alternatively, allow a set-off in the amount of YR 72,000,000. These requests for relief are based on the Respondent's alleged violations of the BIT.

141. The Respondent requests that the Arbitral Tribunal – if it finds that it has jurisdiction - reject the claims as well as the corresponding relief sought by the Claimant, and award damages resulting from the Claimant's alleged breach of the Settlement Agreement and damages and/or set-off for the Claimant's unfulfilled obligations as established by the Yemeni Arbitral Award, including damages for the Claimant's unfinished construction works and its obligation to maintain the bank guarantees.

142. The Respondent considers that the Claimant validly waived all claims between the Parties by freely signing the Settlement Agreement entered into on 22 December 2004, and by having it endorsed by the Sana'a Court of Appeal. The Claimant counters that the Settlement Agreement is ineffective since the way it was obtained was itself a breach of the BIT.

143. The appraisal of the validity of the Settlement Agreement with regard to the BIT will be the first question answered by the Arbitral Tribunal, which will also have to ascertain the consequences of its conclusion in this regard (see below 2). Secondly, the Arbitral Tribunal will dispose of the Claimant's allegations of other violations of the BIT during the period preceding the signing of the Settlement Agreement, particularly during the Yemeni Arbitration (see below 3). Thirdly, the Arbitral Tribunal will assess the soundness of the Respondent's counterclaims (see below 4). Finally, the Arbitral Tribunal will determine, as necessary, the financial consequences of the alleged violations of the BIT (see below 5).

2. Validity of the Settlement Agreement and Its Consequences

a) The Issue

144. On December 22, 2004, the Parties signed the following Settlement Agreement (see above no. 41; see also Exh. CM-124; Exh. ROJ-23):

"*Preamble;*
Whereas both parties are willing to amicably resolve the dispute existing between them in accordance with the provisions of this agreement with respect to all claims of Second Party against First Party regarding all completed and ongoing projects in the Republic of Yemen.
Based on the above, both parties agree as follows:

First: *The above preamble shall be deemed integral part of this agreement.*

Second: *This settlement agreement shall be deemed a final settlement and discharge of all claims between the parties. According to this settlement, both parties waive any claim, request or consequence resulting therefrom including the arbitration award issued in San'a on 09.08.2004.*

Third: *It is agreed between both parties that Second Party is entitled to an amount of (YR 3,524,326,966) Yemeni Rials Three Billion Five Hundred Twenty Four Million Three Hundred Twenty Six Thousand Nine Hundred and Sixty Six Only provided that First Party pays the above amount immediately upon signing this agreement and finalizing its endorsement procedures with the competent court. This amount shall be deemed to be inclusive of all claims and requests of Second Party against First Party.*

Fourth: *First Party shall receive, complete and maintain all works given to Second Party in addition to provisional facilities established by the Company.*

Fifth: *First Party shall release the bank guarantees provided by second Party.*

Sixth: *First Party shall instruct the Customs Authority to release all machinery, equipment and vehicles belonging to the Desert line Projects Company to outside the territories of the Republic unless these machinery, equipment and vehicles are attached for other cases or reasons.*

Seventh: *Both parties acknowledge their undertaking to implement the provisions of this settlement and neither of them has the right to challenge or violate any of its provisions or refer to justice or any other entity inside or outside the Republic of Yemen. Both parties shall commission their respective lawyers to submit this settlement for endorsement to the competent court according to the Proceedings and Civil Execution Law No. 40 for the year 2002.*

Eighth: *Second Party acknowledges that, by signing this agreement, it shall have no rights, legal proceedings, claims or requests of whatever kind against First Party before any entity whether now or in the future.*

Ninth: *This agreement was executed in three originals one for each party for application and enforcement and the third to be kept with the Ministry of Finance.*"

145. The Respondent asserts that the Settlement Agreement was a final settlement in discharge of all claims between the Parties. The Claimant retorts that the Settlement Agreement was obtained by duress, is null and void and/or rescinded, and is therefore not entitled to international recognition. Therefore, the first issue to be decided by the Arbitral Tribunal is whether the Settlement Agreement and the way it was concluded and signed constitutes a violation of the BIT, in particular as a failure of "fair and

equitable treatment" or as the imposition of "legally unjustified measures" under Art. 3 of the BIT.

b) The Contentions of the Parties

146. The Claimant's contentions may be summarised as follows:

- The Respondent's pressure on Claimant to accept lesser payment for satisfaction of the sums due under the Yemeni Arbitral Award amounted to coercion and is a breach of the fair and equitable treatment owed to the Claimant and its investment. The Respondent created or permitted severe pressures – both economic and relating to the physical security of the Claimant's investment – to build up in such a manner so as to coerce the Claimant into the Settlement Agreement dictated by the Respondent (Claim. 30 June 2006, no. 179).

- The Settlement Agreement should be declared null and void because it was obtained by both physical and economic duress resulting from the illegal acts of the Respondent. Faced with the risk of greater loss and even physical harm, the Claimant had no other choice but to accept the Respondent's proposal under protest (Claim. 30 June 2006, no. 229 *et seq.*; see also see also Claim. 19 March 2007, no. 87 and 105). First, under international law, a settlement made under duress does not waive a party's right to later seek relief for international claims if there was no practical alternative to the compelled settlement and if the (physical or economic) duress was illegitimate. Economic duress must be distinguished from ordinary economic pressures and must amount to improper compulsion exercised by the State in order to force the investor to settle. State-imposed duress can transform what would otherwise be a valid transaction into an invalid expropriation or taking violating the principle of fair and equitable treatment (Claim. 30 June 2006, no. 230 *et seq.*). Second, the Respondent's behaviour drove the Claimant to the brink of bankruptcy and amounted to financial duress since, at the time the Claimant was forced to enter into the Settlement Agreement, the Claimant had no further financial means and its entire operations were disrupted due to shortage of material and human resources. To cure part of its default, the Claimant was forced to sell a large number of its properties and to transfer significant amounts to Yemen (Claim. 30 June 2006, no. 240 *et seq.*; see also Claim. 19 March 2007, no. 107 *et seq.*). Third, upon the rendering of the Yemeni Arbitral Award, the Respondent directly and indirectly caused and allowed to be caused repeated attacks on the physical integrity of the Claimant's investment, such as the arrest and the detention of the Claimant's personnel - including the son of the Claimant's chairman - on 28 August 2004 and the failure to protect the Claimant from harassment and theft by armed groups and tribes (Claim. 30 June 2006, no. 246 *et seq.*; see also Claim. 19 March 2007, no. 91 *et seq.*). Fourth, the Respondent took advantage of the duress which it had generated in order to impose the unfavourable Settlement Agreement. The Claimant had no choice, in order to end the abuses to which it was being subjected, to avoid physical harm, to avoid bankruptcy by paying some of its creditors with the proceeds of the Settlement Agreement, and to obtain the release of the bank guarantees and of

its equipment illegally withheld and blocked by the Respondent. It should be stressed that the Claimant protested both before and after the date of the Settlement Agreement (Claim. 30 June 2006, no. 249 *et seq.*; see also Claim. 19 March 2007, no. 74 *et seq.*, 101 *et seq.* and 116).

- The Settlement Agreement is null and void on the ground of gross disparity. It resulted in the Claimant's waiving the bulk of its rights under the Yemeni Arbitral Award in exchange for the Respondent's merely accepting to make partial payment under the Yemeni Arbitral Award, release the Claimant's bank guarantees, and allow the Claimant to dispose of its own machinery, equipment and vehicles – which rights the Claimant was entitled to under law but deprived of due to the breaches of Respondent (Claim. 30 June 2006, no. 256; see also Claim. 19 March 2007, no. 120).

- Even if the Settlement Agreement were valid at the time of its execution, which the Claimant denies, it is now null and void and/or hereby rescinded under international law for failure of the Respondent to promptly allow the Claimant to return its machinery, equipment and vehicles to Oman, notwithstanding the Claimant's numerous requests and notices to this effect. Claimant confirmed the rescission of the Settlement Agreement by letter dated 16 May 2005 (Claim. 30 June 2006, no. 257; see also Claim. 19 March 2007, no. 121 *et seq.*).

147. The Respondent's contentions may be summarised as follows:

- The Claimant's claims on the merits must be dismissed because they were settled and paid pursuant to the Settlement Agreement, which not only resolved all claims between the Parties, but was deemed to represent a full and final enforcement of the Yemeni Arbitral Award on agreed terms; it was endorsed, with the Claimant's participation, by the Sana'a Court of Appeal. The only claim that can possibly be regarded as not having been settled through the Settlement Agreement is the delay in releasing the Claimant's machinery and equipment until July 2005. However, the relevant Yemeni authorities carried out the necessary actions within a reasonable amount of time, which cannot possibly be considered as a breach of the BIT (Resp. 14 May 2007, no. 2.41 *et seq.*).

- The Claimant's argument of duress is ill-founded. The Claimant exercised a considered choice to enter the final Settlement Agreement. It took the business decision to receive a sum of money immediately, to obtain the release of its bank guarantees as well as its machinery, equipment and vehicles, and to be freed from its remaining contractual obligations. This was not a result of coercion by the Respondent. On the contrary, the Claimant was in a position to consider its options well in advance of the day when the Settlement Agreement was signed (Resp. 15 Jan. 2007, no. 2.34 *et seq.*; see also Resp. 16 Oct. 2006, no. 4.19; Resp. 14 May 2007, no. 2.52 *et seq.* and 2.60 *et seq.*).

- The mere fact that the Claimant may have had financial constraints scarcely constitutes coercion. There was no threat by the Respondent and certainly none so imminent or serious as to leave the Claimant with no reasonable alternative

to entering into the Settlement Agreement. The Claimant had a viable alternative and could maintain its enforcement application of the Yemeni Arbitral Award before the Yemen Court of Appeal. The Claimant voluntarily and formally elected to waive that right before the Court in exchange for receiving an immediate payment and being relieved of its remaining contractual obligations (Resp. 15 Jan. 2007, no. 2.36 *et seq.*; see also Resp. 16 Oct. 2006, no. 4.17 *et seq.*).

- Even if the Respondent had coerced the Claimant into signing the Settlement Agreement, *quod non*, the Claimant's conduct after the signing of the Settlement Agreement defeats its claim for avoidance of the Settlement Agreement. First, the Claimant submitted the Settlement Agreement to the Sana'a Court of Appeal for endorsement and in final settlement of the prior Yemeni Arbitral Award. Second, the Claimant relied on article 6 of the Settlement Agreement in its letters to the Yemeni Customs Authority requesting the release of its equipment and machinery. Third, the Claimant encashed the amount due under the Settlement Agreement (Resp. 14 May 2007, no. 2.62 *et seq.* and 2.71).

- It was bad faith for the Claimant to collect under the Settlement Agreement and then turn around and demand payment from the Respondent under the Yemeni Arbitral Award as if the Settlement Agreement, including its recognition of continuing obligations of the Claimant, did not exist (Resp. 15 Jan. 2007, no. 2.38)

- The arrest of the Claimant's executives bears no relationship with the Settlement Agreement. These apparently related to third party disputes. With regard to the alleged withholding of the Claimant's equipment, the Claimant cannot establish that their impounding depended on the signing of the Settlement Agreement. With respect to the bank guarantees, the Respondent was entitled to withhold them based on the Yemeni Arbitral Award. Moreover, the contention that the Respondent refused to agree to any revisions of the Yemeni Arbitral Award and lodged an application to annul it cannot be considered to have been illegitimate and to constitute a threat that the Claimant should enter the Settlement Agreement. The allegations to physical threat are unfounded; the Yemeni authorities neither knew nor tolerated physical threat against the Claimant and its officers. The cash-flow difficulties of the Claimant were not caused by the Respondent (Resp. 14 May 2007, no. 2.76 *et seq.*).

- None of the facts alleged by the Claimant, whether taken individually or collectively, are sufficient to sustain the accusation of duress made by the Claimant. The Respondent made no threat to the Claimant. Similarly, even assuming that there was a threat, the Claimant is unable to show that the threat was unjustified, or that it was imminent or serious such that the Claimant was left with no reasonable alternative but to enter into the Settlement Agreement (Resp. 14 May 2007, no. 2.93).

- With respect to the Claimant's argument of gross disparity, the Respondent refers to the various above-mentioned benefits that the Claimant obtained from the Settlement Agreement and the fact that the Claimant confirmed the validity

of the Settlement Agreement through its subsequent conduct (Resp. 14 May 2007, no. 2.95).

- As to the Claimant's argument that the Settlement Agreement was rescinded, the Respondent denies that it was ever in breach of the Settlement Agreement. Even in the contrary hypothesis, the breach would not be serious enough to have had the effect of rescinding the Settlement Agreement (Resp. 14 May 2007, no. 2.95).

c) The Position of the Arbitral Tribunal

148. The present Arbitral Tribunal was created pursuant to the BIT and is empowered to deal only with claims arising thereunder. The nub of the BIT claims is the series of violations of its substantive provisions which the Claimant asserts were committed by the Respondent in a variety of ways. Yet these claims and defences should not be considered if they have already been resolved by a legally binding agreement. That is precisely the effect the Respondent ascribes to the Settlement Agreement, which by its terms purported to be "a final settlement in discharge of all claims between them." The Claimant retorts that the Settlement Agreement was obtained by duress, and is not entitled to recognition since it is the direct consequence of breaches of the BIT. Indeed, the Claimant has explicitly requested that this Tribunal declare the Settlement Agreement to be null and void and/or rescinded.

149. This has engendered the most acute controversy of this case, in written and oral submissions as well as in testimony. The Respondent invites the Arbitral Tribunal to conclude that the Claimant's pursuit of claims that antedate the Settlement Agreement is an abuse of process. The Claimant responds that the Settlement Agreement was the fruit of an unacceptable campaign of pressure devised or tolerated by Yemeni officials and therefore not entitled to effect.

150. Before detailing the position of the Arbitral Tribunal, it may be useful to set down some general propositions to assist in determining what is legally relevant among the facts debated by the Parties.

151. The first general observation is that the fact that a party is objectively under financial pressure does not necessarily mean that any agreement reached with such a party is vulnerable to invalidation for duress. Such a notion might in fact compound the vulnerability of such a party by making it difficult if not impossible for it to make reliable commercial arrangements. A contractual excuse of duress requires some element of abuse by the other contracting party. The commentary to the well-known Harvard Draft of 1961, L. SOHN & R. BAXTER, CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS, p. 191, contains a passage which well describes the assessment the present Arbitral Tribunal must make:

> "Since economic duress of a sort may be present in virtually any settlement, *it must rest with judicial decision to draw the line* between, on the one hand, economic compulsion exercised by the respondent State over the claimant in order to force him to settle, and on the other hand, the normal operation of economic forces." (Emphasis added.)

152. The second general observation is that a party may fail to make payments expected by another party without necessarily exposing itself to a claim of duress. Settlement agreements are routinely concluded by parties who believe that their cocontractant owes them more, but nevertheless accept a lesser amount because they wish, or indeed acutely need, to receive quicker payment. If all such agreements were voidable for duress, commercial relations would be chaotic.

153. One party may be able to endure very long delays of payment of vast sums because of the abundance of its general resources, while another may be seriously affected by a contractual dispute due to weaknesses on other business fronts which have nothing to do with the non-paying cocontractant. The claim of duress requires clear proof.

154. Counsel for the Respondent observed reasonably that settlements frequently involve the relinquishment of a perceived right. One of the parties may accept such an agreement even though it has a judgment in its favour. It may believe that the other party's obstreperousness in creating enforcement difficulties, or in pursuing frustrating appeals, is in bad faith. Still, such settlement agreements are not automatically considered susceptible to annulment by virtue of coercion. To the contrary, such settlements are routinely not only upheld, but encouraged.

155. The difficulty with this argument is that it fails to perceive the line between the ordinary economic pressure created by delay in the payment of debt (which may be acute, and nevertheless amenable to legally cognizable settlement), on the one hand, and, on the other, the kind of compulsion that can be created by a superior force in a hostile environment, where the scales of justice have been manifestly compromised. As Professor Detlev Vagts put it, in "Coercion and Foreign Investment Rearrangements," 72 AM. J. INT. L. 17, at 30 (1978):

> "Fear – like fraud, undue influence, infancy, or insanity – vitiates the informed, intelligent, and adult consent which contract theory in its classical forms demanded almost everywhere. Force is also illegitimate in terms of any theory that leaves the settling of trade terms to the operation of a market; violence is the antithesis of the ordinary market."

156. These words were written in the days before the advent of modern generation of BITs; but they could hardly have been more apposite if they had also described coercion and fear as the "antithesis" of the promotion and protection of foreign investment.

157. Although the present case does not involve an investment in natural resources, it seems relevant to observe that the 1962 United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources provides that agreements with foreign investors should be respected insofar as they are "freely" concluded; GA Res. 1803, 17 GAOR, Supp. (No. 17) 15, UN Dor. A/5217. The drafters may have been particularly concerned with asymmetrical agreements in favour of prior colonial powers, but the principle is naturally applicable without discrimination. Indeed, it should hardly be necessary to point out that where consent is vitiated, it is a universal norm that the agreement cannot be enforced against the victim of coercion.

158. The final general observation is that the Arbitral Tribunal does not purport to take jurisdiction over a contract concluded in Yemen and possibly subject to Yemeni law. Rather, in the exercise of its jurisdiction under the BIT, it examines the international effectiveness of the Settlement Agreement by reference to the normative standards established by treaty, viz. Art. 3 of the BIT, as against the alleged unfair and inequitable treatment or legally unjustified measures imposed upon the Claimant, with the result that the Respondent is precluded from raising the Settlement Agreement as a bar to its obligations to the Claimant, whether under the Yemeni Arbitral Award or otherwise.

159. The Arbitral Tribunal's understanding of the circumstances has not been assisted in equal measure by the Parties. The Respondent presented no witnesses and few documents. It contented itself with expressing doubts as to the accuracy of the Claimant's version of events. Nevertheless, after evaluating the evidence put forward by the Claimant and the critical comments thereon proffered by the Respondent, the Arbitral Tribunal is satisfied, at least on the balance of probabilities, that it is in a position to make the following findings in relation to the circumstances surrounding the Settlement Agreement.

160. The Arbitral Tribunal cannot accept the Claimant's argument that it was entitled to rescind the Settlement Agreement by reason of the Respondent's failure to perform its obligations under the Settlement Agreement promptly, notwithstanding the Claimant's numerous requests and notices to this effect. The reasons are as follows:

- If this argument were correct, the Claimant should have expressly notified the rescission of the Settlement Agreement to the Respondent or to a local court instead of executing it. In fact, according to the documents in the Arbitral Tribunal's file, the Claimant never asked or applied for such a rescission.

- In any case, it is difficult to admit that the Settlement Agreement was rescinded after its signature, since the Respondent authorized the Central Bank of Yemen to pay to the Claimant the amount provided for in the Settlement Agreement immediately after the signing on 29 December 2004, and the Claimant encashed it (see above no. 45). Moreover, the bank guarantees issued by the Claimant were released without delay after the Settlement Agreement was concluded (see above no. 46). It is true that the Respondent did not release immediately the Claimant's machinery, equipment and vehicles that it withheld and waited for about six months until July 2005 (see above no. 49). However, it should be noted that the Settlement Agreement did not provide for a precise deadline. It is understandable that these steps could have required some time.

- After the payment and the release of the bank guarantees, the Claimant quickly applied for the rescission of the Settlement Agreement on May 16, 2005, an attitude that could jeopardize at least part of the Settlement Agreement and explain the Respondent's sceptical attitude towards the Claimant.

161. The Arbitral Tribunal holds that the Settlement Agreement was not rescinded by either Party, and neither of them was entitled to do so on the grounds considered above.

162. Second, the Claimant argues that the Settlement Agreement was null and void because it was obtained by both physical and economic duress resulting from the illegal acts of the Respondent. Therefore, the Claimant cannot be deprived of its right to continue to pursue the amounts it considers due. The Claimant's central argument is that it considers null and void its declaration regarding the binding and final character of the Settlement Agreement because it was obtained under duress; the conclusion of the Settlement Agreement under these circumstances amounts to a violation of the BIT.

163. In order to decide whether the Settlement Agreement was obtained by duress and whether this situation amounts to a violation of the BIT, the Tribunal shall set forth the facts that it considers as relevant for its decision. While doing so, the Arbitral Tribunal is of the opinion that it shall not only focus on the immediate circumstances enveloping the Settlement Agreement but it shall also take into account the peculiarities of the entire contractual narrative resulting from the facts presented above.

164. First of all, the infrastructural investment at the heart of this case was of a macroeconomic dimension. The project to expand Yemen's road network was destined to be of vast importance in terms of facilitating economic activity, tourism and national cohesion – not to mention security. 1,000 kilometers of asphalt road was to be constructed in remote mountainous areas, featuring rocky soil and high precipices. There were apparently no surveys. The Claimant was not in a position to rely on any tender specifications as a basis for its commitment to pricing; there was no tender. The Claimant was reduced to proceeding on the ground, and deal with technical problems as they arose. Estimating simple bills of quantities in such circumstances is obviously difficult. Therefore, the Claimant was taking an operational risk, and relied upon the absence of a "legal" risk with respect to prompt progress payments.

165. The Respondent, however, made no payments between April 2002 and the end of October 2003. It is uncontestable that payments were due. The Yemeni President himself instructed the Prime Minister on 19 April 2003 to ensure that the Claimant was paid "in accordance with the works performed, the invoices and the contracts" (Exh. CM-172). Still, half a year elapsed before any payments were made. And new arrears emerged. The President wrote again, it seems in early May 2004, to encourage the Claimant to persevere, assuring it that "your rights will be paid" after the evaluation of a neutral "technical" party (Exh. CM-68).

166. Such presidential interventions undoubtedly created incentive for the Claimant to continue. It must therefore have come to a serious disappointment when the Yemeni Ministry of Public Works declared that the Claimant had been "overpaid." This unsurprisingly did not sit well with unpaid subcontractors, one of whom in March 2004 invaded the Al Mahmeet-Qanawis site with a group of armed men (Exh. CM-57). The Claimant informed the Yemeni Government that it would have to envisage suspension of its works. This led to what the Claimant describes as a Governmental "siege with heavy artillery" (Claim. 2 Aug. 2005, no. 67). In May 2004, Mr Ahmed Farid wrote to the President in outraged terms: "This is an armed assault, an act of terror in its worst image." (Exh. CM-77).

167. The Respondent disputes this version of events, but does not provide an alternative explanation. Indeed, the Claimant has submitted a letter from Commander Awadh

Mohammed Farid, the Chief of Staff of the Central Military Region of the Yemeni Ministry of Defence dated 23 May 2004 (Exh. CM-78), referring to the "illegality" of the actions against the Claimants and requesting that the President "personally intervene" to give instructions to lift the "siege," which, the letter observed, was totally at odds with the way issues of unpaid subcontractors on other sites had been handled. The Respondent's answer is that this letter is taken out of context (Resp. 15 Jan. 2007, no 4), yet it does not provide its own version of that context. The Arbitral Tribunal notes that the word "siege" as it appears in the translation provided to the arbitrators corresponds perfectly to the word *El Hisar* actually used by the Commander, which, coming from a senior military officer writing to the President of the Republic, another military man, is at once eloquent and dramatic. If there were some innocuous explanation to be given, the Respondent should have called the Commander to testify, or explain why he could not do so.

168. In these circumstances, the Claimant agreed to the Yemeni Arbitration. These proceedings must at the outset be recognised as more than unusual. Their very premises were dictated by the Yemeni President, who established that the two arbitrators assisted by a local magistrate should calculate the value of the Claimant's works not on the basis of the contracts it had signed, nor by reference to the objective conditions in which it executed its works, but by reference to the price per kilometre of other roads, built elsewhere, by other contractors.

169. The Yemeni Arbitral Award was handed down on 9 August 2004. By reference to international practice, it must be recognized as perplexing, since it was apparently the result of the examination, deliberation, and adjudication of a complex construction claim in a matter of six weeks. Yet the Award contains not a word to describe how the arbitrators went about their business, the opportunities that were given for the parties to be heard, the source of the arbitrators' information, or any steps they may have taken to ensure that the debate was loyal, adversarial, and transparent.

170. At any rate, the Yemeni Arbitral Award recognised a substantial debt owed by the Respondent to the Claimant. Even if in the Claimant's view it contained a vast undercalculation, the Claimant might at least have found comfort in the thought that the Yemeni Arbitral Award would be promptly paid. Indeed, the Yemeni Prime Minister wrote to the Yemeni President on 11 September 2004 stating that the Yemeni Arbitral Award was final and binding, and should be paid (see Exh. CM-96). But no payment was forthcoming. To the contrary, the Yemeni President denied that request and urged the Claimant in October 2004 to accept the reduced sum offered to him by the Ministry of Public Works (Exh. CM-113).

171. This intervention by the Head of State, expressed in peremptory terms and with a negative reference to the Yemeni Arbitral Tribunal, cannot fail to make the most profound impression on an objective observer. This represented, *prima facie*, executive interference with the legal process of the most errant kind; yet no factual or legal testimony or other evidence has been adduced by the Respondent to alleviate the acute discomfort created in this respect, or to dispel the notion that from this point on the Claimant had no realistic choices left.

172. International tribunals refused to give effect to transactions where Governments have created intolerable pressure to conclude transactions; see, e.g., *Différend Industrie*

Vicentine Elettro-Mecchaniche (T.V.E.M.), 13 U.N. REP. INT. ARB. AWARDS 324 (1952); *Différend Wagon-Citernes*, *ibid* 212 (1950) (the latter referring to "une contrainte morale réelle et inévitable").

173. Further back in time, in the case of *Gowen & Copeland*, 4 J.B. MOORE, HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3354 (1898) Venezuela was held to have breached minimum international standards when it pressured the claimants into making a disadvantageous deal, "in the nature of a forced sale," with a company favoured by the Government. The circumstances were these: two U.S. investors had discovered a deposit of guano on a barren group of rocks in the high seas off the Gulf of Maracaibo. The deposit turned out to be exceptionally valuable, and Messrs Gowen and Copeland put men, machinery and materials on site. Less than a year later, another group of U.S. investors obtained a license from the Venezuelan Government, and some months thereafter Venezuelan armed forces seized the installations and expelled the personnel on threat of imprisonment. In this context, the intruder group were able to conclude an advantageous contract with Gowen and Copeland. The latter thereafter successfully pursued Venezuela for damages. The commissioners noted that the claimants "were not compelled to make this bargain, and yet it is difficult to see what other arrangement could have been made without a total loss of the plant as long as Venezuela held it for the purpose of aiding the lessees in consummating the agreement made with her," *id.* at 3357, and ordered reparation of their loss. In other words, they did not accept that the settlement with the competing investors should be decisive, even though Venezuela itself did not directly take over the claimants' enterprise. The offence is more direct in the present case, where the Settlement Agreement had the instant effect of reducing a debt (i.e. the Yemeni Arbitral Award) owed by the Government itself.

174. These cases generally involved sales at an egregiously low price. In the present case, the iniquity is patent, since the Claimant was presumptively entitled to the amount of the Yemeni Arbitral Award and every dinar cancelled by the Settlement Agreement was an injustice.

175. After several written complaints about the arbitrary terms as well as the unfairness of the proposed settlement, the Claimant signed the Settlement Agreement on 22 December 2004. Two days later, it was endorsed by the Sana'a Court of Appeal.

176. A settlement is a standard contractual practice: each party waives its rights and claims arising out of a dispute on a *quid pro quo* basis. In the present case, though, there was no existing dispute when the Settlement Agreement was signed on 22 December 2004: the contractual issues between the Claimant and the Respondent had already been decided by the Yemeni Arbitral Tribunal which had rendered a final and binding award according to the Yemeni Arbitration Agreement. It is true that the Yemeni Arbitral Award was challenged by the Respondent on 25 September 2004, which applied to annul it before the Sana'a Court of Appeal. However, under Art. 56 of Yemeni Arbitration Law issued by Presidential Decree no. 22 of 1992 (hereinafter referred to as "Yemeni Arbitration Law"), an arbitral award has an immediate and direct effect. Therefore, the Settlement Agreement was ostensibly resolving a second time a dispute that had been already settled by the Yemeni Arbitral Tribunal in its Award.

177. As a matter of essence, arbitral proceedings have a final and binding character. Both parties chose arbitrators whom they trust. In consequence, they waive the right to challenge the arbitral tribunal's decision, except for extraordinary circumstances. It is therefore contrary to the spirit of arbitration to constrain a party to negotiate in order to obtain a reduction of the amount effectively owed, when an arbitral tribunal has issued a definitive award.

178. A settlement agreement is a contract according to which a party expressly renounces its rights for valuable consideration consisting of concessions accepted by the other party. Especially when it is entered into after an arbitral tribunal has finally decided upon the claims, such a waiver should be compensated by advantages that are at least equivalent. In the situation at hand, this is hardly the case: the Claimant relinquished nearly half of the amount granted by the Yemeni Arbitral Tribunal. Of course, the bank guarantees provided by the Claimant were fully released. However, this was not truly a concession since the Claimant was entitled to it according to the Contracts and as confirmed by the Yemeni Arbitral Award. Moreover, the Respondent had to instruct the Yemeni customs authority to release all machinery, equipment and vehicles belonging to the Claimant. This duty also corresponded to an undisputed contractual right of the Claimant, equally acknowledged by the Yemeni Arbitral Award.

179. The settlement agreement according to which the prevailing party in an arbitral proceeding renounces half of its rights without due consideration can only be valid if it is the result of an authentic, fair and equitable negotiation. In the case at hand, the rejection of the outcome of a mechanism for the resolution of the claims rendered in a local arbitration by two arbitrators selected by the Parties, and assisted in their deliberations by a local Yemeni magistrate; coupled with the subjection of the Claimant's employees, family members, and equipment to arrest and armed interference, as well as the subsequent peremptory "advice" that it was "in [his] interest" (Exh. CM-113) to accept that the amount awarded be amputated by half, falls well short of minimum standards of international law and cannot be the result of an authentic, fair and equitable negotiation.

180. The circumstances at hand are reminiscent of the 19th century *Idler* case (*Jacob Idler v. Venezuela*, 4 J.B. MOORE, HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3491 (1898)), where claims that had been recognized by the Head of State (Simon Bolívar himself) went unpaid, were then acknowledged by a series of arbitral and judicial decisions, only for the Government to disregard those decisions and say that the claims would now be treated as an "administrative" issue by Governmental officials. Basically, the Venezuelan Government used its executive powers to decide the case itself. That, in effect, is what the Respondent did here.

181. The Claimant found itself in severe financial difficulties due to the Respondent's conduct when Yemeni officials were denying the Claimant's legitimate requests for due payments, thereby starving the Claimant for cash and being the proximate cause of the discomfit of the subcontractors. The Arbitral Tribunal finds that the Claimant therefore had no realistic choice but to enter into the Settlement Agreement.

182. It is true that the Arbitral Tribunal cannot ignore that the Claimant entered into a contractual relationship that was not favourable to it and, while doing so, it chose to assume certain financial risks. However, the Arbitral Tribunal is of the opinion that the Claimant cannot be deemed to have accepted such risks as the ones that were imposed in the Settlement Agreement. The whole contractual narrative demonstrates that the Claimant was induced to be patient by relying on the successive written and oral promises made by the Respondent's senior officials, in particular the Yemeni President. One cannot blame the Claimant for doing so. Based on these assurances, the Claimant continued its construction works without being paid, even if it was legally entitled to discontinue them and, at some point, sought to do so.

183. It is established that the Claimant had to invest considerable amounts of money in order to execute the Contracts. By doing so, it advanced money to the Respondent, which, at the same time, received foreign subsidies to finance the development of its road network. The Claimant asserts that they amounted to between US$ 400 and 500 millions (Transcript, 5 June 2007, p. 54). The Respondent has neither confirmed nor denied it. Money is the oxygen of a construction project. If the principal does not pay, the contractor must advance the required funds since it has to pay its employees, sub-contractors and suppliers. If money is missing, the realisation and the viability of a construction project is at stake.

184. Based on the uncontradicted evidence, including testimony, the Arbitral Tribunal is convinced that the Claimant was almost bankrupt when it signed the Settlement Agreement. The Claimant had to sell several of its properties to meet various outstanding debts and to satisfy obligations arising out of the Contracts.

185. The Claimant also suffered threats and attacks on the *physical* integrity of its investment:

- On August 28, 2004, based on a complaint of the Claimant's subcontractors, the Respondent besieged the construction site of Contract 6 and arrested three managers of the Claimant, including the Chairman's son (see 33).

- During the same period, the Claimant was not provided the protection and security it requested from the Respondent, whereas it was subject to harassment, threat and theft by armed third parties.

- At the end of October 2004, the Claimant's Chairman received a phone call from contacts in Yemen who urged him to leave Yemen since his life was in danger. In these circumstances, he departed from Yemen on 29 October 2004, leaving his son there to definitively phase out the Claimant's operations (see 38).

186. In his oral submissions, counsel for the Respondent contended that "to accept DLP's arguments in this case on the duress and the Settlement Agreement would, I submit, put in jeopardy every settlement agreement that's ever been reached between two parties to arbitration." (Transcript, 5 June 2007, p. 79.) The Arbitral Tribunal is unconvinced. Settlement agreements should not be lightly disregarded, but the circumstances of this case go egregiously far beyond the bounds of ordinary relations, let alone those of "every settlement ever reached." Therefore, the Arbitral Tribunal

finds that the Settlement Agreement was imposed onto the Claimant under physical and financial duress. It is not the result of a fair and sincere negotiation among the Parties.

187. The Respondent counters that the Claimant not only willingly entered into the Settlement Agreement, but also positively ratified it on several occasions, notably by foregoing the possibility of pursuing its attempts to enforce the Yemeni Arbitral Award and indeed by registering the Settlement Agreement in the Sana'a Court of Appeal. This argument fails to distinguish two different concepts, namely that of intention and that of consent. Indeed, the Claimant intended to abandon enforcement attempts, and intended to register the Settlement Agreement with the Court of Appeal: that is ultimately no different than saying it intended to sign the Settlement Agreement. But the real issue is whether the Claimant freely consented to this course of action. The victim of coercion "intends" to give up the thing he is under pressure to relinquish, precisely in the sense that he "intends" to escape the inevitably painful consequences of trying to resist the coercion. By a parity of reasoning, there is no substance in the ratification argument; if there was coercion it does not matter if the victim bows to the pressure once or several times, as long as the coercion continues to be effective.

188. The Respondent further blames the Claimant and its Chairman for freely and voluntarily signing the Settlement Agreement and for challenging it a couple of days later. It is established that the Claimant's Chairman issued a power of attorney in favour of his nephew, that the nephew signed the Settlement Agreement and that this document was submitted to the competent Sana'a Court of Appeal for endorsement. The Arbitral Tribunal is unimpressed by this objection since all these decisions were made in the context of inadmissible threats. The Claimant had no other choice but to accept the conditions that were imposed to him. In any case, the Arbitral Tribunal considers as perturbing the Respondent's attitude that consists of accusing the Claimant's Chairman of adopting a behaviour violating its duty of good faith – by signing the Settlement Agreement and challenging it a couple of days later – whereas the Respondent was the first to act in bad faith by violating its obligations under the Yemeni Arbitral Award.

189. The Respondent also criticizes the Claimant for not having initiated proceedings earlier in order to ensure the respect and the enforcement of its rights, whereas it had the possibility to do so. In this respect, the Arbitral Tribunal is of the following opinion.

- This reproach was not formulated until the initiation of the Yemeni Arbitration. At that time, the Yemeni President and other Yemeni senior officials expressed repeated commitments to pay the owed amounts. In this context of expressions of confidence and comfort from the Yemeni Head of State - involving not only written assurances but also numerous face-to-face meetings as to which the Claimant's Chairman testifies without counter-proof by the Respondent - the Arbitral Tribunal is convinced that it would have been wholly counterproductive and indeed bizarre for the Claimant to bring legal actions. Therefore, one cannot blame the Claimant for not opening formal proceedings, while the promises made by the Respondent prompted it to refrain from such an action by pretending that payments were about to be made in a near future.

- When the situation deteriorated and the Claimant realized that the assurances provided to its Chairman at the highest level of the Yemeni Government were no longer reliable, it initiated the proceedings before this Arbitral Tribunal. In circumstances which the Arbitral Tribunal has examined with the greatest care, there was nothing to be done in Yemen that had reasonable chances of success.

- It is true that the Claimant could theoretically have initiated the present ICSID arbitral proceedings earlier and have applied for provisional recommendations. Due to the particularities of the relationship between the Parties, however, the Claimant cannot be reasonably blamed for not doing so.

- In sum, the Claimant cannot be accused of having waited too long to initiate legal proceedings against the Respondent before this Arbitral Tribunal.

190. Having found that the Settlement Agreement was signed under duress, the Arbitral Tribunal shall now assess whether the Respondent's conduct in connection therewith constitutes a violation of the BIT.

191. Art. 3 of the BIT has the following wording: "*The two Contracting Parties undertake to ensure fair and equitable treatment to the investments of investors of the other Contracting Party. They also undertake not to subject in any way to discriminatory or legally unjustified measures the management, maintenance, use, transfer, enjoyment, assignment of an investment mad by the investors of one of the two Contracting Parties in the territory of the other Contracting Party, as well as companies and projects in which such investments have been made.*"

192. Art. 3 of the BIT imposes therefore on the Contracting State a duty to ensure "fair and equitable treatment" to the investments of investors of the other Contracting State, and to eschew "legally unjustified measures." The application of these norms is dictated by the specific circumstances of the case.

193. The Arbitral Tribunal holds that the conduct of the Respondent, by inadmissibly pressuring the Claimant to accept and execute the Settlement Agreement instead of the final and binding Yemeni Arbitral Award, amounted to a breach of Art. 3 of the BIT.

194. Considering and weighing all of the circumstances before it, the Arbitral Tribunal concludes that the Settlement Agreement was entered into by the Claimant under financial and physical duress and that the Respondent's objections in this regard should be dismissed. Moreover, ***the Arbitral Tribunal holds that the conclusion of the Settlement Agreement contravened the Respondent's obligations under Art. 3 of the BIT. Therefore, the Arbitral Tribunal declares that the Settlement Agreement is not entitled to international effect.***

195. The consequences of declaring the international ineffectiveness of the Settlement Agreement therefore leads to the reinstatement of the Yemeni Arbitral Award for the purposes of determining the Respondent's liability under the BIT – with whatever imperfections it may have had in the eyes of either Party. The financial consequences of that reinstatement will constitute the focus of the section of this Award dealing with quantum (see section III.5 below).

196. To be more precise: the Yemeni Arbitral Award is relevant since it was rendered in accordance with the Yemeni Arbitration Law and the terms of the Arbitration Agreement. The Arbitration Agreement explicitly provided for a neutral tribunal composed of two individuals appointed with the mutual consent of the Parties. The Parties granted the Yemeni Arbitral Tribunal full power to review and evaluate the works performed and to rule on the claims presented by the Claimant (Article 1 of the Yemeni Arbitration Agreement). The power granted to the Yemeni Arbitral Tribunal was stated to be irrevocable (Article 2 of the Yemeni Arbitration Agreement), the Yemeni Arbitral Award was deemed to be final and binding, and neither Party was entitled to refuse the Yemeni Arbitral Award for whatever reason (Article 3 of the Yemeni Arbitration Agreement). Article 4 of the Yemeni Arbitration Agreement provided the Yemeni Arbitral Tribunal with the right to seek assistance from whomever it might choose, including the selection of a third arbitrator to exercise a casting vote in case of disagreement among them. Finally, Article 5 of the Yemeni Arbitration Agreement stated that the Claimant was committed to withdraw the proceedings it had filed in front of the Yemeni Courts on 17 April 2004.

197. In his oral submissions before the Arbitral Tribunal, counsel for the Respondent was particularly emphatic about the *res judicata* of the Yemeni Arbitration (Transcript, 5 June 2007, pp. 69 *et seq.*), and the Arbitral Tribunal considers that his points in this respect were well taken. The existence and the validity of the Arbitration Agreement were not contested throughout the present arbitration proceedings. Moreover, special attention should be given to the fact that the recourse to domestic arbitration instead of judicial court action was initiated under the authority of the Yemeni President, who acted in conformity with a deeply rooted legal tradition according to which no harm should be sustained by either party (لا ضرر ولا ضرار). Due consideration should be given to this fact, in the sense that the Yemeni Arbitration which led to the Yemeni Arbitral Award emerged as a result of an initiative inspired by a general rule seeking justice for both Parties and undertaken at the Respondent's highest level.

198. Whatever imperfections or unusual features may have been extant, the submissions of the Parties do not reflect any reported incidents, complaints or protests arising in the course of the Yemeni Arbitration. True, the Claimant complained during the present proceedings about the fact that the Yemeni Arbitral Proceedings were tainted since the Yemeni Arbitral Tribunal was neutralized and judicialized by the Respondent's intervention (see e.g. Claim. 19 March 2007, no. 170 and 172). However, this aspect has to be evaluated in the light of the rule contained in Art. 9 of the Yemeni Arbitration Law, according to which failure to object in due time about any violation to the Law or to applicable procedural rules must be construed as a waiver precluding later challenge to the validity of the arbitral procedures.

199. The duly constituted Yemeni Arbitral Tribunal accomplished its task and rendered the Yemeni Arbitral Award. It dealt with all of the Claimant's contentions relating to the disputes that had arisen with the Yemeni governmental authorities in connection with the Claimant's activities in Yemen.

200. Under Art. 52 of the Yemeni Arbitration Law, the Claimant was entitled to seize the Arbitral Tribunal during the thirty days following the reception of the Yemeni Arbitral Award to request rectification of the clerical or calculation mistakes, as well as to

request interpretation of certain expressions or sentences or parts of it, provided that the Respondent was officially notified of said requests. The Yemeni Arbitral Tribunal, if it deemed the said requests justified, was required to render its decision in writing within thirty days following the filing of the Claimant's request.

201. According to the documents submitted in the present ICSID proceedings, there is no evidence that the requirements provided for in the said Art. 52 of the Yemeni Arbitration Law were complied with. In any case, no ruling of a corresponding nature was issued by the Yemeni Arbitral Tribunal.

202. True, the Respondent expressed dissatisfaction with the Yemeni Arbitral Award by lodging with Sana'a Court of Appeal a recourse for annulment, based on the alleged violations of Art. 15, 42, 45, 53 and 55 of the Yemeni Arbitration Law. The documents in the possession of the present Arbitral Tribunal do not reveal that this application was ever ruled upon. Thus no judicial Yemeni decision exists that could affect the binding *res judicata* character of the Yemeni Arbitral Award. The binding force of the Yemeni Arbitral Award on both Parties is therefore in full conformity with Art. 56 of the Yemeni Arbitration Law.

203. Moreover, the review of the grounds for annulment invoked in the Respondent's recourse demonstrates *prima facie* that they were unfounded, since none of them fell under any of the seven causes enumerated in Article 53 of the Yemeni Arbitration Law. The failure to state convincing justifications under any of the exclusive legal grounds for annulment provided for in said Article 53 leads to the conclusion that the Respondent's recourse tended only to obstruct the enforcement of the Yemeni Arbitral Award which condemned the Respondent to pay indemnities considered excessive by certain Yemeni authorities. Equally, it seems that the recourse was intended to be used as a tool to press for a bargain in the process of forcing the Claimant to accept a settlement for lesser amounts than those allocated to it under the Yemeni Arbitral Award.

204. In the light of all the above-stated considerations, the Arbitral Tribunal is of the opinion that all disputes submitted to the Yemeni Arbitral Tribunal were resolved definitively by the Yemeni Arbitral Award, which is final and binding, has a *res judicata* effect and is therefore legally enforceable.

205. Hence, the Arbitral Tribunal arrives to the conclusion that ***the Yemeni Arbitral Award shall be implemented in its entirety, and be fully respected as definitively binding on both Parties.*** This conclusion emerges from the combined effect of two basic rules having paramount place within the Yemeni legal order and shared by all other systems of law as well as by international law.

206. First, *pacta sunt servanda*: the Respondent, which entered the Yemeni Arbitration Agreement with the Claimant, was legally bound by its grant of power to the Yemeni Arbitral Tribunal to render final and binding solutions on matters submitted to the arbitrators by either Party. The legally recognized force of the 9 August 2004 Yemeni Arbitral Award requires that the rulings contained therein are definitively binding upon the Claimant in the sense that it is not entitled to resubmit to the present Arbitral Tribunal the issues that were already adjudicated in the Yemeni Arbitration.

207. Second, the mandatory implication of the fundamental general principle of law commonly known as the legal doctrine of estoppel, which originated over twelve centuries ago in the Islamic Jurisprudence under the name " من سعى إلى نقض ماتم على يديه فسعيه مردود عليه", the precise wording of which can be translated in English to read: " whoever tries to undo what he previously undertook, such act on his part shall be turned against him." In application of this general principle of law, all acts undertaken by the Respondent during the period following the issuance of the Yemeni Arbitral Award, opposing the enforcement of the said Award and trying to pressure the Claimant to give up a substantial part of the sums allocated to him under the Award, as well as the ultimate result of pushing the Claimant to accept under duress the so-called Settlement Agreement, are all *ultra vires* acts aiming to escape enforcing parts of the binding Yemeni Arbitral Award rendered as a result of a valid Arbitration Agreement initiated by the Respondent in implementation of directives given by the Yemeni President in inspiration of a deeply rooted general principle of law of Islamic origin.

208. Before turning to quantum (see below 5), it may be worth mentioning that the ineffectiveness of the Settlement Agreement does not operate as a time machine to put the Parties – one or the other – in a position to seek the judicial annulment of the Yemeni Arbitral Award. What was done in 2004 cannot now be undone. This case in that respect bears some resemblance to the ICSID award in *Amco Asia et al. v. Indonesia*, 5 June 1990, 1 ICSID Reports 569, where Indonesian officials had been found responsible for the "procedurally unlawful revocation" of an investment licence. Indonesia argued that the reinstatement of the investment licence should not deprive Indonesia of a new opportunity to prove – this time properly – that there had been grounds to revoke the licence, and that therefore the investor had in truth suffered no loss. The arbitrators rejected this argument, stating that the circumstances of the revocation "tainted the proceedings irrevocably." Similarly in the case at hand, the circumstances and material consequences of the illegitimate Settlement Agreement were such as to render the *status quo ante* irretrievable. Having embarked on a successful campaign of pressuring the Claimant to accept a Settlement Agreement which suspended the debate about the validity of the Yemeni Arbitral Award, and having caused the Claimant to alter its position in fundamental ways to its detriment, the Respondent is now estopped from seeking to achieve the same effects as those it sought by its campaign of pressure by reviving its pursuit of the annulment of the Yemeni Arbitral Award.

209. In sum, it is not for the present Arbitral Tribunal to uphold or set aside the Yemeni Arbitral Award as a matter of national law. Its duty is rather to assess whether the BIT was breached, and the consequences thereof.

3. Other Violations of the BIT

a) The Issue

210. The issue to be decided by the Arbitral Tribunal is whether the Respondent violated other provisions than Art. 3 of the BIT.

b) The Contentions of the Parties

211. The Claimant's contentions may be summarised as follows:

- A series of acts by the Respondent constitute a breach of its obligations under the BIT, notably: the Respondent's failure to provide accurate data to the Yemeni Arbitral Tribunal to remedy the calculation errors adverse to the Claimant contained in the Yemeni Arbitral Award or to give its consent for such correction and/or the Respondent's specific instructions to the Yemeni Arbitral Tribunal to refuse to rule on the motion for correction and/or the Respondent's acts and omissions amounting to the same; the Respondent's failure to make payment of the amount awarded to the Claimant under the Yemeni Arbitral Award; the Respondent's failure to immediately release, as ordered under the Yemeni Arbitral Award, the Claimant's guarantees; the Respondent's failure to authorize the Claimant to have free disposition of its equipment until 2 July 2005; the Respondent's arrest and detention of the Claimant's personnel on or around 28 August 2004, the Respondent's failure to protect the Claimant from third-party harassment, intimidation and theft; and the Respondent's refusal to pre-qualify the Claimant in the tender for other road construction projects in Yemen (Claim. 30 June 2006, no. 154).
- Each of the above acts, individually or collectively, constitutes a breach of the Respondent's obligations under the BIT other that the principle of fair and equitable treatment, namely denial of justice, full protection and security, unreasonable and discriminatory measures and expropriation/taking (Claim. 30 June 2006, no. 156 *et seq.*; Claim. 19 March 2007, no. 131 *et seq.*).

212. The Respondent's contentions may be summarised as follows:

- The Claimant's claims are opportunistic; no conduct on the part of the Respondent could amount to breaches of the BIT, and no evidence to the contrary has been produced by the Claimant (Resp. 15 Jan. 2007, no. 4.1 *et seq.*).
- As to the allegation of breach of full protection and security, no specific provision in the BIT imposes an obligation of full protection and security on the Contracting States separate from the general obligation of fair and equitable treatment. Furthermore, the isolated episodes complained of by the Claimant are not admissible *ratione temporis* since they occurred before the issuance of the Yemeni Arbitral Award. In any event, the majority of this claims cannot be attributed to the Yemeni Government and were outwith its control when they were carried out (Resp. 15 Jan. 2007, no. 4.28 *et seq.*; Resp. 14 May 2007, no. 2.172 *et seq.*).
- As to the claims of expropriation, the Claimant was by no means deprived of its property (Resp. 15 Jan. 2007, no. 4.40 *et seq.*; Resp. 14 May 2007, no. 2.199 *et seq.*).
- As to the claim of unreasonable and discriminatory measures, the Claimant is not able to offer any comparison with a more favourable treatment in relation with similar investments, except for one document which relates to events having taken place before the Yemeni Arbitral Proceedings and therefore not relevant (Resp. 15 Jan. 2007, no. 4.52 *et seq.*; Resp. 14 May 2007, no. 2.194 *et seq.*).

c) Conclusion of the Arbitral Tribunal

213. There is substantial overlap between the facts regarding the breach of Art. 3 of the BIT and the allegations made by the Claimant to sustain its claims of lack of full protection and security, unreasonable and discriminatory measures, and expropriation. The Claimant itself recognizes this when it says that the alleged facts, individually or collectively, constitute a breach of the Respondent's various obligations under the BIT.

214. Moreover, the Claimant's alleged financial consequences (damages) of the violations of the BIT are not related to a specific breach of the BIT and may all be derived from the violation of Art. 3 of the BIT. At any rate, the present Arbitral Tribunal considers inadmissible any claims which could have been presented in the Yemeni Arbitration.

215. There is therefore no reason to scrutinize the other violations of the BIT alleged by the Claimant and contested by the Respondent. ***The Arbitral Tribunal considers it unnecessary to determine whether the factual record ultimately also supports a finding of liability under other provisions of the BIT.***

4. The Respondent's Counterclaims

a) The Issue

216. By way of counterclaim and set-off, the Respondent (and Counterclaimant) concludes that "to the extent the [Arbitral] Tribunal exercises jurisdiction, Yemen is entitled by way of counterclaim to (a) damages resulting from DLP's breach of its undertakings subscribed to in the Settlement Agreement; and (b) damages and/or set off for DLP's unfulfilled obligations decided in the [Yemeni] Arbitral Award, including damages for DLP's unfulfilled construction obligations and its obligation to maintain the bank guarantees" (Resp. 14 May 2007, p. 116).

b) The Contentions of the Parties

217. The Respondent's (and Counterclaimant's) contentions may be summarised as follows:

218. The Respondent submits a counterclaim and set-off for (i) the amounts that the Claimant has already received under the Settlement Agreement, and (ii) the value of the unperformed remedial and other works, and the value of the bank guarantees relinquished pursuant to the Settlement Agreement, which constituted continuing obligations of the Claimant under the Yemeni Arbitral Award that the Claimant did not fulfil.

219. It is undisputed that the Claimant received a cash payment of YR 3,524,326,966 under the Settlement Agreement. It is also undisputed that the Claimant never completed the contractual obligations that the Yemeni Arbitral Award held it was required to do.

220. The Respondent evaluated during the preparation of the Settlement Agreement the monetary value of releasing the Claimant from its continuing obligations at

approximately YR 3,5 billion. If the Arbitral Tribunal awards any portion of the YR 7.1 billion of the Yemeni Arbitral Award, it should also award to the Respondent, by way of set-off and counterclaim, YR 7,1 billion for the amounts already paid to the Claimant following the conclusion of the Settlement Agreement and for the value of the Claimant's unperformed work and of the bank guarantees, for which the Claimant failed to carry out the obligations figuring in the Yemeni Arbitral Award (Resp. 15 Jan. 2007, no. 3.28 *et seq.*).

221. The Claimant (and Counterrespondent) does not comment on the counterclaims and, without stating it expressly, accepts a set-off in the amount of YR 3,524,326,966 (Claim. 30 June 2006, no. 139).

c) Conclusion of the Arbitral Tribunal

222. Under the heading of set-off and counterclaim, the Respondent submits the two following prayers for relief: its first claim is for the cash amounts that the Claimant has already received under the Settlement Agreement; its second claim is for the value of the unperformed remedial and other works, as wells as for the value of the relinquished bank guarantees.

223. As to the cash amount of YR 3,524,326,966 paid under the Settlement Agreement which the present Arbitral Tribunal holds to be internationally ineffective, the Arbitral Tribunal holds that it will take it into consideration when ascertaining the residual amount due by the Respondent under the Yemeni Arbitral Award. To this extent, the Arbitral Tribunal partially upholds the Respondent's set-off claim.

224. As to the value of the unperformed remedial and other works constituting alleged continuing obligations of the Claimant under the Yemeni Arbitral Award as well as to the compensation related to the failure of the Claimant to maintain the bank guarantees after 31 December 2004, the Arbitral Tribunal holds that the Respondent cannot claim benefit from the nullity of a document – i.e. the Settlement Agreement – that it imposed on the Claimant. In the present case, the doctrine of estoppel (*venire contra factum proprium*) serves as a shield to prevent the Respondent from obtaining compensation for the failure of the Claimant to execute its maintenance and repair obligations as well as for its failure to maintain the two bank guarantees. The Respondent – while imposing the Settlement Agreement that provided for the release of all these obligations – had clearly and unmistakably represented that it no longer treated the Claimant's aforementioned obligations as extant.

225. As a result, ***the Respondent's counterclaims shall be dismissed***.

5. Financial Consequences

a) In General

226. The Claimant's claims related to the financial consequences for the Parties of the present proceedings are: (i) claim for the non-payment by the Respondent of amounts due under the Contracts and/or the Yemeni Arbitral Award; (ii) claim for late release by the Respondent of the Claimant's bank guarantees; (iii) claim for the illegal

blocking by the Respondent of the Claimant's equipment; (iv) claim for the inability of the Claimant to exercise a buy-back option with respect to a property in Oman that the Claimant was forced to sell in relation to the Contracts; (v) claim for loss of business opportunities by the Claimant in Oman and Yemen; and (vi) moral damages sustained by the Claimant.

227. As an introductory remark to the financial consequences of the Arbitral Proceedings, the Claimant states that reparation should be determined in accordance with general principles of international law as reflected in the International Law Commission's Articles on State Responsibility (hereafter referred to as "ILC Articles"). Article 31 of the ILC sets forth the principle of full reparation by the State for the injury caused by the internationally wrongful act (Claim. 30 June 2006, no. 258 *et seq.*).

228. As a first introductory remark, the Respondent, after reiterating that the present Arbitral Tribunal lacks jurisdiction over the case and that the alleged breaches of the BIT are without merit, states that the financial consequences brought forward by the Claimant are unfounded, unsubstantiated and, as a result, must be rejected (Resp. 14 May 2007, no. 3.1 *et seq.*).

229. As a second introductory remark, the Respondent recalls that the dispute between the Claimant and the Yemeni Ministry of Public Works was submitted to binding arbitration by agreement of the Parties. Therefore, to the extent that the Claimant failed to present claims that had accrued by August 2004, it should not be permitted to do so in these proceedings (Resp. 14 May 2007, no. 3.4 *et seq.*).

230. As a third introductory remark, the Respondent states that the Claimant's claims for compensation should be dismissed for three main reasons. First, the Claimant has failed to prove that the alleged losses have actually been sustained by it. Second, the Claimant has failed to establish that any such losses (if proven) were caused by the Respondent's alleged breaches of the BIT. Third, the Claimant has failed to establish that the alleged breaches by the Respondent were the proximate cause of the losses allegedly suffered by the Claimant. Each head of damage claimed by the Claimant fail to satisfy one or more of these conditions (Resp. 14 May 2007, no. 3.6 *et seq.*).

231. The Arbitral Tribunal will rule on each financial consequence which, according to the Claimant, is related to the violation of Art. 3 of the BIT as established by the Arbitral Tribunal.

b) Amounts Due under the Contracts and/or the Yemeni Arbitral Award

(i) The Issue

232. The Claimant requests the Arbitral Tribunal to "order Respondent to pay Claimant compensation for (a) Claimant's outstanding rights under the Contracts in an amount quantified at OR 36,657,000 or alternatively at 36,782,238 or, alternatively, (b) Claimant's outstanding right under the [Yemeni Arbitral] Award, including corrections, in the amount of OR 34,122,290 as of August 9, 2004" (Claim. 19 March 2007, no. 221).

(ii) Contentions of the Parties

233. The Claimant's contentions may be summarised as follows:

234. As to its claim related to the non-payment of amounts due under the Contracts and/or the Yemeni Arbitral Award, the Claimant states that it has received only YR 16,383,031,785 from the Respondent for its works under the Contracts and that there was never any independent body constituted to determine the amount owed by the Respondent: the Yemeni Arbitral Tribunal was neutralized and judicialized by the Respondent's intervention from the beginning to the end of the Yemeni Arbitral Proceedings. Moreover, the Claimant's request for correction of the Yemeni Arbitral Award was never examined nor adjudicated. To determine the amount owed by the Respondent under the Contract, Claimant advances the three following alternative amounts: first, OR 36,657,000, which corresponds to the difference between the amount spent by the Claimant for the performance of the Contracts plus standard profit margin minus amount received by the Claimant; second, OR 34,122,290, which corresponds to the amount outstanding under the Yemeni Arbitral Awarded (corrections included); third, OR 36,782,238, which corresponds to the difference between the estimate advanced by the Respondent for the performance of the Contracts and the amount received from the Respondent (Claim. 30 June 2006, no. 269 *et seq.* and 277 *et seq.*; Claim. 19 March 2007, no. 166 *et seq.*).

235. The Claimant adds the following specific comments:

236. In relation with the first method (amount spent by the Claimant plus margin minus amount received from the Respondent), the Claimant first asserts that the argument that this claim was already decided by the Yemeni Arbitral Tribunal does not stand since the Claimant was denied justice in the Yemeni Arbitration. Moreover, the present Arbitral Tribunal shall not be constrained by the Yemeni Arbitral Award - which settled contractual claims - since the present arbitration proceedings are made pursuant to the BIT. Second, contrary to the Respondent's assertions, the Claimant's claims are fully substantiated by a report written by Mr. Scott and by two reports established by KPMG, the last ones being based not only on the Claimant's audited financial statement but also on documentary evidence. Third, the Respondent's argument that the figures set forth by the Claimant in the present arbitration proceedings are different from the higher figures claimed in the Yemeni Arbitration is without merit and the difference is justified (Claim. 19 March 2007, no. 167 *et seq.*).

237. In relation with the second method (amount outstanding under the Yemeni Arbitral Award), the Respondent's argument that the Claimant had continuing contractual obligations worth YR 3.5 billion is contradicted by documentary evidence. No remotely significant work remained outstanding on the day the Yemeni Arbitral Award was rendered. The value of these obligations represents at most YR 72 million. The Respondent's arguments disputing the Claimant's calculations of the errors contained in the Yemeni Arbitral Award are without merit *inter alia* for the following reasons: the Respondent cited the Yemeni Arbitral Award in a misleading fashion; the Yemeni Arbitral Tribunal never rejected the grounds on which the Claimant bases its request for corrections; the various reports by KPMG and Mr. Scott substantiate the Claimant's position; some mistakes in the Yemeni Arbitral Award are confirmed by official Yemeni sources (Claim. 19 March 2007, no. 182 *et seq.*).

238. In relation with the third method (value of works estimate by Yemen minus amounts received), the Claimant should be entitled to rely on the estimates advanced by the Yemeni President in his letter to the Ruler of Abu Dhabi (Claim. 19 March 2007, no. 191 *et seq.*).

239. The Respondent's contentions may be summarised as follows:

240. As to the Claimant's claim (alleged amounts due under the Contracts and the Yemeni Arbitral Award), the Respondent states that the Claimant already introduced claims for allegedly outstanding contract amounts in the Yemeni Arbitration. Those claims were decided in the Yemeni Arbitral Award. According to it, the Claimant was entitled to a total of YR 18,447,857,500 (approximately OR 38,594,000) for the construction of road projects in Yemen, and YR 1,520,620,929 (approximately OR 3,111,200) for additional costs. From this total of YR 19,968,478,429, the Respondent had already paid to Claimant YR 12,858,704,909 before the Yemeni Arbitral Award was rendered, leaving a total amount awarded to the Claimant for its construction work under the Contracts of some YR 7,100,000,000 (or approximately OR 14,800,000). The Claimant's claim is in fact neither for payments outstanding as agreed under the Contracts: the Claimant appears to claim for compensation for additional costs incurred during the period 1999-2004, plus an anticipated profit margin. Similarly, the Claimant does not in fact claim for amounts that were due pursuant to the Yemeni Arbitral Award: it claims for the amount that it considers that the Yemeni Arbitral Award should have awarded it (Resp. 15 Jan. 2007, no. 5.3 *et seq.*; Resp. 14 May 2007, no. 3.8 *et seq.*).

241. The three methods using to quantify the Claimant's claims are flawed: the Claimant has failed to prove that the alleged losses were in fact sustained by it and/or that any such losses were caused by any acts or omissions of the Respondent (Resp. 15 Jan. 2007, no. 5.11 *et seq.*; Resp. 14 May 2007, no. 3.19 *et seq.*).

242. In relation with the first method (amount spent by the Claimant plus margin minus amount received from the Respondent), the mechanism is based on an unfounded assumption that the Respondent is contractually obliged to compensate the Claimant for all direct and indirect costs that the Claimant incurred during the period 1999 to 2004, plus an anticipated profit margin. Moreover, the Claimant has failed to provide sufficient substantiation for its figures by providing an internally-generated list integrated in the report of KPMG. Finally, the amount received by the Respondent that has been deducted by the Claimant is also inaccurate.

243. In relation with the second method (amount outstanding under the Yemeni Arbitral Award), although the Claimant asserts that it seeks the amount outstanding under the Yemeni Arbitral Award, in fact it claims amounts that it now considers should have been awarded. Thus, the Claimant claims for sums that were already rejected by the Yemeni Arbitral Award. The Claimant's attempt to present the corrections undertaken as clerical errors is misleading: the Claimant requests in fact a fundamental revision of the Yemeni Arbitral Award. The present Arbitral Tribunal has no jurisdiction to re-open matters that have been previously resolved through a consensual arbitration mechanism. The Claimant wishes to present in the present arbitral proceedings new submissions and, to some extent, new documents to justify an award more favourable

to it; the new evidence filed in no way supports the Claimant's contention that the Yemeni Arbitral Tribunal made an error. In any event, the documents filed in the present arbitral proceedings do not justify the increases to the amounts stated in the Yemeni Arbitral Award that the Claimant now claims.

244. In relation with the third method (value of works estimate by Yemen minus amounts received), the Claimant attempts to arrive at a higher average price per kilometre by using a letter which has no bearing on the rights and obligations of the Parties under the Contracts. Moreover, in the Yemeni Arbitral Proceedings, the Claimant used different average rates than the ones it uses in the present proceedings.

(iii) Conclusion of the Arbitral Tribunal

245. The Arbitral Tribunal will first assess if the claim for amounts due under the Yemeni Arbitral Award is well founded. In a second step, it will assess if a claim for additional amounts based on other grounds (correction of the award, contracts) withstands scrutiny.

246. When the Arbitral Tribunal analyzed the consequences of the international ineffectiveness of the Settlement Agreement, it made an autonomous finding that the measure of damages should include the amounts that would have been paid had the Yemeni Arbitral Award been promptly respected. Thus, it is not for the present Arbitral Tribunal to disregard the Yemeni Arbitral Award and to retain a new method to calculate the amounts due under the Contracts and/or the Yemeni Arbitral Award.

247. According to the Yemeni Arbitral Award, the Claimant is entitled to YR 19,968,478,429, composed of YR 18,447,857,500 for the construction of road projects in Yemen, and YR 1,520,620,929 for additional costs. The Yemeni Arbitral Award specifies also that the Claimant "shall be paid in accordance with the terms of the Award after deduction of the amounts already paid to [the Claimant] for the aforementioned roads". From this total amount, the Claimant acknowledges that the Respondent already paid YR 12,858,704,909 between 1999 and 2004 before the Arbitral Award was rendered (see Claim. 30 June 2006, no. 96). Moreover, it is also necessary to deduct the cash payment of YR 3,524,326,966 made according to the Settlement Agreement (see Claim. 30 June 2006, no. 139 and Exh. CM-124).

248. With regard to these figures, two elements deserve closer attention:

249. First, the amount awarded in the Yemeni Arbitral Award included an amount of YR 2,520,000,000 for the completed Al Mahweet – Al Qanawis road project (Contract 6), while specifying that the 30 km Al Mahweet – Hajah section was discounted since the initial 120 km scope of work was subsequently reduced to 90 km. According to the Yemeni arbitrators, "*the cost of the Al Mahweet – Al Qanawis relates to the completed road, and hence, Desert Lines Projects has to complete the outstanding works thereof and hand over the completed road in accordance with the contract's provisions*" (Exh. CM-88, p. 40). The road works related to the Contract 6 were never completely terminated by the Claimant. Therefore, the fact that the road project related to Contract 6 was only partially executed was not taken into account in the Yemeni Arbitral Award.

250. The Parties disagree as to which percentage of the road project was executed by the Claimant, respectively approved by the Respondent or its consultant engineer, Dar Al Handasah. Citing internal documents related to the execution of Contract 6 (see Exh. CM-183), the Claimant states that 76% of the works were completed (Claim. 23 July 2007, no. 14). According to the Claimant, this figure does not include the percentage of work executed at the time but which was rejected by the Respondent's consultant (Claim. 23 July 2007, no. 3). Citing a schedule regarding the executed work related to Contract 6 and prepared by its consultant engineer (see Exh. RR-7), the Respondent argues first that the percentage of the works executed contains the percentage of the works that had been rejected. Moreover, it states that the executed part of the total scope of Contract 6 amounts to 58.52% of the work (Resp. 31 July 2007, p. 2 *et seq.*). Both Parties question the validity of the submitted documents: the Claimant criticizes the fact that the report (see Exh. RR-7) was prepared by the Respondent's consultant whose ineptness was expressly mentioned in the Yemeni Arbitral Award; the Respondent answers that the document submitted by the Claimant (see Exh. CM-183) was unreferenced and unilaterally created.

251. It ill behooves the Respondent, having achieved by duress the neutralisation of the Yemeni Arbitral Award, now to seek the rehabilitation of portions of it which it believes were in its favour. The present Arbitral Tribunal cannot ascertain or reconstruct the Yemeni arbitrators' intention with respect to a hypothetical discount by reference to the unfinished portion of Contract 6. The Yemeni Arbitral Award simply does not give the means to determine an answer. The Respondent adopted the course of disparaging the Yemeni Arbitral Award and achieving its neutralisation via the Settlement Agreement. It must now bear the consequences. It would be improper to give the Respondent the benefit of speculation as to what the Yemeni arbitrators might have concluded as to the value to be ascribed to the unfinished portion of Contract 6. Indeed, it is equally open to speculate that a reconsideration of the Yemeni Arbitral Award would have yielded a net adjustment in favour of the Claimant, given its claims of various inaccuracies. Having chosen to avoid the Yemeni Arbitral Award by dint of the improperly procured Settlement Agreement, the Respondent must now face the fact, as the saying goes, that the omelette cannot be unscrambled. The Respondent has not demonstrated an entitlement to its counterclaim in this respect.

252. Second, the amount for the construction of road projects includes an amount of YR 2,520,457,500 for the Harad – Sa'ada project (Contract 4) which is based on a report of May 2004 submitted by the Consultant of the Respondent, Dar Al Handasah. According to the Yemeni Arbitrators, "[*w*]*ith respect to the Harad Sa'ada project, its value relates to the works executed until the end of May 2004 as per the consultant's report knowing that Desert Line Projects won't continue performing this project*" (Exh. CM-88, p. 40). The Arbitral Tribunal relies on this declaration of the Yemeni Arbitral Tribunal and does not grant a higher amount for the execution of Contract 4.

253. The Claimant has requested relief under this head payable in OR. The Tribunal considers that the Yemeni Arbitral Award should constitute the bench-mark for the reparation due to the Claimant for the breach of the BIT, and that it should have been open to the Claimant to repatriate the corresponding amount as of the date of the Yemeni Arbitral Award. Accordingly, ***the claim is granted in the amount in Omani Riyals equivalent to YR 3,585,446,554 at the exchange rate of the Omani Central Bank as of 9 August 2004***.

c) Late Release of the Bank Guarantees

(i) The Issue

254. The Claimant requests the Arbitral Tribunal to "order Respondent to pay Claimant damages quantified at OR 30,731 for the late release by Yemen of DLP's two bank guarantees" (Claim. 19 March 2007, no. 221).

(ii) Contentions of the Parties

255. The Claimant's contentions may be summarised as follows:

256. Because of the late release by the Respondent of the Claimant's bank guarantees, the Claimant claims an amount of OR 30,731 in compensation for the damages that it has sustained. According to the Claimant, the bank guarantees had to be released, at the latest, upon the rendering of the Yemeni Arbitral Award, i.e. on 9 August 2004. Yet, there were released by the Respondent only on 31 December 2004. As a result, the Claimant sustained a loss in the said amount. The Claimant points out that it was not required to maintain the bank guarantees to fulfil its obligations under the Yemeni Arbitral Award and that letters of Yemeni officials preceding and following the Yemeni Arbitral Award conceded that the guarantees had to be released as the works for which the guarantees had been given were completed (Claim. 30 June 2006, no. 286 *et seq.*; Claim. 19 March 2007, no. 197 *et seq.*).

257. The Respondent's contentions may be summarised as follows:

258. The Claimant's claim on account of the alleged late release of its bank guarantees is misplaced for the following reasons. First, the premise that the guarantee should have been released on 9 August 2004 is incorrect. There is no legal basis for this assertion, which is directly contradicted by the holding of the Yemeni Arbitral Award which stated unambiguously that the bank guarantees had to be maintained until the Claimant has fulfilled its obligations. The Claimant's argument in its Reply Memorial that the Yemeni Arbitral Award provides for a different rule is baseless. Moreover, the quantum of the claim raises serious questions since it seems that several transactions may have taken place between August and December 2004 and that part of the margin for the bank guarantees was withdrawn before 31 December 2004. Finally, if the Claimant is right in its argument that the Settlement Agreement is null and void, then its obligation to maintain the bank guarantees remains in force, and the Claimant has breached its obligations under the Yemeni Arbitral Award. Therefore, the Respondent counterclaims for the failure of the Claimant to maintain its bank guarantees after 31 December 2004 (Resp. 15 Jan. 2007, no. 5.25 *et seq.*; Resp. 14 May 2007, no. 3.71 *et seq.*).

(iii) Conclusion of the Arbitral Tribunal

259. The Arbitral Tribunal deems it proper to adhere to the holding of the Yemeni Arbitral Award related to the release of the bank guarantees. According to the Yemeni Arbitrators, "*the legally required guarantees shall be conserved until Desert Line Project cures the defects and maintains the roads executed in the eastern region in*

accordance with the above stated technical specifications and methods" (Exh. CM-88, p. 41). Therefore, neither the contract nor the Yemeni Arbitral Award nor any other sources provide for a release of the bank guarantees on or around 9 August 2004. On the other hand, the obligation to maintain them was extinguished by virtue of the Settlement Agreement and cannot be restored.

260. The Arbitral Tribunal holds that the Claimant is neither entitled to any compensation under this head of damage, nor liable for any consequences of the release of the guarantees. Therefore, ***the Claimant's claim shall be dismissed***

d) The Illegal Blocking of the Claimant's Equipment

(i) The Issue

261. The Claimant requests the Arbitral Tribunal to "order Respondent to pay Claimant damages quantified at OR 4,171,935 for the illegal blocking by Yemen of DLP's equipments from August 9, 2004 to July 2, 2005 " (Claim. 19 March 2007, no. 221).

(ii) The Contentions of the Parties

262. The Claimant's contentions may be summarised as follows:

263. On account of the blocking by the Respondent of Claimant's equipment, the Claimant claims OR 4,171,935 in compensation for its sustained damages. This amount was calculated based on internal hire rates that are lower than the market rates, and on the list of the Claimant's equipment blocked by the Respondent. As confirmed by the Yemeni President, the Claimant had the right to transfer its equipment to Oman as of 3 June 2004. Yet the Respondent did not allow the Claimant to do so until 2 July 2005, although the Claimant regularly requested the Respondent to release its equipment. The fact that the Claimant's equipment was blocked by the Respondent more than six months after the Settlement Agreement is proof that the equipment was not blocked for purposes of compliance with any alleged outstanding obligations. Finally, the Claimant has fully substantiated the Respondent's concern in the KPMG's second report which traced 560 out of the 576 items of equipment blocked in Yemen (Claim. 30 June 2006, no. 291 *et seq.*; Claim. 19 March 2007, no. 201 *et seq.*).

264. The Respondent's contentions may be summarised as follows:

265. As to the damages alleged to have arisen from the blocking of the Claimant's equipment, the Respondent stresses that the Claimant has failed to explain what the legal basis of its claim is. The Yemeni Arbitral Award states nowhere that the Respondent was under an obligation to arrange for the release of the Claimant's equipment. This obligation is only contained in the Settlement Agreement. To the contrary, the Claimant continued to have obligations related to the construction works and its equipment was required for these continuing obligations. Moreover, the Claimant has introduced no evidence from 9 August 2004 to early 2005 that it applied to export its equipment out of Yemen. Even if the Claimant wished to base its claim on the Settlement Agreement - in contradiction with its assertion that the said Settlement Agreement is null and void - the Claimant did not have an unfettered and immediate right to have its equipment released by the Respondent. Additionally, the list of the

576 pieces of equipment which the Claimant alleges was blocked in Yemen is not sufficiently substantiated. The same applies for the daily hire rate used by KPMG in its report. Furthermore, the Claimant is misleading when it asserts that it regularly requested the Respondent as of August 2004 to release its equipment since the letter dated 24 August 2004 refers to problems faced by the Claimant in exporting its equipment not from Yemen to Oman, but rather from Oman to Yemen. Finally, the Claimant has failed to file any evidence that it suffered any actual losses caused by the fact that some of its equipment remained in Yemen during the period ending on 2 July 2005 (Resp. 15 Jan. 2007, no. 5.33 *et seq.*; Resp. 14 May 2007, no. 3.84 *et seq.*).

(iii) Conclusion of the Arbitral Tribunal

266. The Arbitral Tribunal is of the opinion that there is insufficient proof of deliberate governmental attitude to prevent the Claimant from repatriating his equipment. Moreover, the Claimant failed to sufficiently substantiate damages in this respect. Therefore, the Claimant's claim shall be dismissed

e) The Inability to Exercise a Buy-back Option with Respect to a Property in Oman

(i) The Issue

267. The Claimant requests the Arbitral Tribunal to "order Respondent to pay Claimant damages quantified at OR 7,117,050 for the loss sustained by DLP as a result of its inability to exercise the buy-back option under the Agreement to repurchase the Property" (Claim. 19 March 2007, no. 221).

(ii) The Contentions of the Parties

268. The Claimant's contentions may be summarised as follows:

269. Given its inability to exercise a buy-back option, the Claimant had to sell a property below its market price and could not repurchase it within the agreed deadline since it did not have the required funds to do so as a result of the Respondent's failure to pay the amounts that it owed to the Claimant for its works and/or under the Yemeni Arbitral Award. Today, the property is worth much more due to the real estate boom in Oman during the past years. The Claimant has thus sustained a loss in the said amount. In response to the Respondent's arguments, the Claimant points out that the Yemeni Arbitral Tribunal never addressed such claim. Moreover, the Claimant explains that the real property was a fixed asset of the Claimant: it was registered under the Claimant's Chairman's name according to an accepted practice in Oman. This practice was developed after a Royal Decree limited the right of companies to own real estates (Claim. 30 June 2006, no. 294 *et seq.*; Claim. 19 March 2007, no. 209 *et seq.*).

270. The Respondent's contentions may be summarised as follows:

271. The alleged loss due to the Claimant's inability to exercise a buy-back option was already rejected by the Yemeni Arbitral Tribunal, since it was not based on legal or contractual grounds. Additionally, the Claimant has failed to demonstrate that the parcel of land actually belonged to it rather than to its Chairman and that the buy-back

option was in favour of it since it was its Chairman who possessed the right to re-purchase the property. If the Claimant's Chairman suffered any losses, they are not recoverable from the Respondent in the present proceedings. Furthermore, even if the buy-back option was in favour of the Claimant, it failed to provide evidence that it would have been in a position to exercise the option had there been no alleged breach from the Respondent (Resp. 15 Jan. 2007, no. 5.47 *et seq.*; Resp. 14 May 2007, no. 3.98 *et seq.*).

(iii) Conclusion of the Arbitral Tribunal

272. The Arbitral Tribunal observes that the Yemeni Arbitral Tribunal held with this regard that "[t]his claim is not based on legal or contractual grounds" (Exh. CM-88, p. 36). This reasoning may be exceptionally succinct, but the present Arbitral Tribunal broadly comes to the same conclusion, as explained hereinbelow.

273. Theoretically, the Claimant could seek relief based on the alleged prejudice resulting from the Respondent's failure to pay the amounts that it owed to the Claimant for its works and/or under the Yemeni Arbitral Award arbitral proceedings.

274. According to the common principles applying to such a petition, the Respondent should then establish the substantiality and the amount of its prejudice, the type of liability, and the causation between the type of liability and the alleged prejudice.

275. Without examining all the other conditions, the Arbitral Tribunal is of the opinion that the causes brought forward by the Claimant – i.e. the Respondent's failure to pay the amounts owed under the Contracts and the Yemeni Arbitral Award – do not adequately justify the forced sale of the real property and the compensation of the alleged prejudice. The Claimant did not sufficiently establish that the inability to buy back its real property by the Claimants was due to the behaviour of the Respondent. The attitude taken by the Respondent may effectively have complicated the Claimant's financial situation but, in the eyes of the Arbitral Tribunal, it cannot, on the state of evidence, be accepted as the cause of the Claimant's inability to buy back its property (without entering into the debate whether the allegedly injured party was not the Claimant but rather its Chairman personally).

276. Therefore, ***the Claimant's claim shall be dismissed***.

f) Loss of Business Opportunities in Oman and Yemen

(i) The Issue

277. The Claimant requests the Arbitral Tribunal to "order Respondent to pay Claimant damages quantified at OR 8,308,000 for the loss of business opportunities sustained by DLP from 2002 to 2005 in Oman and Yemen" (Claim. 19 March 2007, no. 221).

(ii) The Contentions of the Parties

278. The Claimant's contentions may be summarised as follows:

279. As a result of the Respondent's breaches of its obligations under the BIT, the Claimant claims the amount of OR 6,962,000 for loss of business opportunities in Oman and Yemen. In Oman, the Claimant's entire operations were severely disrupted from 2002 to 2005, which prevented it from participating in tenders in the Omani market. Although the Claimant had a leading position and an impressive track record in the Omani construction market, it was not awarded a single contract in or by Oman during the years 2002-2005. In Yemen, the Claimant could not even pre-qualify for a Saudi-sponsored project for which it applied in July 2004, although it was better qualified that other applicants ultimately admitted. Contrary to the Respondent's argument, this claim was never examined by the Yemeni Arbitral Tribunal (Claim. 30 June 2006, no. 299 *et seq.*; Claim. 19 March 2007, no. 213 *et seq.*).

280. The Respondent's contentions may be summarised as follows:

281. As to the Claimant's claim for alleged loss of business opportunities from 2002 to 2005), the Respondent states that in connection with lost business opportunities in Oman there is no remaining legal basis on which the Respondent can be held liable for delayed payments in connection with the Claimant's construction activities up to 9 August 2004 since these claims were already submitted to the Yemeni Arbitral Tribunal. In addition, the quantification of the Claimant's claim is speculative, not legally compensable and unsubstantiated. In particular, there is no causal connection between the alleged shortcomings of the Respondent and the Claimant's failure to obtain profitable contracts in Oman. With respect to the loss of business opportunities in Yemen, the claim is outside the jurisdiction of the present Arbitral Tribunal since the Claimant had no vested rights and had made no investment with respect to the project mentioned by the Claimant. Moreover, the letter on which the Claimant relies indicates clearly that the Respondent was under no legal obligation to accept the Claimant's application (Resp. 15 Jan. 2007, no. 5.56 *et seq.*; Resp. 14 May 2007, no. 3.107 *et seq.*).

(iii) Conclusion of the Arbitral Tribunal

282. The Arbitral Tribunal reasons in the same terms as it did in the previous subsection dedicated to the Claimant's inability to exercise the buy-back option. Therefore, it holds that the Claimant was not able to sufficiently establish the adequate causation between the damages it alleges and the alleged illicit behaviour of the Respondent.

283. Therefore, ***the Claimant's claim shall be dismissed***.

g) Moral Damages, Including Loss of Reputation

(i) The Issue

284. The Claimant requests the Arbitral Tribunal to "order Respondent to pay Claimant moral damages quantified at OR 40,000,000" (Claim. 19 March 2007, no. 221).

(ii) The Contentions of the Parties

285. The Claimant's contentions may be summarised as follows:

286. Based on international law, the Claimant claims the amount of OR 40,000,000 for moral damages including loss of reputation. The Claimant states that it has suffered extensive moral damages as a result of the Respondent's breaches of its obligations under the BIT: the Claimant's executives suffered the stress and anxiety of being harassed, threatened and detained by the Respondent as well as by armed tribes; the Claimant has suffered a significant injury to its credit and reputation and lost its prestige; the Claimant's executives have been intimidated by the Respondent in relation to the Contracts. The quantified amount, representing one third of the Claimant's claims in the present arbitration, is in harmony with other cases, such as the *Fabiani Case* (Claim. 30 June 2006, no. 309 *et seq.*; Claim. 19 March 2007, no. 219).

287. The Respondent's contentions may be summarised as follows:

288. The Claimant's quantification is based on an entirely speculative estimate and based on unsubstantiated allegations which it attempts to attribute to the Respondent. For example, the Claimant has failed to point to any evidence of this alleged loss of reputation or to any losses suffered as a result. Moreover, the Claimant has failed to establish that the harassment of its executives and other acts were related to the Contracts and attributable to the Respondent. If any Party has suffered any moral damages, it is the Respondent which has been faced with a spurious allegation of coercion and whose President has been subject to abusive, threatening and unjustified letters from the Claimant's Chairman. (Resp. 15 Jan. 2007, no. 5.69 *et seq.*; Resp. 14 May 2007, no. 3.121 *et seq.*).

(iii) Conclusion of the Arbitral Tribunal

289. The Respondent has not questioned the possibility for the Claimant to obtain moral damages in the context of the ICSID procedure. Even if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages. It is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages. There are indeed no reasons to exclude them.

The Arbitral Tribunal knows that it is difficult, if not impossible, to substantiate a prejudice of the kind ascertained in the present award. Still, as it was held in the *Lusitania* cases, non-material damages may be "very real, and the mere fact that they are difficult to measure or estimate by monetary standards makes them none the less real and affords no reason why the injured person should not be compensated," *U.S. V. GERMANY*, NOVEMBER 1923, VII RIAA 32, AT P. 42, QUOTED WITH APPROVAL IN JAMES CRAWFORD, ILC ARTICLES ON STATE RESPONSIBILITY at p. 223 *et seq.*

It is also generally recognized that a legal person (as opposed to a natural one) may be awarded moral damages, including loss of reputation, in specific circumstances only.

290. The Arbitral Tribunal finds that the violation of the BIT by the Respondent, in particular the physical duress exerted on the executives of the Claimant, was malicious and is therefore constitutive of a fault-based liability. Therefore, the Respondent shall be liable to reparation for the injury suffered by the Claimant, whether it be bodily, moral or material in nature. The Arbitral Tribunal agrees with the Claimant that its

prejudice was substantial since it affected the physical health of the Claimant's executives and the Claimant's credit and reputation.

Nevertheless, the amount asked by the Claimant is exaggerated and cannot be allocated in its entirety. The Arbitral Tribunal considers that, based on the information at hand and the general principles, an amount of USD 1,000,000 should be granted for moral damages, including loss of reputation.

This amount is indeed more than symbolic yet modest in proportion to the vastness of the project.

291. Therefore the Arbitral Tribunal grants the Claimant's Claim for moral damages, including loss of reputation, in the amount of USD 1,000,000 without interest. This amount shall be paid within 30 days from the notification of the award.

6. Interest

a) The Issue

292. The issue to be decided by the Arbitral Tribunal is whether the Claimant is entitled to obtain interest on amounts awarded by the Arbitral Tribunal.

b) Contentions of the Parties

293. The Claimant claims for compounded interest at the rate of 7% per year - the term rate of the Claimant's borrowings - as of the date that these amounts were due to the Claimant until the date of the effective payment thereof by the Respondent (Claim. 30 June 2006, no. 321; Claim. 19 March 2007, no. 220).

294. The Respondent argues that the starting date form which interest would begin to accrue is not specified and that the rate used by the Claimant is significantly higher that what would have been obtained at the time in the open market. Moreover, compound interest cannot be awarded in this case. The first reason is that international courts and tribunals generally rule against the award of compound interest and this preponderance of authority applies in this case. The second reason is that the Claimant's claims for damages remain largely unsubstantiated and speculative, its record of profits provides no certainty, and the award of compound interest is contrary to the Yemeni law applicable to the Contracts. The third reason is that the Claimant has not advanced any reason why it should be awarded compound interests (Resp. 14 May 2007, no. 3.130 *et seq.*).

c) Conclusion of the Arbitral Tribunal

295. The Arbitral Tribunal considers that the appropriate rate of interest in this case is the simple rate of 5% per annum.

296. With regard to the amount due under the Yemeni Arbitral Award, it should be granted for the period extending from the date of the Yemeni Arbitral Award, i.e. 9 August 2004, until full payment.

297. With regard to the moral damages, including loss of reputation, there should not be granted any interest because this amount is at the entire discretion of the Arbitral Tribunal.

298. ***A simple interest of 5% is due on the amount to be paid under the Yemeni Arbitral Award from 9 August 2004 until full payment. No interest is due on the amount for moral damages; in case of no payment of the amount for moral damages within 30 days from the notification of the award, it will bear interest of 5% until full payment.***

IV. Costs and Legal Expenses

1. The Issue

299. Both parties ask the Arbitral Tribunal to award them their arbitration, legal and related costs in connection with the present arbitral proceedings.

2. Contentions of the Parties

300. The Claimant's contentions may be summarised as follows:

- The Claimant asks the Arbitral Tribunal to "*order Respondent to pay Claimant all arbitration, legal and related including counsel fees sustained by DLP in connection with this arbitration.*" (Claim. 19 March 2007, no. 221).
- As to the Claimant's costs, they include USD 225,000 representing the lodging fee and the advance on costs paid by the Claimant; USD 717,191 representing the fees and expenses of Salans (inclusive of those of Mr. Fathallah; GBP 21,209 representing the fees of Mr. J.H. Scott; OMR 75,500 representing the fees of KPMG; OMR 4,147 representing expenses directly paid by the Claimant relating to the visit of counsel (Salans and Mr. Fathallah), expert (Mr. Scott) and witnesses to Muscat; and OMR 3,981 and EUR 18,172 representing expenses incurred by the Claimant for its representatives and witnesses relating to the June 2007 hearing.
- The Claimant is not claiming for the time spent by its executives and its staff for the gathering of documents and translation as well as for some of the expenses that it has directly incurred in Oman and Yemen (e.g., telecommunication, DHL, visa fees).

301. The Respondent's contentions may be summarised as follows:

- The Respondent requests the Arbitral Tribunal to award its costs in this arbitration in the amount of USD 471,534.82 plus USD 200,000 - or whatever different amount represents Yemen's non-reimbursed share of the costs of the proceedings as finally determined by the ICSID Secretariat (Resp. 6 July 2007, no. 48).
- The Respondent's request is based on two elements. The first one corresponds to the costs incurred by the Respondent for its legal representation. The Respondent

incurred legal costs relating to the arbitration of USD 461,534.02 through 7 June 2007, and a further amount of approximately USD 10,000.00 during the period from 8 June 2007 to the 6 July 2007. The second element corresponds to the cost incurred and paid by the Respondent to ICSID for the administrative expenses of the proceedings, including the fees and expenses of the members of the Arbitral Tribunal. The Respondent has paid USD 200,000.00 in advance costs to the ICSID Secretariat (Resp. 6 July 2007, no. 44 *et seq.*).

- The Respondent is not claiming costs borne by the Yemeni Government for its own costs and time spent in participating in the present proceedings in order to deep its request for costs within reasonable bounds (Resp. 6 July 2007, no. 45).
- The Respondent believes that there are compelling reasons why it should be awarded costs in this case. First, this case should never have been submitted to ICSID arbitration since the Arbitral Tribunal lacks jurisdiction under the provisions of the BIT. Second, the Respondent cannot be held to have breached any provision of the BIT. Third, the Respondent has fully cooperated in the present proceedings and has therefore incurred significant costs (Resp. 6 July 2007, no. 37 *et seq.*).

3. Conclusion

302. According to Rule 47 (1) of ICSID Arbitration Rules, the arbitral "award shall contain any decision [...] (j) regarding the cost of proceeding."

303. The Arbitral Tribunal has broad powers of discretion in matters of arbitration costs and expenses incurred by the Parties under Article 61(2) of the ICSID Convention. Two principles may be applied. On the one hand, a party injured by a breach must be fully compensated for its losses and damages, which include arbitration costs and its own legal expenses. On the other hand, the "loser-pays" principle is not absolute, in particular when the Claimant succeeds only partially.

304. Considering all circumstances of this case, including in particular that the Respondent breached the BIT; that it unsuccessfully challenged jurisdiction; that it insufficiently cooperated in providing documents and testimonial evidence; that not all Claimant's claims were granted; the Arbitral Tribunal deems it fair and reasonable that the cost burden be shared between the Parties as follows. ***The Claimant, respectively the Respondent, will bear 30% respectively 70% of the arbitration costs. Additionally, the Respondent should contribute to the Claimant an amount of US$ 400,000.00 for legal expenses***.

C. AWARD

In view of the above, the Arbitral Tribunal hereby orders that:

1. The Arbitral Tribunal has jurisdiction over the present dispute;

2. *The Settlement Agreement contravened the Respondent's obligations under Art. 3 of the BIT and, therefore, it is not entitled to international effect;*

3. *The Yemeni Arbitral Award shall be implemented in its entirety, and be fully respected as definitively binding on both Parties;*

4. *The Respondent's counterclaims shall be dismissed;*

5. *The Claimant's claim based on the Yemeni Arbitral Award is granted in the amount in Omani Riyals equivalent to YR 3,585,446,554 at the exchange rate of the Omani Central Bank as of 9 August 2004; this amount shall be paid within 30 days from the notification of the award;*

6. *The Claimant's claim based on the late release of the bank guarantees is dismissed;*

7. *The Claimant's claim based on the inability to exercise a buy-back option with respect to a property in Oman is dismissed;*

8. *The Claimant's claim based on the loss of business opportunities in Oman and Yemen is dismissed;*

9. *The Claimant's claim based on moral damages, including loss of reputation, is granted in the amount of USD 1,000,000; this amount shall be paid within 30 days from the notification of the award;*

10. *A simple interest of 5% is due on the amount to be paid under the Yemeni Arbitral Award from 9 August 2004 until full payment. No interest is due on the amount for moral damages; in case of no payment of the amount for moral damages within 30 days from the notification of the award, it will bear interest of 5% until full payment;*

11. *The costs of the proceeding, including the fees and expenses of the Tribunal and the ICSID Secretariat, shall be borne 30% by the Claimant and 70% by the Respondent;*

12. *The Respondent shall pay the Claimant an amount of US$ 400,000 for legal expenses; this amount shall be paid within 30 days from the notification of the award;*

13. *All other claims are dismissed.*

Prof. Pierre Tercier, President
Date : 21.01.08

Prof. Jan Paulsson, Arbitrator
Date:
29 JAN. 2008

A.S. El Kosheri
Prof. Ahmed S El-Kosheri, Arbitrator
Date: 23.01.08