International Centre for Settlement of Investment Disputes

BAYINDIR INSAAT TURIZM TICARET VE SANAYI A.Ş.

CLAIMANT

v.

ISLAMIC REPUBLIC OF PAKISTAN

RESPONDENT

ICSID Case No. ARB/03/29

DECISION ON JURISDICTION

Rendered by an Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, President

Sir Franklin Berman, Arbitrator

Prof. Karl-Heinz Böckstiegel, Arbitrator

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TABLE OF ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Bayindir	Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. A.Ş.
BIT	Bilateral investment treaty; specifically "Agreement Between the Republic of Turkey and the Islamic Republic of Pakistan Concerning the Reciprocal Promotion and Protection of Investments" of 16 March 1995
1997 Contract	Agreement for the Revival of Contract Agreement for the Construction of Islamabad-Peshawar Motorway of 29 March 1997
C-Mem. J.	Bayindir's Counter-Memorial on Jurisdiction dated 31 March 2005
Contract	1993 Contract as revived by the1997 Contract
EOT	Extension of time
Exh. [Bay.] B	Bayindir's Exhibit [Request for arbitration]
Exh. [Bay.] CX	Bayindir's Exhibit (Documentary Evidence)
Exh. [Bay.] CLEX	Bayindir's Exhibit (Legal Materials)
Exh. [Pak.] C	Pakistan's Exhibit (Principal Contractual Documents) [Volume 2 of Mem. J.]
Exh. [Pak.] D	Pakistan's Exhibit (Documentary exhibits) [Volume 7 of Mem. J.]
Exh. [Pak.] L	Pakistan's Exhibit (Legal Materials) [Volume 3 to 6 of Mem. J.]
Exh. [Pak.] RL	Pakistan's Exhibit (Legal Materials) [Volume 3 to Reply.]
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
M1 Project	Pakistan Islamabad-Peshawar Motorway
Mem. J.	Pakistan's Objections to Jurisdiction dated 31 December 2004
MFN	Most favoured nation clause
NHA	National Highway Authority of Pakistan
PMC JV	Pakistani Motorway Contractors Joint Venture
RA or Request	Bayindir's Request of Arbitration of 15 April 2002
Rejoinder J.	Bayindir's Rebuttal (on Jurisdiction) dated 17 June 2005
Reply J.	Pakistan's Reply on Bayindir's Counter-Memorial on Jurisdiction of 9 May 2005
Tr. P.	Transcript of the preliminary hearing
Tr. J. [page:line]	Transcript of the hearing on jurisdiction

I. THE RELEVANT FACTS REGARDING THE ISSUE OF JURISDICTION

1. This Chapter summarizes the factual background of this arbitration in so far as it is necessary to rule on the Respondent's objections to jurisdiction.

A. THE PARTIES

a. The Claimant

2. The Claimant, Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. A.Ş. ("Bayindir") is a company incorporated and existing under the laws of the Republic of Turkey. Its principal office is situated at Tunus Caddesi No. 24, Kavaklidere, Ankara, Turkey.

3. The Claimant is part of the Bayindir group of companies. It is engaged in the business of construction of motorways and other larger infrastructure projects in Turkey and abroad.

4. The Claimant was initially represented in this arbitration by

- Dr. Michael Bühler and Mr. Jonathan Eades; JONES DAY; 120, Rue du Faubourg Saint Honoré; 75008 Paris; France, and
- Mr. Farrukh Karim Qureshi; WALKER MARTINEAU SALEEM; 40-B, Street 30, Sector F-8/1; Islamabad; Pakistan.

5. On 1st July 2005, Claimant informed the ICSID Secretariat that it had retained new counsel and that it would be represented by

- Prof. Emmanuel Gaillard; SHEARMAN & STERLING LLP; 114, avenue des Champs-Elysées; 75008 Paris; France, and
- Mr. John Savage; SHEARMAN & STERLING LLP; 6 Battery Road, #25-03; 049909 Singapore, Singapore.

6. On 14 July 2005, Prof. Gaillard and Mr. Savage advised the ICSID Secretariat that SHEARMAN & STERLING LLP had ceased to represent the Claimant with immediate effect.

7. On 18 July 2005, Claimant informed the ICSID Secretariat that it had retained new counsel and would be represented at the jurisdictional hearing by Mr. Farrukh Karim Qureshi and

- Mr. Gavan Griffith, QC; ESSEX COURT CHAMBERS; 24 Lincoln's Inn Fields; London WC2A 3EG; United Kingdom.

b. The Respondent

8. The Respondent is the Islamic Republic of Pakistan ("Pakistan").

9. The Respondent is represented in this arbitration by

- The Hon. Makhdoom Ali Khan; Attorney General for Pakistan; Supreme Court Building; Islamabad; Pakistan, and
- Mr. V. V. Veeder QC, Prof. Christopher Greenwood CMG, QC and Mr. Samuel Wordsworth; ESSEX COURT CHAMBERS; 24 Lincoln's Inn Fields; London WC2A 3EG; United Kingdom, and
- Mr. Rodman R. Bundy and Ms. Loretta Malintoppi; EVERSHEDS Avocats à la Cour de Paris; 8, Place d'Iéna; 75116 Paris; France,
- Mr. Iftikharuddin Riaz; Bhandari; Nagvi & Riaz; 5 Miccop Centre; 1 Mozang Road; Lahore; Pakistan, who replaced Mr. Umar Atta Bandial, UMAR BANDIAL & ASSOCIATES, Lower Ground Floor, LDA Plaza Egerton Road; Lahore; Pakistan; and
- Mr. Khurram M. Hashmi; Barrister-at-Law; 24 Mezzanine Floor, Beverley Centre, Blue Area, Islamabad, Pakistan.

B. BACKGROUND FACTS

a. The M1 Motorway Project

10. The National Highway Authority ("NHA") is a public corporation established by the Pakistani Act No XI (National Highway Authority Act) of 1991 to assume responsibility for the planning, development, operation and maintenance of Pakistan's national highways and strategic roads. Although controlled by the Government of Pakistan, NHA is a body corporate in Pakistan with the right to sue and to be sued in its own name (Section 3(2) National Highway Authority Act 1991).

11. Among other projects, NHA has planned the construction of a six-lane motorway and ancillary works known as the "Pakistan Islamabad-Peshawar Motorway" (the "M1 Project").

12. In 1993, NHA and Bayindir entered into an agreement for the construction of the M1 Project (the "1993 Contract") (Exh. [Pak.] C-1). The 1993 Contract was a two page

agreement incorporating, *inter alia*, Addenda No.1-9 (Exh. [Pak.] C-1), the Conditions of Contract - Part I and II (Exh. [Pak.] C-4), General Specifications, Special Provisions and Addenda to General Specifications, Drawings, Priced Bill of Quantities (BOQ), as well as the Bid and Appendices "A to M". In particular, it bears noting that:

(i) Part I incorporated the FIDIC General Conditions of Contract for Works of Civil Engineering Construction (1987 edition).

(ii) Part II, entitled "Conditions of Particular Applications", incorporated the amendments and supplements to Part I as negotiated by the Parties.

13. Disputes arose in connection with the 1993 Contract, which NHA and Bayindir resolved in 1997. As part of their settlement, on 29 March 1997 the parties executed a Memorandum of Agreement "with the objective of reviving The Contract Agreement dated 18 March 1993" (Exh. [Pak.] C-5). Under Clause 8 of this Memorandum of Agreement, the Parties agreed "to apply to the arbitration tribunal in the appropriate manner to seek the decision of the tribunal on only the issue of the quantum of expenses incurred by Bayindir as specified in Bayindir's claim for expenses only"[1].

14. On 3 July 1997, the Parties entered into a new contract, the "Agreement for the Revival of Contract Agreement for the Construction of Islamabad-Peshawar Motorway" (the "1997 Contract") (Exh. [Pak.] C-6). The 1997 Contract incorporated the 1993 Contract "in its entirety" with some "overriding conditions" agreed by the parties in the Memorandum of Agreement signed on 29 March 1997.

15. For the sake of simplicity, the Tribunal will simply use the term "Clause of the Contract" to mean the relevant clause of the (FIDIC) General Conditions of Contract (Conditions of Contract – Part I incorporated in the 1993 agreement), as possibly supplemented by the Conditions of Particular Applications (Conditions of Contract – Part II incorporated in the 1993 agreement), as revived and possibly amended by the 1997 Contract. The Tribunal will refer to the (revived) contractual relationship between the parties as the "Contract".

16. The Contract is governed by the laws of Pakistan.

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[1] By an arbitral award of 30 June 1999, Bayindir was ordered to pay USD 12,909,935 to NHA but was declared entitled to retain USD 10,721,595 of the advance payment made under the Contract in 1993 (Exh. [Pak.] L-27).

17. It was a term of the Contract that NHA would pay to Bayindir 30% of the Contract price as an advance payment (the "Mobilisation Advance"). Thereafter, NHA paid to Bayindir an amount of USD 159,080,845 as Mobilisation Advance (namely two separate amounts of USD 96,645,563.50 and PKR 2,523,009,751.70[2]).

18. It was a further term of the Contract that Bayindir would provide a bank guarantee equivalent to the amount of the Mobilisation Advance. On 9 January 1998, a consortium of Turkish banks (comprising Türkiye İş Bankasi A.Ş., Türkiye Vakiflar Bankasi T.A.O., Türkiye Halk Bankasi A.Ş., Finansbank A.Ş., DenizbanktheA.Ş. and Kentbank A.S., which subrogated its rights to Bayindirbank A.Ş.) issued two guarantees on behalf of Bayindir to secure the Mobilisation Advance in accordance with the Contract (the "Mobilisation Advance Guarantees"). Consistent with the Contract, the Mobilisation Advance Guarantees were payable to NHA "on his first demand without whatsoever right of objection on [the Bank's] part and without his first claim[ing] to the Contractor". The amounts of the Mobilisation Advance Guarantees were to decrease, as interim payments were made for work in progress[3].

19. The performance of the Contract was to be supervised by an Engineer.

20. The Contracts set forth a multi-tier mechanism for "Settlement of Disputes", which may be sketched as follows:

- Any "matter in dispute shall, in the first place, be referred in writing to the Engineer" (67.1(1) of the Contract).
- Either of the parties dissatisfied with any decision of the Engineer[4] "may give notice to the other party of his intention to commence arbitration" (67.1(3) of the Contract).
- The parties "shall attempt to settle such dispute amicably" and, unless the parties otherwise agree, arbitration cannot be commenced on or after the fifty-sixth day after the day on which notice of intention to commence arbitration was given.
- The dispute shall then be "finally settled under the rules and provisions of the Arbitration Act 1940 as amended or any statutory modification or re-enactment thereof for the time being in force".

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2 The parties seem to agree on a relevant exchange rate of 40.41 PKR to 1 USD.

3 The final terms of the reimbursement were set in Addendum No. 09 (see *infra* No. 23; Exh. [Bay.] CX-12 at 3).

4 The same applies "if the Engineer fails to give notice of his decision on or before the eighty-fourth day after the day on which he received the reference".

b. The origin of the present dispute

21. On 3 June 1998, the Engineer issued the order to proceed to the construction with original completion dates foreseen on 31 July 2000.[5]

22. Between September 1999 and 20 April 2001, Bayindir submitted several claims regarding payment and four claims for extension of time (EOT) invoking different omissions on the part of Pakistan (in particular delays in the construction work resulting from late hand over of the land by Pakistan and/or NHA[6]).

23. The first two EOT claims (EOT/01 and EOT/02) were settled by agreement among the parties during a meeting held on 18 February 2000. This agreement[7] led to the execution of Addendum No. 9 of 17 April 2000 to the Contract, which set out, among other things, that "the revised Contract Completion Date shall be 31st December 2002" and that "NHA will hand over the remaining land as expeditiously as possible but not later than 4 months from the signing" of Addendum No. 9. The detailed schedule attached to Addendum No. 9 provided that two priority sections had to be completed before 23 March 2003 (the Priority Sections).

24. Asserting primarily that NHA failed "to give the Possession of Site as per Addendum No. 9", on 15 January 2001 Bayindir submitted its third EOT claim (EOT/03) for completion of the two "Priority Sections" by October 2001 (Exh. [Bay.] B-15). On 3 April 2001 the Engineer's representative granted Bayindir a limited extension of time of twenty-seven and ten days respectively (Exh. [Bay.] B-17).

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5 See 1997 Contract. This date was extended till 31 December 2002 though Addendum No. 9 dated 17 April 2000 (see *infra* No. 23-24).

6 During the same period, Bayindir also issued several claims for delay in the settlement of Bayindir's monthly progress payments (interim payment certificates).

7 Under the agreement reached during the meeting of 18 February 2000, it was decided, inter alia, that "December 2002 as the new completion date for the Project with about one year advance completion of two sections from Islamabad to Burhan and Indus to Mardan" (Exh. [Bay.] B13). Among other new conditions that were not contemplated by the agreement of 18 February 2000, Addendum No. 9 provided that Bayindir had to "complete the two Priority Sections mentioned therein by 23 March 2001". It is Bayindir's contention that it accepted this new demand by NHA "[a]s a result of the pressure, coercion and duress exercised by Pakistan" (RA p. 5 ¶ 13).

25. By letter of 6 April 2001 Bayindir disputed this extension of time (Exh. [Bay.] B-18) and referred the matter to the Engineer for his decision under Clause 67.1 of the Contract reiterating its entitlement to an extension under EOT/03.[8]

26. On 19 April 2001 NHA informed Bayindir that liquidated damages would be imposed on Bayindir for late completion of the two Priority Sections with effect from 20 April 2001; that is, the end of the limited extension granted on 3 April 2001 (Exh. [Bay.] B-20).

27. The same day, Bayindir wrote to NHA to refer the decision to impose liquidated damages to the Engineer pursuant to Clause 67.1, in particular on the ground that EOT/03 was "still pending with the Engineer for decision" (Exh. [Bay.] B-25).

28. On 20 April 2001, Bayindir wrote to NHA to inform that it had been unable to complete the Priority Sections "due to reasons beyond [its] control" and requested that "the procedure [that is the submission of EOT/03 to the Engineer for decision under Clause 67.1] be allowed to follow to determine [its] entitlement for Time extension" (Exh. [Bay.] B-21).

29. On 23 April 2001 – before the engineer issued its determination – NHA served a "Notice of Termination of Contract" upon Bayindir requiring the latter to hand over possession of the site within 14 days (Exhibit [Bay.] B-26). Thereafter, the Pakistani army surrounded the site and Bayindir's personnel were evacuated.

30. On 23 December 2002 NHA concluded a contract for the "Completion of Balance Works of Islamabad – Peshawar Motorway (M-1) Project with "M/s Pakistan Motorway Contractors Joint Venture (PMC JV)" providing for a completion term of 1460 days (Exh. [Bay.] CX29).

c. Related litigation

31. From January to July 2001, Bayindir served several Notices of Intention to Commence Arbitration pursuant to Clause 67.1 of the Contract. The matters were not settled but the arbitration was not pursued.[9]

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8 The Engineer rendered its decision on EOT/03 on 28 June 2001 granting an extension of time until 19 and 1st April respectively.

32. On 30 April 2001, Bayindir filed a constitutional challenge against the notice of termination served by NHA before the Lahore High Court (Exh. [Pak.] D-15). On 7 May 2001, the Lahore High Court dismissed Bayindir's constitutional challenge on the ground that the Contract contained an arbitration clause (Exh. [Pak.] D-16, in particular pp. 17-18)[10].

33. Between 2001 and early 2003, NHA raised a series of claims against Bayindir and served a notice of arbitration. On 31 March 2003, NHA sought Bayindir's concurrence in the appointment of a sole arbitrator. On 10 April 2003, Bayindir informed NHA that it had already submitted the matter to ICSID jurisdiction and requested to await the decision on Bayindir's request for ICSID Arbitration (Exh. [Pak.] D-23).

34. On 5 January 2004, NHA applied for the appointment of an arbitrator in Pakistan under section 20 of the Arbitration Act 1940. On 28 May 2004, the Court of Civil Judge in Islamabad appointed Mr. Justice (Retd.) Afzal Lone as arbitrator. The court subsequently upheld an objection of NHA (claiming that Mr. Lone was too closely linked with the previous government of Pakistan; that is the government that decided the revival of the contract in 1997) and appointed Mr. Justice (Retd.) Zahid. Following a request by Pakistan, NHA moved for an extension of time limits in such a manner that the arbitration would not proceed prior to this Tribunal's decision on jurisdiction (see *infra* No. 45).

35. In the meantime, on 24 April 2001, NHA called for payment under the Mobilisation Advance Guarantees of approximately USD 100,000,000. Bayindir then obtained an order from the Turkish courts enjoining the Banks from paying. This injunction was lifted on 12 September 2003. Execution proceedings against the Banks, to which Bayindir is not a party, are currently stayed following this Tribunal's Procedural Order N° 1 (PO#1) that Pakistan take steps to ensure that NHA does not enforce any final judgment it may obtain from the Turkish courts with regard to the Mobilisation Advance Guarantees (see *infra* No. 46).

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9 With specific regard to a claim introduced on 7 September 2001 concerning escalation payment, Bayindir filed an application under Section 20 of the 1940 Arbitration Act for the appointment of an arbitrator on 19 April 2001 (Exh. [Pak.] D-13). The application was dismissed as premature (failing notice under Clause 67.4 of the Contract) on 24 March 2003 (Exh. [Pak.] D-17). An appeal against this decision was dismissed as withdrawn (Exh. [Pak.] D-19).

10 An appeal against this decision was dismissed as withdrawn by the Supreme Court of Pakistan on 16 November 2003.

d. The BIT

36. The present proceedings are based on the "Agreement Between the Republic of Turkey and the Islamic Republic of Pakistan Concerning the Reciprocal Promotion and Protection of Investments" of 16 March 1995 (the "BIT"), which entered into force on 3 September 1997.

37. Article VII of the BIT contains a dispute settlement provision with respect to investments between one of the parties and an investor of the other party (see *infra* N° 80).

II. PROCEDURAL HISTORY

A. INITIAL PHASE

38. On 15 April 2002, Bayindir submitted a Request for Arbitration (the "Request" or "RA") to the International Centre for the Settlement of Investment Disputes ("ICSID" or the "Centre"), accompanied by 15 exhibits (Exh. [Bay.] B-1 to B-15). In its Request Bayindir invoked the provisions of the BIT and sought the following relief:

    (i) payment of outstanding Interim Payment Certificates US$62,514,554.00;

    (ii) payment of additional financial claims related to the Works completed by Bayindir provisionally quantified as US$27,000.000.00;

    (iii) reimbursement of all costs incurred in anticipation of completing the Project by Bayindir US$19,071,449.00;

    (iv) payment against all fixed and movable assets expropriated by Pakistan US$43,050,619.00;

    (v) compensation for mobilisation and demobilisation costs US$7,444,854.00;

    (vi) compensation for profits lost through Pakistan's unlawful acts and omissions provisionally quantified as US$107,154,634.00;

    (vii) compensation for damage to Bayindir's reputation resulting from Pakistan's unlawful acts and omissions provisionally quantified as US$150,000,000.00;

    (vii) […] compensation and costs on account of the following items:

        (i) the reimbursement of all costs incurred by Bayindir in pursuing the resolution of the claims brought in this arbitration, including but not limited to the fees and/or expenses of the arbitrators, ICSID, legal counsel, experts and Bayindir's own experts and staff;

        (ii) compounded interest on all amounts awarded at an appropriate rate or rates and over an appropriate period or periods;

        (iii) compensation for opportunities lost as a direct result of Pakistan's unlawful acts and omissions;

(iv) compensation for losses and damages suffered by Bayindir in Turkey as a direct consequence of Pakistan's unlawful acts and omissions;

(v) any other relief that the Arbitral Tribunal may deem fit and appropriate in the circumstances of this case.

(RA, ¶¶ 39-40)

39. On 16 April 2002, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "Institution Rules"), acknowledged receipt and transmitted a copy of the RA to Pakistan and to the Pakistani Embassy in Washington D.C.

40. After a long and extensive exchange of correspondence between Bayindir[11], Pakistan[12], NHA[13] and the Centre, on 1 December 2003, the Secretary-General of the Centre registered Bayindir's RA, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention" or "the Convention"). On the same date, the Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration of the request and invited them to proceed, as soon as possible, to constitute an Arbitral Tribunal.

41. In the absence of agreement between the parties, on 6 February 2004, Bayindir elected to submit the arbitration to a panel of three arbitrators, as provided in Article 37(2)(b) of the ICSID Convention and appointed Prof. Karl-Heinz Böckstiegel, a national of

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11 In particular, on 10 February 2003, Bayindir supplemented its RA by the submission of a Volume III.

12 In particular, on 23 May 2002, the republic of Pakistan stated that "[t]he nomination of Secretary Communication by [Bayindir] is without any relevance to the terms of Contract. In view of provisions of Contract Agreement and various guarantees given by [Bayindir] to NHA for faithful performance of [Bayindir]'s obligations and against Mobilization Advance; NHA is the party to the Contract and not the Secretary Communication. The alleged dispute is manifestly outside the jurisdiction of the Centre, pursuant to sub-para 1 Article 25, sub-para 3 of Article 36, sub-para 1(b) of Rule 6 of INSTITUTION RULE of the Centre. The contents of the requests by [Bayindir] are in contravention to Rule 2 of the INSTITUTION RULE of the Centre" (Pakistan's submission of 23 May 2002). The Government of Pakistan further "requested that all future communication and notices if required, regarding the subject issue, are to be sent to the [NHA]" (Pakistan's submission of 19 February 2003).

13 In particular, on 22 August 2003, NHA submitted its "Observation and Reply to ICSID" with reference to Bayindir's RA. In its submission NHA concluded that "[t]he documented statements as given in this submission provide further material to conclude the fact that *Bayindir had never been an Investor neither* the dispute referred to *ICSID has any bearing with the relevant provision of BIT*. Therefore, the 'Request for Arbitration' submitted by Bayindir to ICSID is void of merits at its own account and manifestly *beyond the jurisdiction of ICSID. Therefore, the Secretary General is requested to refuse the registration of Bayindir's 'Request for Arbitration'* pursuant to Article 36(3) and institution Rule 6(1)(b) of the Convention" (NHA's submission of 22 August 2003, p. 2, emphasis in the original).

Germany. On 26 February 2004, Pakistan appointed Sir Franklin Berman, a national of the United Kingdom, as arbitrator. On 27 April 2004, the parties agreed to appoint Prof. Gabrielle Kaufmann-Kohler, a national of Switzerland, as the President of the Tribunal.

42. On 15 June 2004, the Secretary-General of ICSID, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), notified the parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun on that date. The same letter informed the parties that Mr. José-Antonio Rivas, Counsel, ICSID, would serve as Secretary of the Tribunal[14].

43. On 20 July 2004, Bayindir submitted a Request for Provisional Measures, seeking in substance recommendations by the Tribunal that the Respondent stay all proceedings pending before the Courts of Pakistan and Turkey. On 27 August 2004, Pakistan filed its Response to Claimant's Request for Provisional Measures.

44. The Arbitral Tribunal held a first hearing on 24 September 2004, at the offices of the World Bank in Paris. At the outset of the preliminary hearing, the parties expressed agreement that the Tribunal had been properly constituted (Arbitration Rule 6) and stated that they had no objections in this respect. The parties further agreed on a set of procedural rules to apply to the present proceedings. The preliminary hearing was tape-recorded, a *verbatim* transcript was taken and later distributed to the parties (Tr. P.).

45. During the course of the preliminary hearing, the parties' counsel also presented oral arguments on Bayindir's request for provisional measures. At the end of the preliminary hearing, Bayindir withdrew its request seeking a stay of the arbitration pending in Pakistan between NHA and Bayindir before the sole arbitrator, Mr. Justice (Retd.) Zahid,[15] as a result of an offer by Pakistan to request NHA to move for an extension of the time limits fixed in the latter in such a manner that the Pakistani arbitration would

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14 In the course of the Proceedings, Mr. Rivas was replaced by Ms. Martina Polasek, Counsel, ICSID, on 11 May 2005.

15 As amended at the hearing, this request reads as follows: "1. The Parties immediately take all steps required to obtain a temporary stay of all proceedings brought under the Pakistan Arbitration Act 1940 and pending before the Courts of Pakistan and/or before an arbitrator" (Bayindir's amended Request for provisional measures submitted at the hearing on 24 September 2004).

not proceed before this Tribunal rendered its decision on jurisdiction (Tr. P. 153:17–155:25).

46. On 29 November 2004, the Tribunal rendered its Decision on Claimant's Request for provisional measures (PO#1), which reads as follows:

> Having reviewed the Claimant's and the Respondent's written submissions and having heard oral argument, the Tribunal issues the following order:
>
> (i) The Tribunal acknowledges that Bayindir withdrew the request seeking a stay of the Pakistani arbitration as a result of an offer of Pakistan to request NHA to move for an extension of time limits in such a manner that that arbitration will not proceed prior to this Tribunal's decision on jurisdiction.
>
> (ii) The Tribunal recommends that Pakistan take whatever steps may be necessary to ensure that NHA does not enforce any final judgment it may obtain from the Turkish courts with regard to the Mobilisation Advance Guarantees. This recommendation remains in effect until: (a) an arbitral award declining jurisdiction is issued; or (b) an arbitral award is rendered on the merits; or (c)·any other order of the Tribunal amending the recommendations is issued; whichever comes first.
>
> (iii) The Tribunal dismisses Pakistan's request to recommend, as a matter of principle, that Bayindir should provide security for Pakistan's costs.
>
> (iv) The Tribunal will rule on the costs of this application in its decision on jurisdiction or, if it asserts jurisdiction, in its decision on the merits of the dispute.
>
> (PO#1, at No. 78)

47. As a threshold matter in the Tribunal's decision on provisional measures, the Tribunal emphasized that the reasons contained in that decision were "without prejudice to a later decision of this Tribunal on Pakistan's objection to the jurisdiction of the Tribunal" (PO#1, at No. 40).

B. THE WRITTEN PHASE ON JURISDICTION

48. In accordance with the timetable agreed during the preliminary hearing, on 31 December 2004, Pakistan submitted its Memorial on jurisdictional objections (Mem. J.) accompanied by one volume of contractual documents (Annexes C-1 to C-13), four volumes of legal materials (Annexes L-1 to L-43) and one volume of Documentary Exhibits (Exhibits 1 to 35). Pakistan did not append any witness statement or expert opinion.

49. In accordance with the timetable agreed during the preliminary hearing, on 31 March 2005, Bayindir submitted its Counter-Memorial on jurisdiction (C-Mem. J.) accompanied

by one volume of documentary evidence (CX 79 to CX 124) and five volumes of legal materials (Exhibits CLEX 18 to CLEX 55). Bayindir did not append any written witness statement or expert opinion.

50. In accordance with the timetable agreed during the preliminary hearing, on 9 May 2005, Pakistan submitted its Reply to Claimant's Counter-Memorial on jurisdiction (Reply J.) accompanied by one volume of documentary exhibits (Exhibits R-1 to R-74) and one volume of legal materials (Exhibits RL-1 to RL-22).

51. Within the extension of time allowed by the Tribunal, on 17 June 2005, Bayindir submitted its Rejoinder on Jurisdiction (Rejoinder J.) accompanied by one volume of documentary exhibits (Exhibits CX 125 to CX 156)[16] and one volume of legal materials (Exhibits CLEX 56 to CLEX 61).

52. On 5 July 2005, pursuant to Article 19 of the ICSID Arbitration Rules, the Tribunal invited Pakistan to file a written response limited to the new factual allegations contained in ¶¶ 101 to 104 of Claimant's Rejoinder on Jurisdiction on or before 15 July 2005.

53. On 7 July 2005, the Tribunal held a preparatory telephone conference to organize the hearing on jurisdiction for which the dates of 25 and 27 July 2005 had previously been retained. None of the parties having submitted witness statements or expert opinions, it was agreed that the hearing on jurisdiction would be limited to oral arguments.

54. On 11 July 2005, the Secretary of the Tribunal informed the parties that the jurisdictional hearing would be held on 25, 26 and 27 July 2005 and transmitted the agenda for the hearing.

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16 At the outset of the hearing on jurisdiction, Pakistan pointed out that some of these exhibits – namely Exh. [Bay]CX127, an internal letter dated 4 November 2000; Exh. [Bay]CX131, an internal letter dated 2 May 2001; Exh.[Bay]CX145, an internal letter of June 2001; Exh. [Bay]CX146, an internal letter dated May 200; Exh. [Bay]CX151, an internal letter of April 2001; Exh. [Bay]CX152, a confidential letter from the World Bank dated 26 May 2000 to the Government of Pakistan; Exh. [Bay]CX153, a confidential letter from the World Bank to the Government of Pakistan dated 5 June 2000 – constituted "confidential and privileged legal materials which have apparently been taken from the files of the Government of Pakistan" (Tr. J., 18:3-16). Pakistan did not however object to their production in this arbitration (see *infra* No 248).

55. On 22 July 2005, Mr Bundy wrote to the Tribunal to inform it that Pakistan had ratified the New York Convention and attached the ratification instrument dated 9 June, deposited with the Secretary-General of the United Nations on 14 July. Mr. Bundy's letter also informed the Tribunal that Pakistan had enacted the New York Convention in the form of the Recognition of Enforcement of Arbitration Agreements and Foreign Arbitral Awards Ordinance of 2005, which came into force with retroactive effect on 14 July 2005[17].

C. THE HEARING ON JURISDICTION

56. The Arbitral Tribunal held the hearing on jurisdiction from 25 July 2005, starting at 11:00 am to 26 July ending at 4:15 pm, at the Salons des Arts et Metiers, 9 bis avenue d'Iena, Paris. In addition to the Members of the Tribunal[18], and the Secretary, the following persons attended the jurisdictional hearing:

(i) On behalf of Bayindir:

- Mr. Gavan Griffith QC, Essex Court Chambers
- Mr. Farrukh Karim Qureshi; Walker Martineau Saleem
- Mr. Sadik Can; Bayindir Insaat Turizm Ticaret Ve Sanayi AS
- Mr. Zafer Baysal; Bayindir Insaat Turizm Ticaret Ve Sanayi AS
- Ms. Gokce Cicek BIcioglu
- Ms. Nudrat Ejaz Piracha

(ii) On behalf of Pakistan:

- Mr. Aftab Rashid; Ministry of Communications of Pakistan
- Mr. Raja Nowsherwan Sultan; NHA
- Lt. Col. (Ret'd.) Muhammad Azim; Consultant, NHA
- Mr. Iftikharuddin Riaz; Bhandari, Naqvi & Riaz
- Prof. Christopher Greenwood, CMG, QC; Essex Court Chambers
- Mr. V.V. Veeder, QC; Essex Court Chambers
- Mr. Samuel Wordsworth; Essex Court Chambers
- Mr. Rodman R. Bundy; Eversheds

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17 At the hearing on jurisdiction, the Tribunal granted Pakistan's formal application to introduce these legal materials into the file (Tr. J., 17:30-32).

18 With the agreement of the parties, Dr. Antonio Rigozzi, an attorney practising in the law firm of the President of the Tribunal, attended the hearing.

- Ms. Loretta Malintoppi; Eversheds
- Mr. Charles Claypoole; Eversheds
- Ms. Cheryl Dunn; Eversheds
- Ms. Victoria Forman Hardy; Eversheds
- Mr. Nicholas Minogue; Eversheds

57. During the jurisdictional hearing, Messrs. Veeder, Greenwood, Wordsworth and Bundy addressed the Tribunal on behalf of Pakistan and Mr. Griffith addressed the Tribunal on behalf of Bayindir.

58. The jurisdictional hearing was tape-recorded, a *verbatim* transcript was taken and later distributed to the parties (Tr. J.). It ended earlier than scheduled, both parties having fully presented their arguments and agreeing to such change of schedule.

* * *

59. It was agreed at the close of the jurisdictional hearing that the Tribunal would issue a reasoned decision on the preliminary questions of jurisdiction and admissibility. If the decision were negative, the Tribunal would render an award terminating the arbitration; if the decision were affirmative, the Tribunal would render a decision asserting jurisdiction and issue an order with directions for the continuation of the procedure pursuant to Arbitration Rule 41(4).

60. The Tribunal has deliberated and thoroughly considered the parties' written submissions on the question of jurisdiction and the oral arguments delivered in the course of the jurisdictional hearing. Before reaching a conclusion on the question of jurisdiction, the present decision summarizes (III) and discusses (IV) the position of the parties.

III. THE PARTIES' POSITIONS

A. BAYINDIR'S POSITION

61. In its written and oral submissions, Bayindir advanced the following four main contentions:

(i) Bayindir made an "investment" under both the BIT and the ICSID Convention;

(ii) Bayindir has *prima facie* claims against Pakistan for breaches of the BIT, namely for breaches of the treaty provisions on national and most favoured nation treatment, fair and equitable treatment and expropriation without compensation (hereinafter generally referred to as "Treaty Claims");

(iii) The Treaty Claims are distinct and autonomous claims which Bayindir can assert against NHA (and or Pakistan) independently from those claims which arise out of the Contract (hereinafter generally referred to as Bayindir's "Contract Claims").

(iv) Finally, as an independent argument, Bayindir claims that the Tribunal also has jurisdiction over the Contract Claims.

62. On the basis of these contentions, Bayindir requested the Tribunal to decide:

> [t]hat this Tribunal has jurisdiction to hear the claims for breach of the BIT, but in addition also claims that would be only contractual in nature. The requirements for this Tribunal to exercise its jurisdiction under the BIT over the Parties and over Bayindir's claim have been satisfied.
>
> (C-Mem. J., p. 88, ¶ 312)

63. At the outset of the jurisdictional hearing, Bayindir withdrew its independent argument that the Tribunal has jurisdiction also over the Contract Claims:

> [I]t appears to us that our claim for treaty breaches is so strongly expressed that it is not necessary for us to turn to alternative and fall-back mechanisms to pursue our claims by asserting as we did in Part VI of our counter memorial that even if there is no treaty BIT breaches made out nonetheless we can make a freestanding contract claims as the basis of our jurisdiction under ICSID and under the BIT.
>
> (Tr. J., 7:12-19)

64. Accordingly, Bayindir resiles from pressing purely contractual claims (Tr. J., 60:2-4).

B. PAKISTAN'S POSITION

65. In its written and oral submissions, Pakistan advanced the following six main arguments:

(i) Bayindir has not made an investment within article I(2) of the BIT or Article 25 of the ICSID Convention.

(ii) The basis of Bayindir's claims is alleged breach of the Contract. The Contract is governed by the law of Pakistan and, pursuant to the law of Pakistan, the Employer (NHA) is a separate legal person, distinct from Pakistan. The Tribunal has no jurisdiction in respect of alleged breaches of the Contract as such breaches are not attributable to Pakistan.

(iii) The Contract Claims are inadmissible in the light of the agreement of the Employer and the Contractor to refer their disputes to arbitration, and the proceedings should be stayed pending resolution of the contractual dispute by arbitration.

(iv) To the extent that Bayindir's claims are based on an alleged breach of the BIT, i.e., to the extent that they are Treaty Claims, they are entirely artificial and advanced solely for purposes of expediency.

(v) Since Bayindir's Treaty Claims are dependent upon the claims for breach of the Contract that have to be settled in another forum, the Tribunal cannot exercise jurisdiction over the Treaty Claims, at least until that other forum has reached a conclusion with regard to the alleged breach of the Contract.

(vi) Insofar as Bayindir's Treaty Claims are distinct from the alleged breach of the Contract, these allegations "have no colourable basis" and are insufficient for this Tribunal to assert jurisdiction.

66. In reliance on these arguments, Pakistan invites the Tribunal:

> [t]o declare that it has no jurisdiction in respect of the whole of Bayindir's claim, and that the claim is accordingly to be dismissed. Insofar as the Tribunal considers that the claim is not to be dismissed in its entirety for want of jurisdiction, Pakistan invites the Tribunal to make alternative declarations to reflect restrictions on its jurisdiction and/or on the admissibility of Bayindir's claims, namely:
>
> a. That it has no jurisdiction in respect of Bayindir's allegations of breach of the Contract, alternatively that such claims are inadmissible before this Tribunal;
>
> b. That, insofar as the Tribunal has jurisdiction to determine Bayindir's claims characterised as breaches of the BIT, such claims should not be heard pending resolution of the disputes pursuant to the Arbitration Agreement in the Contract.
>
> (Mem. J., p. 2)

67. Following Bayindir's above-mentioned change of position at the outset of the jurisdictional hearing, on 16 August 2005 Pakistan requested the Tribunal to:

> [d]eal with the issues of principle and apportionment relating to costs in its award/decision, including the wasted costs due to Bayindir's late change in position, and to award the Government of Pakistan its costs and expenses incurred as a result of these proceedings.[19]

68. On 26 August 2005, Bayindir submitted in response "that the issue of costs should be a matter for submission after the award on objections to jurisdiction"[20].

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[19] See letter of Mr. Bundy to the Secretary of the Tribunal of 16 August 2005.

[20] See letter of Mr. Farrukh Karim Qureshi to the Secretary of the Tribunal of 26 August 2005.

69. On 29 August 2005, "in the light of the above[-mentioned change in Bayindir's position], Pakistan request[ed] the Tribunal's permission to withdraw its offer to request NHA to move for an extension of the time limits in the Pakistani arbitration so that this does not proceed prior to a decision on jurisdiction in the present case" (see *supra* N° 46).

70. On 20 September 2005, Bayindir opposed such request, asked that it "be declined and taken up for consideration after the decision on jurisdiction and upon consulting the parties on opportunity to make written and oral submissions."

71. In support of their position on jurisdiction, both parties have relied on rules of international law, decisions of courts and arbitral tribunals, and opinion of learned authors. In the course of the following discussion, the Tribunal will review the law pleaded by the parties and its applicability to the facts of the present case. The Tribunal adds that while Part III of this decision summarizes the main arguments of the parties, other arguments were made and considered by the Tribunal, and will be referred to in Part IV to the extent the Tribunal considers them relevant.

IV. DISCUSSION

INTRODUCTORY MATTERS

72. Before turning to the actual issues, the Tribunal wishes to address certain preliminary matters, i.e., the relevance of previous ICSID decisions (a), some uncontroversial matters (b), the law applicable to the Tribunal's jurisdiction and the relevant issues for determination (c).

a. The relevance of previous ICSID decisions or awards

73. In support of their position, both parties relied extensively on previous ICSID decisions or awards, either to conclude that the same solution should be adopted in the present case or in an effort to explain why this Tribunal should depart from that solution.

74. In particular, part of the parties' oral and written submissions was devoted to discussing the relevance, the scope and the 'appropriateness' of the recent decision on jurisdiction

in the arbitration between Impregilo S.p.A. and the Islamic Republic of Pakistan (hereinafter the *Impregilo* case)[21].

75. For instance[22], in its Rejoinder on jurisdiction, Bayindir submitted:

> As a final point, Bayindir again submits that this Tribunal is not bound to follow the decisions of other investment Tribunals deciding different cases on the basis of similar, yet distinctly worded treaties. Nevertheless, this Tribunal will be asked in the Rebuttal to carefully consider the very recent decision of *Impregilo v. Pakistan*. Contrary to the Reply, rather than assisting Pakistan, the *Impregilo* decision actually exposes several of the major flaws in Pakistan's arguments, as shall be hereafter discussed.
>
> (Rejoinder J., p. 3, ¶ 9)

76. The Tribunal agrees that it is not bound by earlier decisions[23], but will certainly carefully consider such decisions whenever appropriate.

b. Uncontroversial matters

77. There is no dispute as to the jurisdiction of this Tribunal to decide the jurisdictional challenges brought by Pakistan (Article 41 of the ICSID Convention).

78. Pakistan's jurisdictional objections are related to the nature of the dispute and to the legal characterization of the claims. In other words, Pakistan contests the jurisdiction of the tribunal *ratione materiae*. Pakistan raises no jurisdictional objection *ratione personae* or *temporis*[24].

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21 *Impregilo S.p.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶ 108; available at http://www.worldbank.org/icsid/cases/impregilo-decision.pdf (Exh. [Pak]RL-1 = Exh. [Bay]CLEX 57).

22 Pakistan expressed a similar view for instance as regards the most favoured nation clause of Article II(2) of the BIT. After having relied upon *Siemens v. Argentina* [*infra* Fn. 80] to contend that "[p]ursuant to its ordinary meaning, the more favourable protection that Bayindir seeks falls outside the scope of Article II(2) of the 1995 Treaty", Pakistan felt compelled to add the following: "The Tribunal is not, of course, bound by the decisions of previous ICSID tribunals on the extent of most favoured nations provisions in other treaties. However, if necessary, Pakistan will submit that, in the absence of express wording, it would be wrong to find that the rights of an investor under a most favoured nation provision could extend to benefiting either from an agreement to arbitrate where there was no such agreement" (Mem. J., p. 65, ¶ 5.9).

23 *AES Corporation v. the Argentine Republic*, ICSID Case No. ARB/02/17, Decision on jurisdiction of 13 July 2005, ¶¶ 30-32; available at http://www.investmentclaims.com/decisions/AES-Argentina_Jurisdiction.pdf.

24 Inasmuch as they involve objective requirements, these conditions shall be analysed by the Tribunal *motu propio* (see SCHREUER, *The ICSID Convention: A Commentary*, Cambridge (UK), 2001, para. 4-45 ad Article 41, pp. 535-536). The Tribunal notes that the Parties to the dispute are a State (Pakistan), and a Turkish company (Bayindir) and that both Pakistan and Turkey are Contracting States within the meaning of Article 25(1) of the ICSID Convention.

c. The law applicable to this Tribunal's jurisdiction and the relevant issues

79. This Tribunal's jurisdiction *ratione materiae* depends in the first instance upon the requirements of the BIT and of the ICSID Convention.

80. Article VII of the BIT contains the following dispute settlement clause:

> 1. Disputes between one of the Parties and an investor of the other Party, in connection with his investment, shall be notified in writing, including a detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party shall endeavour to settle the disputes by consultations and negotiations in good faith.
>
> 2. If these disputes cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to:
>
> (a) the International Centre for Settlement of Investment Disputes (ICSID) set up by the 'Convention on Settlement of Investment Disputes Between States and nationals of other States'; [in case both Parties become signatories of this Convention]
>
> (b) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Law (UNCITRAL), [in case both Parties are members of UN]
>
> (c) the Court of Arbitration of the Paris International Chamber of Commerce,
>
> provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year.

81. Article 25(1) of the ICSID Convention provides that:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

82. The Tribunal notes that Pakistan has not objected to its jurisdiction on the ground that the dispute is not legal or that it does not involve a Contracting State and a national of another Contracting State.

83. In order to establish the jurisdiction of this Tribunal under Article 25 of the ICSID Convention, Bayindir relies upon (1) the consent of Pakistan to arbitration as contained in the BIT combined with (2) its own consent as contained in the Request for arbitration. As the tribunal held in *Impregilo*, according to a now "well established practice, it is clear that the coincidence of these two forms of consent can constitute 'consent in

writing' within the meaning of Article 25(1) of the ICSID Convention […] if the dispute falls within the scope of the BIT."[25] This is not disputed by Pakistan.

84. Pakistan has objected to the jurisdiction of the Tribunal and/or to the admissibility of Bayindir's claim.

85. Pakistan's objection to jurisdiction is based on the following grounds:

(i) Bayindir has not made an investment within Article I(2) of the BIT or Article 25 of the ICSID Convention.

(ii) There are no freestanding treaty breaches capable of being alleged by Bayindir.

(iii) Insofar as there are alleged breaches of the Treaty distinct from the alleged breaches of the Contract, these allegations "have no colourable basis", i.e., they are not "sustainable".

86. Pakistan's objection to the admissibility of the claim is based on the following grounds:

(i) To exercise jurisdiction would raise a potential conflict between two very important treaties, the 1958 New York Convention and the 1965 Washington Convention.

(ii) Insofar as there are alleged breaches of the Treaty distinct from the alleged breaches of the Contract, Bayindir is barred from raising them as it has previously characterized these breaches as contractual.

(iii) Insofar as there are alleged breaches of the Treaty distinct from the alleged breaches of the Contract, the ICSID proceedings should be stayed pending the resolution of the contractual dispute by arbitration.

(iv) Bayindir has failed to comply with the formal requirements of Article VII of the BIT.

87. The Tribunal will examine Pakistan's objections in turn, without distinguishing between objections to the jurisdiction of the Tribunal and objections to the admissibility of the claims[26]. For the sake of logic, the Tribunal will begin with Pakistan's objection that Bayindir has failed to comply with the pre-conditions to arbitration in Articles VII(1) and (2) and that, accordingly, Bayindir is not entitled to submit any dispute to arbitration under Article VII(2) of the 1995 Treaty.

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25 *Impregilo v. Pakistan* [*supra* No. 74], ¶ 108.

26 *Consortium Groupement L.E.S.I. - DIPENTA v. République Algérienne Démocratique et Populaire*, Award of 27 December 2004, ¶ 2 (Exh. [Bay]CLEX 57); available at http://www.worldbank.org/icsid/cases/lesi-sentence-fr.pdf.

A. HAS BAYINDIR FAILED TO COMPLY WITH FORMAL REQUIREMENTS PREVENTING IT TO SUBMIT THE PRESENT DISPUTE (ARTICLE VII OF THE BIT)?

88. Pakistan's first, "fundamental and principled objection" is that Bayindir did not satisfy the "prerequisites for jurisdiction" set forth in Article VII of the BIT (Tr. J., 73:17-26). More specifically, Pakistan contends that Bayindir has failed to give notice of any claim for alleged breaches of the BIT and/or to negotiate in respect of such a claim as provided by Article VII of the BIT "and that, accordingly, Bayindir is not entitled to submit any dispute to arbitration under Article VII(2) of the 1995 Treaty" (Mem. J., p. 67, ¶ 5.10).

89. In its relevant part, Article VII of the BIT provides that the investor can submit disputes to arbitration only "if these disputes cannot be settled in this way within six months following the date of the written notification" of the dispute. It further specifies that:

> Disputes between one of the Parties and an investor of the other Party, in connection with his investment, shall be notified in writing, including a detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party shall endeavour to settle these disputes by consultations and negotiations in good faith.

90. Bayindir contends that it has complied with the requirement of notice under Article VII of the BIT by disputing the validity of various decisions of the Engineer (RA, p. 7, ¶ 21) and, by serving the Government of Pakistan with the "Constitutional Petition" on 26 April 2001 (Exh.[Bay.]CX 35, referred to in C-Mem. J., p. 51, ¶ 178). In substance, Bayindir admits that this notice could be framed "more perfectly", but contends that it "effectively g[a]ve notice" (Tr. J., 180:1 *et seq*.).

91. As shown at the jurisdictional hearing by Pakistan (Tr. J., 42:13 *et seq*.), the notices referred to in Bayindir's RA were purely contractual notices to the Engineer with a view to commencing arbitration under clause 67.1 of the Contract and cannot be assimilated to a notice under Article VII(2) of the BIT[27].

92. As regards the Constitutional Petition, it is Bayindir's contention that it "provided 20 pages of detailed information concerning the dispute between Bayindir and Pakistan" (C-Mem. J., p. 51, ¶ 179). More specifically, Bayindir points out that in the Constitutional

[27] The Tribunal notes that Bayindir seems to abandon the argument that it complied with the requirement of notice by disputing the validity of various decisions of the Engineer (Tr. J., 180:13-18).

Petition it complained that it had been treated "unilaterally, arbitrarily and illegally […] without […] due process of law" and that the expulsion "appears to have been taken under the dictates of [the Government of Pakistan] for ulterior motives" (C-Mem. J., p. 51, ¶ 180 referring to Exh. [Bay.] CX-35, p. 19 at xv).

93. Pakistan did not address this contention in its Reply. At the hearing on jurisdiction, it adopted the following position:

> But it is an interesting question in theory whether a constitutional petition in the courts of a state is capable of amounting to the necessary notification as a prelude to a good faith attempt to settle a dispute by negotiation. But this is a constitutional petition that does not refer to the BIT. It could not remotely be described as a notification in writing of a dispute under the BIT accompanied by the appropriate detailed information.
>
> (Tr. J., p. 71:25-33)

94. Although it is true that – unlike other treaties and in particular NAFTA – "[t]here is no requirement in the BIT that such written notice refer either to the BIT or BIT breaches" (C-Mem. J., p. 51, ¶180), the fact remains that the Constitutional Petition was not filed in view of a dispute under the Treaty. Moreover, as correctly pointed out by Pakistan, the Constitutional Petition could hardly rely on the BIT since the BIT itself is not part of the law of Pakistan (Tr. J., 216.15-16 referring (implicitly) to Tr. J., 192:3-5).

95. This being said, the Tribunal does not need to make a definitive ruling on the 'theoretical' question of whether a constitutional petition in the courts of a State may serve as a notice under a BIT. Nor does the Tribunal need to rule on the more practical question whether, in Bayindir's terms, "when one looks closely at the constitutional petition one can spell out" the necessary information required under Article 7 of the BIT (Tr. J., 182:13-16) or, more generally, whether these requirements constitute "a necessary ingredient of the notice provision" (Tr. J., 182:20-21). In the Tribunal's view, the requirement of notice contained in Article VII of the BIT should not be interpreted as a precondition to jurisdiction.

96. Determining the real meaning of Article VII of the BIT is a matter of interpretation. Pursuant to the general principles of interpretation set forth in Article 31 of the Vienna Convention on the Law of Treaties, and consistently with the practice of previous ICSID

tribunals dealing with notice provisions[28], this Tribunal considers that the real meaning of Article VII of the BIT is to be determined in the light of the object and purpose of that provision.

97. The parties made extensive submissions on what the correct interpretation of Article VII of the BIT should be:

(i) In Pakistan's view, the notice requirement constitutes a "carefully crafted" limitation of the consent given by the parties to the BIT offering the foreign investor a direct right of recourse to international arbitration against the defendant state (Tr. J., 72:3-12). Hence, Article VII is a mandatory provision and the parties have a "real obligation" to endeavour to settle their dispute within the six months periods (Tr. J., 213:16 *et seq.*). Accordingly the notice requirement is to be interpreted as a precondition to the jurisdiction of the Tribunal, which if it is not met, bars the non-complying party from commencing arbitration: it is not only a procedural matter, "it does go to jurisdiction" (Tr. J., 71:37–72:2).

(ii) According to Bayindir, the purpose of the notice requirement is "to allow the possibility of an agreed settlement before formal proceedings" (Tr. J., 184:15-17) "in a way rather of exhortation than compulsion for the parties to see whether they can resolve the dispute by negotiations" (Tr. J., 186:21-23). Accordingly, "[t]hese provisions should be regarded as ones that do not disable the next level in the process" (Tr. J., 186:38-187:1[29]). In other words, the non fulfilment of the notice requirement should "not b[e] regarded as a bar" (Tr. J., 188:3) to the Tribunal's jurisdiction.

98. The Tribunal notes that Pakistan has not denied that the main purpose of Article VII of the BIT is to provide for the possibility of a settlement of the dispute. In the Tribunal's view, the purpose of the notice requirement is to allow negotiations between the parties which may lead to a settlement. Significantly, Article VII(2) does not read, if these disputes "are not settled" within six months but "cannot be settled" within six months, which wording implies an expectation that attempts at settlement are made. Faced with a similar situation, the tribunal in *Salini v. Morocco* refused to adopt a formalistic

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28 See, for instance, *L.E.S.I. v. Algeria* [*supra* Fn. 26], ¶ 32. In *L.E.S.I. v. Algeria* the tribunal considered the purpose of the notice provision to hold that one could not require that the notice contains more than the general framework of the claim: *"Il n'est nulle part exigé que cette requête comprenne d'autres éléments, qui seraient de toute façon étrangers au but poursuivi par la règle"* (see *L.E.S.I. v. Algeria* [*supra* Fn. 26], ¶ 32(iii)).

29 Referring to *SGS v. Pakistan* [*infra* Fn. 32], specifically ¶ 184 quoted hereinafter at No. 99.

approach and stated that an attempt to reach amicable settlement implies merely "the existence of grounds for complaint and the desire to resolve these matters out-of court"[30].

99. Pakistan itself admits that the notice requirement cannot constitute a prerequisite for jurisdiction when the necessary "steps […] are impossible to take in the circumstances of the case" (Tr. J., 72:20-24). In the specific setting of investment arbitration, international tribunals tend to rely on the non-absolute character of notice requirements to conclude that waiting period requirements do not constitute jurisdictional provisions but merely procedural rules that must be satisfied by the Claimant[31]:

> Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction.[32]

100. The Tribunal agrees with the view that the notice requirement does not constitute a prerequisite to jurisdiction. Contrary to Pakistan's position, the non-fulfilment of this requirement is not "fatal to the case of the claimant" (Tr. J., 222:34). As Bayindir pointed out, to require a formal notice would simply mean that Bayindir would have to file a new request for arbitration and restart the whole proceeding, which would be to no-one's advantage (Tr. J., 184:18 *et seq.*).

101. The Tribunal is reinforced in this conclusion by the undisputed fact that on 4 April 2002, Bayindir notified the Government of Pakistan that it was compelled to commence ICSID arbitration regarding the "serious disputes in connection with the investments made by Bayindir" given that its efforts to negotiate had "failed to bear fruit" (Exh. [Bay.] B-40). Pakistan did not respond to this letter by pointing to the requirement of notice and the obligation to endeavour to reach a settlement contained in Article VII of the BIT. Similarly, in its first response to Bayindir's RA, Pakistan did not rely on Article VII of the BIT but heavily insisted on the fact that Bayindir "had already filed three (3) suits in the

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30 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001, ¶ 20 as translated in 42 ILM 609 (2003); (Exh. [Pak]L-6 = Exh. [Bay]CLEX 15); also available at http://www.worldbank.org/icsid/cases/salini-decision.pdf.

31 *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Final Award, 3 September 2001, ¶ 187 (Exh. [Bay]CLEX 30); available at http://www.mfcr.cz/cps/rde/xbcr/mfcr/FinalAward_pdf.pdf.

32 *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction of 6 August 2003, ¶ 184 (Exh. [Bay]CLEX 9 = Exh. [Pak]L-7), 42 ILM 1290 (2003); also available at http://www.investmentclaims.com/decisions/SGS-Pakistan-Jurisdiction-6Aug2003.pdf.

courts of law in Pakistan"[33]. It was the ICSID Secretariat, on 14 June 2002, which raised the issue asking Bayindir to provide further information and documentation regarding "the fulfilment of the condition set forth at the beginning of Article VII(2) […] as it appears that the first notice mentioning the BIT was made on April 4, 2002"[34]. Two weeks later, on 28 June 2002, Pakistan wrote to the Centre to challenge its jurisdiction without making any mention of the requirements of Article VII of the BIT[35].

102. The Tribunal further notes that Pakistan made no proposal to engage in negotiations with Bayindir following Bayindir's notification of 4 April 2002, which made an explicit reference to the failure of the efforts to negotiate. In the Tribunal's view, if Pakistan had been willing to engage in negotiations with Bayindir, in the spirit of Article VII of the BIT, it would have had many opportunities to do so during the six months following the notification of 4 April 2002[36]. Along the lines of the award rendered in *Lauder v. The Czech Republic*, the Tribunal is prepared to find that preventing the commencement of the arbitration proceedings until six months after the 4 April 2002 notification would, in the circumstances of this case, amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties[37] and hold "that the six-month waiting period in [the BIT] does not preclude it from having jurisdiction in the present proceedings"[38].

103. As a result of this conclusion, the Tribunal will not discuss Bayindir's additional argument pursuant to which it would be entitled to disregard the notice requirement of Article VII of the BIT by virtue of the operation of the most favoured nation clause contained in Article II(2) of the BIT.

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33 Letter of Pakistan to the Centre of 23 May 2002.

34 Letter of the Centre to Bayindir of 14 June 2002.

35 Letter of Pakistan to the Centre of 28 June 2002. In fact, Pakistan invoked Article VII of the BIT for the first time in a letter of the Attorney General of 22 December 2003 requesting the Centre to recall the decision to register the RA. [Following the Centre's letter of 14 June 2002, on 8 July 2002 NHA filed an unsolicited response referring for the first time to Article VII of the BIT noting that "no mention of the BIT was ever made by Bayindir 'the Contractor' in their correspondence regarding amicable settlement of disputes" and emphasizing that Bayindir letter of 4 April was addressed to Pakistan, "and not to NHA". It was only in the beginning of 2003 that NHA relied for the first time on Article VII of the BIT (see letter of NHA to the Centre of 2 January 2003).]

36 The Tribunal notes that in *Impregilo*, "immediately after the registration of Impregilo's first request for arbitration by ICSID, negotiations took place between the Parties on the initiative of the Pakistan Minister of Finance" (*Impregilo v. Pakistan* [*supra* No. 74], ¶ 44).

37 *Lauder v. Czech Republic* [*supra* Fn. 31], ¶¶ 189-190.

38 *Lauder v. Czech Republic* [*supra* Fn. 31], ¶ 191.

B. HAS BAYINDIR MADE AN INVESTMENT?

104. Pakistan's first objection to jurisdiction is based on the alleged lack of an investment within the meaning of Article I(2) of the BIT (a) and Article 25 of the ICSID Convention (b) (Mem. J., p. 1 at (iv)).

a. Investment under Article I(2) of the BIT

105. It is common ground between the parties that the Tribunal's jurisdiction is contingent upon Bayindir having made an investment within the meaning of the BIT. Article I(2) of the BIT defines investment as follows:

> The term "investment", in conformity with the hosting Party's laws and regulations, shall include every kind of asset, in particular, but not exclusively:
>
> (a) Shares, stocks or any other form of participation in companies
>
> (b) returns reinvested, claims to money or any other rights to legitimate performance having financial value related to an investment,
>
> (c) moveable and immoveable property, as well as any other rights in rem such as mortgages, liens, pledges and any other similar rights,
>
> (d) […]
>
> (e) business concessions conferred by law, or by contract, including concessions to search for, cultivate, extract or exploit natural resources on the territory of each Party as defined hereinafter.

106. The parties first disagree on the meaning of the phrase "in conformity with the hosting Party's laws and regulations" following the "investment" in Article I(2). On the one hand, Bayindir argues that the requirement of conformity is meant "to exclude investments that have been made in violation of local law from the treaty's protection" and has no bearing on the definition of the term investment itself (C-Mem. J., p. 20). By contrast, Pakistan contends that this phrase limits the definition of investment under the BIT to "investment within the laws and regulations of Pakistan" (Mem J., p. 10 ¶ 2.6).

107. Pakistan further asserts that Bayindir has obtained the authorisation by the Pakistan Board of Investment to engage in the construction work upon an express representation that it was not making an investment (Mem. J., p. 11-13), so that "there has been no investment for the purposes of the laws and regulations of Pakistan as required by Article I(2)" of the BIT (Mem. J., p. 14, ¶ 2.12).

108. For the purpose of deciding on its jurisdiction, the Tribunal does not need to determine the exact legal significance of Bayindir's statements before the Pakistan Board of

Investment (as well as Pakistan's own statements that Bayindir did actually invest in Pakistan[39]). In and of itself the representation that Bayindir was not making an investment given for the purposes of obtaining an authorisation by the Board of Investment does not mean that the activity of Bayindir does not qualify as an investment under Pakistani laws. Moreover, Pakistan does not set forth any domestic laws or regulations providing for a specific definition of investment.

109. In any event, the Tribunal cannot see any reason to depart from the decision of the tribunal in *Salini v. Morocco* holding that "this provision [i.e., the requirement of conformity with local laws] refers to the validity of the investment and not to its definition"[40]. The mere fact that in *Salini* the phrase "in accordance with" qualified the words "assets invested" and not the term "investment" is not a sufficient basis to distinguish *Salini*, contrary to Pakistan's suggestion (Mem. J., p. 10, Fn. 17). Indeed, the *Salini* holding refers explicitly to the "investment" and not to the "assets invested".

110. Since Pakistan does not contend that Bayindir's purported investment actually violates Pakistani laws and regulations, the Tribunal considers that the reference to the "hosting Party's laws and regulations" in Article I(2) of the Treaty could not in any case oust the Tribunal's jurisdiction in the present case.

111. Accordingly, the question boils down to whether Bayindir made an investment within the meaning of Article I(2) of the BIT. Before listing a non exhaustive series of examples, Article I(2) provides as a general definition that investment "shall include every kind of assets".

112. Quoting a publication by the United Nations Conference on Trade and Development (UNCTAD)[41], Bayindir contends that the indication "that investment includes 'every kind

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39 See the instances cited by Bayindir in C-Mem. J., pp. 25-26, ¶ 85.

40 *Salini v. Morocco* [*supra* No. 98], ¶ 46. Neither the fact that the regularity-validity of the investment under the host state law is specifically dealt with in another provision of the Treaty (namely Article II(1) and (2)) nor the fact that in *Salini* the provision qualified the words 'assets invested' and not 'the term investment', provides sufficient grounds to depart from the *Salini* reasoning.

41 United National Conference On Trade And Development, Scope and Definition, UNCTAD Series on issues in international investment agreements (1999) (Exh. [Bay] CLEX 47); available at http://www.unctad.org/en/docs/psiteiitd11v2.en.pdf. In the relevant passage of this paper, UNCTAD refers to Article 1(3) of the ASEAN Agreement for the Promotion and Protection of

of asset' suggest[s] that the term embraces everything of economic value, virtually without limitation" (C-Mem. J., p. 17, ¶ 57).

113. The Tribunal agrees with Bayindir that the general definition of investment of Article I(2) of the Treaty is very broad. On a comparative basis, it has been suggested that the reference to "every kind of asset" is "[p]ossibly the broadest" among similar general definitions contained in BITs[42].

114. Bayindir submits that its contributions in terms of know-how, equipment and personnel (aa) and financing (bb) qualify as a Treaty investment under this broad definition.

aa. Bayindir's contribution in terms of know-how, equipment and personnel

115. Bayindir alleges that it has trained approximately 63 engineers, and provided significant equipment and personnel to the Motorway.

116. On the facts of the case, this cannot be seriously disputed. Bayindir's contribution in terms of know how, equipment and personnel clearly has an economic value and falls within the meaning of "every kind of asset" according to Article I(2) of the BIT.

117. Indeed, Pakistan's objections concern mainly the purely financial contribution of Bayindir.

bb. Bayindir's financial contribution

118. According to Pakistan, Bayindir did not make any significant injections of funds that could be considered as an investment. Referring to Clause 60.8 of the Contract's Conditions of Particular Application (as amended by Addenda Nos. 6 and 8 [of 1993]) and to Clause 3 of Addendum No. 9 of 17 April 2000, Pakistan relies upon the following considerations:

> [Bayindir] received almost one-third of the Contract price up front, which more than adequately covered mobilisation costs. In this respect, it is recalled that as of April 2001, Bayindir had retained approximately $100 million of the

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Investment, according to which, exactly as in the BIT at hand, the term investment shall mean "every kind of asset".

42 N. RUBINS, The Notion of 'Investment' in International Investment Arbitration, in: N. Horn (ed), Arbitrating Foreign Disputes, The Hague, 2004, p. 292.

> mobilisation advance. At the same time, the risk engaged was minimal because Bayindir had received such a substantial mobilisation advance, which it was to retain (proportionally reduced) until the end of the Contract (Mem. J., pp. 15-16).

119. The very fact that a part of the price is paid in advance has in and of itself no bearing on the existence of a financial contribution. In any event, Pakistan's contention overlooks the fact that Bayindir provided bank guarantees equivalent to the amount of the Mobilisation Advance payable to NHA "on his first demand without whatsoever right of objection on our part and without his first claim[ing] to the Contractor" (see *supra* No. 18). Specifically, Pakistan did not dispute Bayindir's allegation that it "has incurred bank commission charges in excess of USD 11 million" (C-Mem. J., p. 19 ¶ 33).

120. Under these circumstances, the Tribunal concludes that Bayindir made a substantial financial contribution to the Project.

cc. Conclusion

121. Considering Bayindir's contribution both in terms of know how, equipment and personnel and in terms of injection of funds, the Tribunal considers that Bayindir did contribute "assets" within the meaning of the general definition of investment set forth in Article I(2) of the BIT.

b. Investment under Article 25 of the ICSID Convention

122. It is common ground between the parties that the jurisdiction of the Tribunal is further contingent upon the existence of an "investment" within the meaning of Article 25 of the ICSID Convention (be it as an independent requirement or as a specification of the concept of investment under the BIT).

123. Article 25 of the ICSID Convention provides the following:

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

124. The Tribunal notes that Bayindir claims that Pakistan has breached various rights conferred on it by the BIT with respect to its investment. Hence, the current dispute is a dispute with Pakistan, as required by Article 25(1) of the ICSID Convention.

125. Pakistan did not contest that the current dispute is a "legal dispute" within the meaning of Article 25(1) of the ICSID Convention[43]. Irrespective of the possible nexus between Bayindir's claims under the BIT and the issues to be determined under the underlying Contract, the fact remains that the present dispute is clearly legal in nature as it concerns, in the words of the Report of the Executive Directors of the World Bank on the Convention, "the existence or scope of [Bayindir's] legal rights" and the nature and extent of the relief to be granted to Bayindir as a result of Pakistan's violation of those legal rights[44].

126. Whether the rights asserted by Bayindir in the end are found to exist must await the proceedings on the merits. Subject to determining whether Bayindir made an investment within the meaning of Article 25 of the ICSID Convention, which will be discussed below, the Tribunal holds that the assertion of said rights has given rise to a dispute that comes within the jurisdiction of the Centre as set out in Article 25(1) of the ICSID Convention.

aa. The object of the contract

127. First of all, Pakistan objects that, in the absence of express wording, a straightforward highway construction contract does not constitute an investment under within Article 25 of the ICSID Convention (Mem. J., p. 8 referring to SCHREUER, *op. cit.* [supra Fn. 24], p. 139, footnote 158).

128. The Tribunal is unpersuaded by this objection. The construction of a highway is more than construction in the traditional sense. As noted by the tribunal in *Aucoven*, the construction of a highway, "which implies substantial resources during significant

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43 In fact, Pakistan disputes the characterization of the legal dispute (see, for instance, Tr. J. 207:7-17: "We do not conceal the fact that there is a real dispute between Bayindir and NHA about this, there is not question about that at all. But it is not a dispute about breach of treaty; it is a dispute about whether the exercise of a contractual power was justified under this term of the contract, or whether instead the contracting party should have acted under a different contractual provision and on payment of compensation. With the very greatest respect to Bayindir and its representatives, there is no way of turning that into a claim for breach of treaty").

44 Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States; International Bank for Reconstruction and Development, March 18, 1965, ¶ 26; available at http://www.worldbank.org/icsid/basicdoc/partB-section05.htm#03.

periods of time, clearly qualifies as an investment in the sense of Article 25 of the ICSID Convention"[45].

129. The Tribunal is reinforced in this conclusion by the fact, referred to by Bayindir, that in the recent *Impregilo* case, which regarded a similar dispute concerning the construction of a dam, Pakistan did not challenge the existence of an investment under Article 25 of the ICSID Convention.[46]

bb. The so-called "Salini Test"

130. Both parties relied upon previous decisions by ICSID Tribunals to define the notion of investment under Article 25 of the ICSID Convention and in particular upon the decision in *Salini v. Morocco*[47]. The Tribunal in *Salini* held that the notion of investment presupposes the following elements: (a) a contribution, (b) a certain duration over which the project is implemented, (c) sharing of the operational risks, and (d) a contribution to the host State's development, being understood that these elements may be closely interrelated, should be examined in their totality,[48] and will normally depend on the circumstances of each case[49]. In the following paragraphs the Tribunal will examine these conditions in turn.

131. Firstly, to qualify as an investment, the project in question must constitute a substantial commitment on the side of the investor. In the case at hand, it cannot be seriously contested that Bayindir made a significant contribution, both in terms of know how, equipment and personnel and in financial terms (see *supra* Nos. 115 *et seq.*).

132. Secondly, to qualify as an investment, the project in question must have a certain duration. The element of duration is the paramount factor which distinguishes investments within the scope of the ICSID Convention and ordinary commercial

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45 *Autopista Concesionada de Venezuela v. Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, ¶ 101 (Exh. [Bay]CLEX 14); also available at http://www.worldbank.org/icsid/cases/decjuris.pdf.

46 See *Impregilo v. Pakistan* [*supra* No. 74], ¶ 111(a).

47 *Salini v. Morocco* [*supra* No. 98], *passim*.

48 *Id.* See also *L.E.S.I. v. Algeria* [*supra* Fn. 26], ¶ 13 (iv).

49 *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on jurisdiction of 6 August 2004, ¶ 53 *in fine* (Exh. [Pak]L-11); available at http://www.worldbank.org/icsid/cases/joy-mining-award.pdf.

transactions. When denying the qualification of investment to an ordinary sales contract (even if complex), the Tribunal in *Joy Mining* expressly distinguished *Salini v. Morocco* on the ground that "[i]n that case, however, a major project for the construction of a highway was involved and this indeed required not only heavy capital investment but also services and other long-term commitments."[50]

133. Bayindir points out that the Contract had an initial duration of three years followed by a defect liability period of one year and a maintenance period of four years against payment. It is further undisputed that the project had been underway for three years and that Bayindir was granted a contractual extension of an additional twelve months. Contracts over similar periods of time have been considered to satisfy the duration test for an investment[51]. Since Pakistan has not contended that the project was not sufficiently extended in time to qualify as an investment, the Tribunal considers that this requirement is met. More generally, as mentioned by the tribunal in *L.E.S.I. v. Algeria*, one cannot place the bar very high, as (a) experience shows – and a preliminary assessment of the facts of the case seem to confirm – that this kind of project more often than not requires time extensions, and (b) the duration of the contractor's guarantee should also be taken into account[52].

134. Thirdly, to qualify as an investment, the project should not only provide profit but also imply an element of risk. Pakistan's argument in this respect is that "the risk engaged was minimal because Bayindir had received such a substantial mobilisation advance, which it was to retain (proportionally reduced) until the end of the Contract" (Mem. J., ¶ 2.19, p. 16).

135. Bayindir contested this argument, *inter alia*, on the ground that it had placed itself at considerable risk by securing first demand bank guarantees, and by opening itself to the danger of an unlawful call on the guarantees. More generally (C-Mem. J., ¶ 41, p. 13). Bayindir relied on the following passage of the *Salini* decision:

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50 *Joy Mining v. Egypt* [*supra* Fn. 49], ¶ 62.

51 *Salini v. Morocco* [*supra* No. 98], ¶¶ 54-55, citing D. CARREAU *et al.*, Droit International Economique, pp. 558-78 (3d ed., 1990); C.H. SCHREUER, Commentary on the ICSID Convention (1996) 11 ICSID Rev - FILJ 318 et seq).

52 *L.E.S.I. v. Algeria* [*supra* Fn. 26], ¶ 14(ii) *in fine*: *"On ne peut de toute façon pas se montrer excessivement rigoureux tant l'expérience apprend que des objets du genre de celui qui est en cause justifient souvent des prolongations, sans parler de la durée de la garantie."*

> It does not matter in this respect that these risks were freely taken. It also does not matter that the remuneration of the Contractor was not linked to the exploitation of the completed work. A construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor.[53]

136. The Tribunal cannot agree with Pakistan's objection. Besides the inherent risk in long-term contracts, the Tribunal considers that the very existence of a defect liability period of one year and of a maintenance period of four years against payment, creates an obvious risk for Bayindir. Under these circumstances, the Tribunal is of the opinion that Bayindir's participation in the risks of the operation was significant.

137. Lastly, relying on the preamble of the ICSID Convention, ICSID tribunals generally consider that, to qualify as an investment, the project must represent a significant contribution to the host State's development[54]. In other words, investment should be significant to the State's development. As stated by the tribunal in *L.E.S.I*, often this condition is already included in the three classical conditions set out in the 'Salini test'[55]. In any event, in the present case, Pakistan did not challenge the numerous declarations of its own authorities emphasising the importance of the road infrastructure for the development of the country[56].

138. For all the foregoing reasons, the Tribunal concludes that Bayindir made an investment both under Article I(2) of the BIT and Article 25 of the ICSID Convention. Accordingly, Pakistan's jurisdictional challenge that there is no investment fails.

C. ARE BAYINDIR'S TREATY CLAIMS IN REALITY CONTRACT CLAIMS?

139. It is Pakistan's "primary submission" (Tr. J., 209:36) that "Bayindir's (treaty) claims, however skilfully repackaged, are inextricably bound up with the Contract" (Reply J., p. 3 ¶ 2.2) and that "the only rights which Bayindir claims have been violated are rights which it asserts are derived from the Contract" (Reply J., p. 21, ¶ 2.44). In other words, regardless of how they have been formulated in this arbitration, Bayindir's Treaty

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53 *Salini v. Morocco* [*supra* No. 98], ¶ 56 referred to in C-Mem. J.

54 The significance of the contribution, an element that was not contemplated in *Salini*, was added in *Joy Mining v. Egypt* [*supra* Fn. 49], ¶ 53.

55 *L.E.S.I. v. Algeria* [*supra* Fn. 26], ¶ 13(iv) *in fine*.

56 See for instance CX 122 referred to in C-Mem. J. p. 14 ¶ 46.

Claims “are in reality contract claims […] and thus beyond the scope of this tribunal's jurisdiction” (Tr. J., 45:24-27).

140. In response, Bayindir relies on the above-mentioned ‘precedent’ in the *Impregilo* case, in which Pakistan was unsuccessful with this very same argument to object to jurisdiction[57]. As pointed out by Bayindir, the tribunal in *Impregilo* held, *inter alia*, as follows:

> The fact that Article 9 of the BIT does not endow the Tribunal with jurisdiction to consider Impregilo's Contract Claims does not imply that the Tribunal has no jurisdiction to consider Treaty Claims against Pakistan which at the same time could constitute breaches of the Contracts. [58]

141. And the tribunal added:

> [C]ontrary to Pakistan’s approach in this case, the fact that a breach may give rise to a contract claim does not mean that it cannot also – and separately – give rise to a treaty claim.[59]

142. In substance Bayindir contends that it has laid out in some detail its claims for the breach of four separate BIT provisions and has thus, in the words of the *Impregilo* tribunal, properly stated a claim "that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty” (Rejoinder J., pp. 18-19, ¶ 57[60]). Before discussing in more detail the difference between Treaty Claims and Contract Claims (b) under the specific circumstances of the case (c) and Pakistan’s subsidiary arguments in this respect (d), it is useful to recall the actual formulation of Bayindir’s Treaty Claims (a).

a. Bayindir’s Treaty Claims

143. In its RA, Bayindir submitted that Pakistan’s conduct in connection with the project constituted:

> [b]latant violation of its obligations to Bayindir under the BIT. In particular, Pakistan has allegedly:
>
> - failed to promote and protect Bayindir's investment in violation of Article II of the BIT;

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57 In *Impregilo*, Pakistan submitted that “the Treaty Claims [t]here c[ould] not be separated from the Contract Claims and that, consequently, such claims fall outside the scope of the BIT and this Tribunal has no jurisdiction over them” (see *Impregilo v. Pakistan* [*supra* No. 74], ¶ 77).

58 *Impregilo v. Pakistan* [*supra* No. 74], ¶ 219.

59 *Impregilo v. Pakistan* [*supra* No. 74], ¶ 258.

60 Referring to the wording of *Impregilo v. Pakistan* [*supra* No. 74], ¶ 260.

- failed to ensure the fair and equitable treatment of Bayindir's investment, in violation of Article II (2) of the BIT;
- taken measures of expropriation, or measures having the same nature or the same effect, against Bayindir's investment in violation of Article III (1) of the BIT.

(RA, p. 11 ¶ 36-*37*)

144. In its Counter-Memorial on Jurisdiction, Bayindir expanded on the alleged violation of Article II (2) of the BIT explaining that this provision contained an obligation of both national and most favoured nation treatment. Bayindir's Treaty Claims are of three types:

(i) claims for violation of Pakistan's obligation to ensure fair and equitable treatment (based on the BIT's preamble and indirectly on Article II(2) of the BIT);

(ii) claims for violations of Pakistan's obligation to accord most favoured nation treatment (based directly on Article II(2) of the BIT);

(iii) claims for expropriation (based directly on Article III(1) of the BIT).

145. At the jurisdictional hearing Bayindir summarized its case in the following terms:

> We assert that we entered bona fide a substantial contract for the construction of a motorway, the contract having been entered with the NHA, in terms which undoubtedly as it seems to be common ground, would provide a profitable contractual enterprise for us as a substantial contractor to provide a result which in the circumstances was at a tender price some 30 per cent less than any other tender for this substantial project. We expected no more than to be treated fairly and without discrimination as we executed our contract pursuant to the arrangements which we made with the NHA. Our complaint is that for reasons external to our contractual performance it became convenient to the Respondent, the Republic of Pakistan, acting in its own behalf and also, we say, through its emanation, NHA, to terminate their contractual arrangement before the completion of the project.
>
> (Tr. J., 126:16:32)

146. There can be no dispute that these claims are directly stated by reference to Pakistan's obligations under the BIT. In and of themselves, assuming *pro tem* that they may be sustained on the facts, Bayindir's Treaty Claims fall within the scope of the BIT. This being so, the following aspects are, however, disputed:

(a) whether Bayindir's Treaty Claims are in reality Contract Claims or, in other words whether there is any "credible self-standing Treaty Claim" (Mem. J., p. 5 ¶1.7);

(b) whether Bayindir's Treaty Claims are sufficiently substantiated;

(c) whether the actions about which Bayindir's complains were taken in the exercise of *puissance publique*.

147. Pakistan summarized its objections to the Tribunal's jurisdiction to hear Bayindir's Treaty Claims as follows:

> Bayindir's claims for breach of the treaty are claims that its rights under the Contract have been interfered with or abrogated. It follows that in the present case (and it is not suggested that this will invariably be the case whenever there is a combination of contract and treaty claims in an investment dispute), if the claims for breach of contract are unsuccessful, because it is determined that Bayindir did not possess the rights which it claims or (which amounts to the same thing) that abrogation of those rights was contractually justified, then the treaty claims must also fail.
>
> (Reply J., p. 18, ¶ 2.39)

b. The difference between Treaty Claims and Contract Claims

148. As a preliminary matter, the Tribunal notes that Pakistan accepts that "treaty claims are juridically distinct from claims for breach of contract, even where they arise out of the same facts" (Reply J., p. 18, ¶ 2.38). The Tribunal considers that this principle is now well established[61]. The ad hoc committee in *Vivendi v. Argentina* described this "conceptual separation"[62] as follows:

> A particular investment dispute may at the same time involve issues of the interpretation and application of the BIT's standards and questions of contract.[63]
>
> Whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law in the case of the BIT, by international law, in the case of the Concession Contract, by the proper law of the contract.[64]

149. The *Vivendi* ad hoc Committee went on to state:

> [W]here "the fundamental basis of the claim" is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the

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61 See, for instance, *Siemens v. Argentina* [*infra* Fn. 80], ¶ 180; *AES Corp. v. Argentina* [supra No. 76], ¶¶ 90 *et seq*.

62 B. CREMADES and D.J.A CAIRNS, Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes, in: T. Weiler (Ed) International investment law and arbitration: leading cases from the ICSID, NAFTA, bilateral treaties and customary international law, London, 2005, p. 331.

63 *Compañia de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, Decision of Annulment, 3 July 2002, ¶ 60 (Exh. [Pak]L-5 = Exh. [Bay]CLEX16); ICSID Review (2004), vol. 19, No. 1, 41 ILM 1135 (2002), also available at http://www.worldbank.org/icsid/cases/vivendi_annul.pdf

64 *Ibid.*, ¶ 96.

> existence of an exclusive jurisdiction clause [or, for present purpose, an arbitration clause[65]] in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.[66]

And:

> In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.

150. In the present case, it is undisputed that the 1997 Contract contains a dispute settlement clause providing for arbitration under the 1940 Arbitration Act of Pakistan.

151. As a matter of principle, this arbitration clause is irrelevant for the purpose of the jurisdiction of this Tribunal over the Treaty Claims[67]. However, following the withdrawal of the Contract Claims, Pakistan argues that, under the particular circumstances of this case, "to use the language of the award in the *Vivendi* Annulment case, the essential basis of [Bayindir's] claims is purely contractual" (Tr. J., 45:22-26).

c. The specific circumstances of the case

152. On Pakistan's case, the Treaty Claims are purely contractual as they:

> [c]oncern [aa.] the interpretation and application of contract provisions, to what extent and whether the contract was breached by either NHA or Bayindir, whether and to what extent the engineer's decisions as to which Bayindir's claims are ultimately directed were justified and [bb.] how any claim should be quantified under the contract's provisions".
>
> (Tr. J., 45:22-26).

153. In other words, the Treaty Claims are in reality contract claims (over which the Tribunal does not have jurisdiction) because (aa) their 'ingredients' are essentially contractual which is confirmed by the fact that (bb) the amount of the Treaty Claims corresponds to the amount of the Contract Claims.

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65 See, for instance 90-91.

66 *Vivendi v. Argentina* [*supra* No. 148], ¶ 101. See also *Impregilo v. Pakistan* [*supra* No. 74], ¶ 225.

67 See also *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2, Decision on Jurisdiction of 11 May 2005, available at http://www.worldbank.org/icsid/cases/camuzzi-en.pdf, ¶ 89, where the tribunal seems to limit the relevance of the contractual forum only to "purely contractual questions having no effect on the provisions of the Treaty".

aa. The “ingredients” of Bayindir’s claims

154. In substance, Pakistan’s case is that the Treaty Claims are in reality dependent upon the existence of a breach of contract:

> The right not to be the victim of unfair and inequitable treatment, the right not to be the victim of expropriation, are both rights that are tied to specific substantive rights of an investor, and one has to ask what has been interfered inequitably or unfairly; what has been taken in an expropriation? […] it is logically and juridically essential to establish that Bayindir has the rights under the contract that it claims to have before it will even be possible to determine whether those rights have been the subject of expropriation.
>
> (Tr. J., 85:3-8; 85:30-34).

155. Bayindir acknowledges that its case arises out of the contractual relationship but insists on the fact that its claims rest on breaches of the BIT:

> [I]t is difficult to contemplate, although one can postulate, a situation for breach of a BIT obligation that would not be some underlying contractual situation supporting the circumstances that have given rise to the claim for a breach of the treaty obligation. So the fact that one can identify a particular contractual relationship is a usual, one would say almost inevitable, precursor to any aspect of a claim arising from the breach of a BIT obligation.
>
> (Tr. J., 126:7-15)

156. On the expropriation claim in particular, Pakistan further argues that:

> Bayindir's expropriation claim, what it now terms an expropriation claim, as well as all of its claims which are based on its expulsion from the site, can only be assessed in the light of the contract's terms and taking into account their actual application in fact, including an assessment of whether Bayindir was responsible for insufficient progress on the works, the actions and decision of the engineer and the contractually based qualification of any amounts potentially owing to Bayindir for work performed or for its fixed and moveable assets on the site under the contract, and those are all quintessentially contractual matters as to which Pakistan respectfully submits this tribunal has no jurisdiction.
>
> (Tr. J., 52:20-33)

157. The Tribunal is however of the opinion that the fact that a State may be exercising a contractual right or remedy does not of itself exclude the possibility of a treaty breach (see also *infra* Nos. 180 *et seq.*).

bb. The quantum of Bayindir’s claims

158. According to Pakistan, “the most striking indication [of the intrinsically contractual nature of the Treaty Claims] is that the amount claimed in the present proceedings (US $416,236,110) is exactly the same as that claimed by Bayindir in the proceedings it has

initiated in Pakistan under the contractual provisions for arbitration" (Mem. J, p. 40, ¶ 4.1) or in other words:

> [T]he amount of Bayindir's claim quantified in its request for arbitration is precisely to the dollar the same amount that Bayindir claim to the Engineer under clause 53 of the contract. In and of itself that is a test to the fact that the underlying basis for Bayindir's claims must be contractual.
>
> (Tr. J. 47:17-23)

159. Bayindir's position is that, following the abandonment of the Contract Claims, "the issue of what would have happened under the contract, which is not by definition before the tribunal, is irrelevant"; since Bayindir is pursuing exclusively "treaty breach[es], all these problems about damages fall away" (Tr. J., 146:14-22).

160. As Bayindir's original Treaty and Contract Claims clearly arose out of the same set of facts, it is not surprising that at the stage of the RA Bayindir articulated damages by reference to the Contract. In the current situation, following the abandonment of its Contract Claims, Bayindir is required to articulate the damage exclusively by reference to the Treaty. In Bayindir's counsel's terms:

> [O]ur complaint is a completely different complaint under a treaty, which has its own measures of compensations. Once you get to that point we say that you levitate yourself out of contract issues and come to the issue of if there is a breach amounting to expropriation, what is the compensation.
>
> (Tr. J., 146:5-10)

161. At the jurisdictional hearing, Bayindir recognized that it has "not yet articulated" the requested amount of compensation (Tr. J., 147:23-24) and qualified the articulation "by reference to the issues about contract claims" as merely "a convenient reference point" (Tr. J., 145:16-17). Referring to the principles set out by the Permanent Court of International Justice in the 1928 *Chorzów Factory* case, Bayindir contends that reparation must as far as possible wipe out all the consequences of the illegal act and re-establish the situation which in all possibility would have existed if that act had not been committed. According to Bayindir, if it concludes that Pakistan breached the BIT, the Tribunal will have to address the question of compensation according to these principles. In Bayindir's view, "it does not involve working through the contractual provisions" (Tr. J. 143:7-8; see also Tr. J., 168:16-19), the "obvious elements of compensation" being:

> [o]ne loss of profit, which we say we can measure exactly here because of the price at which the contract was let out to other contractors as well as in other ways. We have the element, we say, of destruction of our corporate business because of the hardship imposed by reason of this expulsion. We have the

> issues, we say, of recouping unrecouped expenditure including amounts which had not even been certified. We do not claim them because they have been certified here; we just claim the set amounts we have spent and which are entitled to be recouped as part of our losses. Fifthly, we would say that we would be entitled to have appropriate orders indemnifying us completely against a call up of these guarantees of 71.6 million and 1.87 billion rupees and other customs and guarantees which even recently have been called up to put us in the position we would have been if there had not been, for the purpose of this argument, undoubted treaty breaches amounting to reparation.
>
> (Tr. J. 144:28-145:8)

162. In and of itself, "Bayindir's contemporaneous characterisation and pursuit of those claims under the contract dispute resolution mechanism" (see. Tr. J., 54:18-21) – which was described as "a self evident fact" by Bayindir (Tr. J., 63:35-38; 64:1-10) – does not mean that Bayindir's current Treaty Claims are in reality Contract Claims.

163. In support of its case that the Treaty Claims are in reality Contract Claims, Pakistan puts much weight on "[t]he fact that it is admitted by Bayindir that if they are completely successful in the ICSID proceedings that will wipe out the totality of their contractual claim" (Tr. J., 83:27-30).

164. Indeed, when abandoning its Contract Claims, Bayindir expressed the following views:

> [W]e are pursuing our remedies on the basis that there is a treaty breach. If, as we expect, we are successful in establishing liability with respect to that matter, we would expect that our relief as claimed would provide complete relief for us with respect to all matters arising out of the agreements made with respect to the freeway. That would mean that there would be no outstanding issues to be resolved.
>
> (Tr. J., 12:11-19)

165. Moreover, as will be discussed below, at the jurisdictional hearing Bayindir further submitted that the Contract Claims are in any event time barred under Pakistani law. One may ask whether, under these circumstances, Bayindir's re-articulation of the claims and of the possible measure of compensation is legitimate. This is a question that the Tribunal will address more generally when discussing Pakistan's argument that Bayindir's procedural behaviour constitutes qualified "abuse of process" (cf. *infra* Nos. 169 *et seq.*). For the present purpose, the Tribunal must assess its jurisdiction on the basis of the record as it stands. The fact remains that Bayindir is asserting Treaty Claims and a newly articulated request for compensation, which may include "an appropriate sum for compensation" (Tr. J., 147:33-38).

166. Under these circumstances, the Tribunal holds that the present case is not a case where the essential basis of the claims is purely contractual. Hence, there is no reason to depart from the principle of the independence of treaty claims and contract claims as it was expressed by the ad hoc Committee in *Vivendi*.

167. In conclusion, the Tribunal considers that when the investor has a right under both the contract and the treaty, it has a self-standing right to pursue the remedy accorded by the treaty. The very fact that the amount claimed under the treaty is the same as the amount that could be claimed (or was claimed) under the contract does not affect such self-standing right.

d. Pakistan's subsidiary arguments

168. Having concluded that the Treaty Claims are independent from the Contract Claims, the Tribunal will now review Pakistan's two subsidiary objections to its jurisdiction to hear the Treaty Claims, that is (aa) abuse of process and (bb) conflict of conventions.

aa. Abuse of Process

169. At the jurisdictional hearing, Pakistan qualified Bayindir's articulation of claims as an "abuse of process […] under international law with the BIT and the ICSID convention" (Tr. J., 34:4-32). In particular, Pakistan insisted on the following circumstances:

> [R]eally almost up until the last minute before this dramatic request for arbitration in the Spring of 2002 to ICSID, Bayindir treated all its complaints against NHA as contractual complaints. There is not a hint of any complaint under any BIT against Pakistan.
>
> (Tr. J., 34:5-10)
>
> Bayindir [became] unhappy with the dispute resolution mechanism it voluntarily agreed with when it signed the contract and which was an essential part of the bargain between NHA and Bayindir, and wants to re-write the contract and effectively substitute this Tribunal for the Tribunal that it hitherto recognised was the competent Tribunal.
>
> (Tr. J., 65:35-66:3)

170. Pakistan asserts that there is an "inherent power and duty for an international Tribunal to guard against this kind of abuse of process, and that that has had jurisdictional or at least preliminary objections significance" (Tr. J., 83:37-84:2).

171. In the Tribunal's opinion, one should distinguish between Bayindir's tactical choice to abandon the Contract Claims at the outset of the jurisdictional hearing and Bayindir's fundamental choice to pursue the Treaty Claims. It is evident that Bayindir's initial choice to raise Contract Claims and its late withdrawal of these Claims may have engendered a significant amount of useless work for both the Tribunal and Pakistan. Whether Bayindir's late abandonment of the Contract Claims should have an incidence on the allocation of costs will be addressed below (cf. *infra* Nos. 276 *et seq.*).

172. The same can be said of Bayindir's contention that, on the basis of the "relevant limitation periods under the law of Pakistan, there are no contract claims being maintained by the claimant in arbitration or in legal proceedings in Pakistan nor is there a possibility that any contract claims could be maintained because they are out of time" (Tr. J., 229:7-11). If the Tribunal can only regret that this submission was made at the very end of the jurisdictional hearing, this does not make Bayindir's pursuit of the Treaty Claims abusive.

173. Hence, the Tribunal dismisses Pakistan's challenge to its jurisdiction to the extent it is based on an alleged abuse of process.

bb. Conflict of Conventions

174. At the hearing on jurisdiction, Pakistan put forward a new argument: Pakistan's recent ratification of the 1958 New York Convention which brings with it "Pakistan's obligations to respect and to enforce a private arbitration agreement" under Article II of the New York Convention (Tr. J., 28:31-32). Pakistan relies on a "potential conflict between […] the 1958 New York Convention and the 1965 Washington Convention" and argues that "the New York Convention both historically and because of its specialist terms should be preferred to the Washington Convention" (Tr. J., 28:34-29:8). It is Pakistan's submission that the Tribunal should avoid "creat[ing] a situation where by thwarting the private arbitral process [it] induce[s] a breach of Pakistan's treaty obligations both to Turkey and to all other ratifiers of the New York Convention" (Tr. J., 29:11-15).

175. The Tribunal cannot conceal its surprise at the raising of this argument, which it considers devoid of merit. Along the lines of the *Impregilo* decision as quoted by Pakistan itself, the Tribunal considers that, as the current proceedings are not

concerned with the Contract Claims, the issue of "the impact (if any) of competing arbitration agreements, including all questions as to the viability of such provisions, does not arise" (*Impregilo v. Pakistan* [*supra* No. 74], ¶ 85 referred to in Tr. J., 118:9-119:15)[68].

176. In any event, Pakistan's point regarding a potential conflict of conventions might only arise if an ICSID tribunal were to order a state to disregard a local arbitration agreement, contrary to Article II of the New York Convention which obliges states to "recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them" (see Tr. J., 117:18-21).

177. It is true that, at a time when this arbitration was still concerned with the Contract Claims, Bayindir applied to obtain preliminary measures in order to stay the Islamabad arbitration. It then withdrew its request as a result of an offer by Pakistan to request NHA to move for an extension of time limits in such a manner that that arbitration would not proceed prior to this Tribunal's decision on jurisdiction (see PO#1, p. 23). It has always been the common understanding that Pakistan agreed to this measure in a "spirit of co-operation" (Tr. J., 116:4) and there is no question that Pakistan will not be bound by its commitment following the Tribunal's decision on jurisdiction. In any event, the mere stay of the arbitration would not under any circumstances amount to a non-recognition of the arbitration agreement in violation of Article II of the New York Convention.

178. Moreover, Pakistan's ratification of the New York Convention in the course of the present proceedings cannot have any bearing on the jurisdiction of the Tribunal in the present case. The contrary would entail, amongst other things, that a unilateral act by the respondent to an arbitral proceeding could retrospectively affect (to the respondent's own benefit) the arbitral tribunal's jurisdiction which, according to the long-established jurisprudence of international tribunals of all kinds, is fixed as of the time the proceedings are commenced, and is not subject to *ex post facto* alteration[69].

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68 This Tribunal is aware that a conflict of convention argument was put forward by Pakistan in *Impregilo*, but is unable to find any endorsement of such argument in the *Impregilo* Tribunal's brief remark just quoted.

69 Again, the Tribunal notes that Pakistan put forward a similar argument in *Impregilo*. However, it observes that, contrary to the present one, *Impregilo* was a case in which the allegedly

179. As a result, the Tribunal cannot see any merit in Pakistan's argument regarding the potential conflict of conventions.

e. The question of 'puissance publique'

180. Having held that a contractual breach may give rise to a separate treaty claim, the tribunal in *Impregilo* added that:

> [o]nly the State in the exercise of its sovereign authority ("*puissance publique*"), and not as a contracting party, may breach the obligations assumed under the BIT. In other words, the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty. [70]

181. On Pakistan's case, almost all of the allegations which make up Bayindir's claim for breach of treaty (whether relating to claims of discriminatory treatment, unfair and inequitable treatment, or expropriation) concern the conduct of NHA, which was contractual and not sovereign in character. Moreover, Pakistan contends that

> [e]ven if the possibility that some small part of NHA's actions could potentially be characterised as sovereign, the fact that the overwhelming majority are self-evidently acts of a contractual character demonstrates the essentially contractual nature of the claim and the futility of this Tribunal proceeding until the contractual forum has examined all of the contractual claims and pronounced upon them.
>
> (Reply J., p. 21, ¶ 2.43)

182. Bayindir's argues that the record shows the exercise of sovereign power, i.e., a decision "from the top down", in which "the element of national interest […] was the driving force for the result of our expulsion and expropriation of our contract" (Tr. J., 170:9-23)[71].

183. In the Tribunal's view, the test of *'puissance publique'* would be relevant only if Bayindir was relying upon a contractual breach (by NHA) in order to assert a breach of the BIT.[72]

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contradictory treaty obligations (BIT versus Geneva Convention) were already binding on both states well before the arbitral proceedings were brought.

70 *Impregilo v. Pakistan* [*supra* No. 74], ¶ 85.

71 Similarly, the Tribunal does not have to decide on Bayindir's argument that the tribunal in "*RFCC v. Morocco*, which *Impregilo* cites, discussed "puissance publique" only in the context of fair and equitable treatment and expropriation claims before it, while it did not apply the test to the national treatment and MFN claims" (Reply J., p. 17, ¶ 54 referring to *Consortium RFCC v. Royaume du Maroc*, ICSID N° ARB/00/6, Award of 22 December 2003, ¶¶ 52-53 (Exh. [Pak]L-8 = Exh. [Bay]CLEX 59); available at http://www.worldbank.org/icsid/cases/rfcc-award.pdf).

72 The Tribunal notes that this view is not contrary to *Impregilo* and *RFCC*. The tribunal in *Impregilo* referred to the concept of *'puissance publique'* in respect of the question whether a "breach of an investment contract can be regarded as a breach of a BIT" (*Impregilo v. Pakistan* [*supra* No. 74], ¶¶ 259-260). Similarly, *RFCC v. Morocco* (cited by the tribunal in *Impregilo*) was concerned with

In the present case, Bayindir has abandoned the Contract Claims and pursues exclusively Treaty Claims. When an investor invokes a breach of a BIT by the host State (not itself party to the investment contract), the alleged treaty violation is by definition an act of *'puissance publique'*. The question whether the actions alleged in this case actually amount to sovereign acts of this kind by the State is however a question to be resolved on the merits.

184. Hence, at this stage the real question is whether the Treaty Claims are sufficiently substantiated for jurisdictional purposes or, in Pakistan's words, whether they have a "colourable basis".

D. ARE BAYINDIR'S TREATY CLAIMS SUFFICIENTLY SUBSTANTIATED FOR JURISDICTIONAL PURPOSES?

185. Significantly, Pakistan itself assimilates the issue whether the Treaty Claims are in reality Contract Claims to the question whether the Treaty Claims are in fact sufficiently substantiated for jurisdictional purposes:

> So a Tribunal that is not the Tribunal chosen under the contract should not be hearing this case, we say, unless it really is a treaty claim that is confronting it and not a contract claim dressed up to look like something on breach of treaty.
>
> The Impregilo case at paragraph 254 of the award makes very much this point […]. Having quoted both Oil Platforms and the arbitration award in SGS/Philippines […], at paragraph 254 the Tribunal goes on in these terms. "The present Tribunal is in full agreement with the approach evident in this jurisprudence. It reflects two complementary concerns. To ensure that courts and Tribunals are not flooded with claims which have no chance of success or may even be of an abusive nature […] and equally to ensure that in considering issues of jurisdiction courts and Tribunals do not go into the merits of cases without sufficient prior debate."
>
> (Tr. J., 81:33-82:15)

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the questions of whether (i) the alleged contract breach could constitute an unfair and inequitable treatment under the BIT, and (ii) the alleged bad performance of the contract could amount to interference tantamount to expropriation. *RFCC v. Morocco*, [*supra* Fn. 71]: *"L'Etat, ou son émanation, peuvent s'être comportés comme des cocontractants ordinaires ayant une divergence d'approche, en fait ou en droit, avec l'investisseur. Pour que la violation alléguée du contrat constitue un traitement injuste ou inéquitable au sens de l'Accord bilatéral, il faut qu'elle résulte d'un comportement exorbitant de celui qu'un contractant ordinaire pourrait adopter."* (¶ 51). And further: *"Or un Etat cocontractant n' « interfère » pas, mais « exécute » un contrat. S'il peut mal exécuter ledit contrat cela ne sera pas sanctionné par les dispositions du traité relatives à l'expropriation ou à la nationalisation à moins qu'il ne soit prouvé que l'Etat ou son émanation soit sorti(e) de son rôle de simple cocontractant(e) pour prendre le rôle bien spécifique de Puissance Publique"* (*Ibid*, ¶ 65 ; see also ¶ 69).

186. To answer the question whether the Treaty Claims are sufficiently substantiated for jurisdictional purposes, the Tribunal will first define the relevant standard (a). It will then apply it to the different Treaty Claims, i.e., the most favoured nation (MFN) claim (b), the fair and equal treatment claim (c) and the expropriation claim (d).

a. The relevant test

187. According to Pakistan, Bayindir cannot merely allege breach of the BIT with a view to establishing the Tribunal's jurisdiction. Referring to previous decisions by international tribunals, Pakistan submits that:

> [i]t is for the Tribunal to interpret each provision of the BIT relied upon (Articles II (1) and (2), III(1)), and to see whether on the facts alleged that provision could be breached.
>
> (Mem. J., p. 6, ¶ 1.9)

188. Pakistan accepts that the Tribunal need not determine whether Bayindir's allegations of breach are well-founded, but maintains that "some broad consideration of the facts may be appropriate". Specifically, Pakistan contends that:

> Bayindir can only rely on allegations of fact (i) that are credible, (ii) where such allegations could give rise to a breach of the BIT, (iii) taking into account the views expressed by Pakistan on such allegations.
>
> (Mem. J., p. 6, ¶ 1.10)

189. Bayindir seems[73] to accept that it has the burden (aa.) to demonstrate that the Tribunal has jurisdiction (C-Mem. J., p. 3, ¶ 6). As to the standard of proof (bb.), Bayindir seems[74] to accept that in the jurisdictional phase of this arbitration it has to establish that "the claims it pleads are sustainable on a *prima facie* basis" (C-Mem. J., p. 3, ¶ 6).

aa. The onus of establishing jurisdiction

190. In accordance with accepted international (and general national) practice, a party bears the burden of proving the facts it asserts. In *Impregilo*, the tribunal took it for granted

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[73] At the hearing, Bayindir expressed the following view: "Now, it is put that there is an onus on us to establish jurisdiction. We say that is not so. We say that the onus is on Pakistan to establish there is no jurisdiction but in the context that we have been firstly in our request for arbitration expressed a tenable basis for putting a claim" (Tr. J., 138:38-140:5).

[74] At the hearing, Bayindir expressed the following view: "We do not have to establish in our submission a *prima facie* case, but we say whatever is the test we comfortably clear it" (Tr. J., 151:24-26).

that the Claimant had to satisfy "the burden of proof required at the jurisdictional phase" and make "the *prima facie* showing of Treaty breaches required by ICSID Tribunals".[75]

191. At the jurisdictional hearing, Bayindir declared that it did not accept this passage of the *Impregilo* decision (Tr. J., 13:34-36). Upon a specific request for clarification by the Tribunal, Bayindir expressed the following view:

> [I]t is necessary for this objection to be successful to the Republic of Pakistan to say on this preliminary documentation that even if [Bayindir] establish the matters and the characterisation of those matters which [it asserts], it becomes untenable to make out [the Treaty] breach.
>
> (Tr. J., 156:24-30)

192. In the Tribunal's understanding, this approach does not alter the fact that, as conceded in Bayindir's written submissions, Bayindir has the burden of demonstrating that its claims fall within the Tribunal's jurisdiction.

bb. The relevant standard

193. In their written submissions, the parties formulated the test which the Tribunal is to apply in determining jurisdictional disputes in various ways. They made extensive reference to decisions of the International Court of Justice, ICSID tribunals and other international tribunals. The gap between their positions appeared to narrow down through that written process and, at the jurisdictional hearing, counsel for both parties accepted the following test stated by the tribunal in *Impregilo* (Tr. J., 157:13 *et seq.* [Bayindir]; 198:31 *et seq.* [Pakistan]):

> [T]he Tribunal has considered whether the facts as alleged by the Claimant in this case, *if* established, are capable of coming within those provisions of the BIT which have been invoked.[76]

194. The tribunal in *Impregilo* went on to explain that, applying the approach set out above, the tribunal has to determine whether the "Treaty Claims fall within the scope of the BIT, assuming *pro tem* that they may be sustained on the facts"[77]. In other words, the

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75 *Impregilo v. Pakistan* [*supra* No. 74], ¶ 79.

76 *Impregilo v. Pakistan* [*supra* No. 74], ¶ 254, emphasis in the original

77 *Impregilo v. Pakistan* [*supra* No. 74], ¶ 263. In this respect, the Tribunal agrees with the observation in *United Parcel Service v. Government of Canada* that "the reference to the facts alleged being 'capable' of constituting a violation of the invoked obligations, as opposed to their 'falling within' the provisions, may be of little or no consequence. (*United Parcel Service v. Government of Canada* (NAFTA), Decision on Jurisdiction, 22 November 200, ¶ 36; available at http://www.investmentclaims.com/decisions/UPS-Canada-Jurisdiction-22Nov2002.pdf.)

Tribunal should be satisfied that, if the facts or the contentions alleged by Bayindir are ultimately proven true, they would be capable of constituting a violation of the BIT.

195. The Tribunal notes that the approach has 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*[78], *Salini v. Jordan*[79], *Siemens v. Argentina*[80] and *Plama v. Bulgaria*[81]. In the last of these cases, the tribunal held that "if on the facts alleged by the Claimant, the Respondent's actions might violate the [BIT], then the Tribunal has jurisdiction to determine exactly what the facts are and see whether they do sustain a violation of that Treaty"[82]. Likewise, the tribunal in *Impregilo* considered that "it must not make findings on the merits of those claims, which have yet to be argued, but rather must satisfy itself that it has jurisdiction over the dispute, as presented by the Claimant"[83].

196. The Tribunal is in agreement with this approach, which strikes a helpful balance between the need "to ensure that courts and tribunals are not flooded with claims which have no chance of success or may even be of an abusive nature" on the one side, and the necessity "to ensure that, in considering issues of jurisdiction, courts and tribunals do not go into the merits of cases without sufficient prior debate" on the other.

197. Accordingly, the Tribunal's first task is to determine the meaning and scope of the provisions which Bayindir invokes as conferring jurisdiction and to assess whether the facts alleged by Bayindir fall within those provisions or are capable, if proved, of

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78 *Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 January 2004, ¶ 29 (Exh. [Pak]L-9); available at http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf.

79 *Salini Costruttori S.p.A and Italstrade S.p.A v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Award of 15 November 2004, ¶¶ 31 *et seq*. (Exh. [Pak]L-12); also available at http://www.worldbank.org/icsid/cases/salini-decision.pdf.

80 *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction of 3 August 2004 (Exh. [Pak]L-10); available at http://www.asil.org/ilib/Siemens_Argentina.pdf, ¶ 180: "The Tribunal simply has to be satisfied that, if the Claimant's allegations would be proven correct, then the Tribunal has jurisdiction to consider them."

81 *Plama Consortium Limited v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction of 8 February 2005, ¶ 119; available at http://www.worldbank.org/icsid/cases/plama-decision.pdf.

82 *Plama v. Bulgaria* [*supra* Fn. 81], ¶ 132.

83 *Impregilo v. Pakistan* [*supra* No. 74], ¶ 237.

constituting breaches of the obligations they refer to[84]. In performing this task, the Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the BIT provisions and to the assessment whether the facts alleged may constitute breaches. If the result is affirmative, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits.

198. Before applying this approach to each specific claim which Bayindir bases on the BIT, the Tribunal notes that at the jurisdictional hearing Bayindir submitted that Pakistan should have waited until the memorial on the merits before raising its jurisdictional objections (Tr. J., 141:4-5), which "of itself lowers the bar for [Bayindir] to clear" (Tr. J., 151:24-28).

199. It is true that under ICSID Arbitration Rule 41, Pakistan could have waited to raise its objections on jurisdiction until its counter-memorial. However, this Rule also provides that jurisdictional objections "shall be made as early as possible". Moreover, as Pakistan mentioned, Bayindir has explicitly accepted the way in which these proceedings have been organised (Tr. J., 197:32-198:2). The reason for the exchange of pleadings on jurisdiction prior to the memorial on the merits was to clear the question of jurisdiction at an early stage. Bayindir knew the challenges brought forward by Pakistan and had three opportunities to respond. At the first opportunity, Bayindir submitted "that this Tribunal should consider whether the claims it pleads in the jurisdictional phase of this arbitration are sustainable on *a prima facie* basis" (C-Mem. J., p. 3, ¶ 6).

200. The Tribunal therefore sees no reason to "lower the bar for [Bayindir] to clear" and thus will apply the standard defined in paragraph 197 above.

b. Bayindir's most favoured nation claim

201. Article II (2) of the BIT states:

> Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its

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[84] Contrary to the tribunal in *L.E.S.I.*, this Tribunal will not simply verify that the Claimant invokes treaty breaches (see *L.E.S.I. v. Algeria* [*supra* Fn. 26], ¶ 25.4. The Tribunal observes that a similar approach was adopted by the Tribunal in Consortium *RFCC v. Royaume du Maroc*, Decision on jurisdiction, ¶¶ 70-71; available at http://www.investmentclaims.com/decisions/-Consortium-Morocco-Jurisdiction-16Jul2001.pdf).

> investors or to investments of investors of any third country, which ever is the most favourable.

202. It is Bayindir's contention that its investment was not given treatment equivalent to the best treatment accorded to a comparable Pakistani or third country investment. Specifically, Bayindir alleged that (aa) it was expelled allegedly to save costs and for reasons of local favouritism, considering in particular that (bb) far more favourable timetables were accorded to Pakistani and other foreign contractors and that (cc) these other contractors were not expelled even though they were behind schedule far more than Bayindir.

203. Pakistan opposes this claim arguing (i) that Bayindir has not pleaded the MFN claim in its RA, (ii) that Bayindir's contentions do not amount to "an MFN national treatment type claim", and (iii) that Bayindir has "not show[n] enough to get this tribunal across the threshold to establish a *prima facie* breach" (Tr. J., 100:11-24).

204. As a preliminary matter, the Tribunal observes that the fact that the most favoured nation claim was first brought forward only in Bayindir's C-Mem. J. is not relevant *per se*.

205. Pakistan further contends that MFN claims "are predominantly about regulatory action where a local investor or a foreign investor is offered better treatment, i.e., a more preferable regulatory treatment than the foreign investor", which is clearly not the case of Bayindir (Tr. J., 100:24-30). In other words, the obligation arising out of the most favourable treatment clause concerns "regulatory protection not the exercise of discretion where no legal obligation exists", in particular in contractual matters:

> The periods for the completion of the project and the employer's remedies for a failure to complete on time, just like questions of remuneration, are matters that fall within the scope of a given construction contract. […] The fact that NHA may not have terminated contracts in other cases is wholly irrelevant.
>
> (Tr. J. 96:11-22)

206. The Tribunal disagrees. The mere fact that Bayindir had always been subject to exactly the same legal and regulatory framework as everybody else in Pakistan does not necessarily mean that it was actually treated in the same way as local (or third countries) investors. In other words, as is evident from the broad wording of Article II(2)

of the BIT, the treatment the investor is offered under the MFN clause is not limited to "regulatory treatment"[85].

207. Hence, the Tribunal will verify whether the facts alleged by Bayindir fall within this broad wording of the MFN clause or would be capable if proved of constituting breaches asserted. In the following paragraphs, the Tribunal will discuss this point in respect of each of Bayindir's contentions referred to above (cf. *supra* No. 202).

aa. Expulsion for reasons of costs and local favouritism

208. In support of its allegation that it was expelled for reasons of costs and local favouritism, Bayindir relies primarily on three articles published by the Pakistani newspaper "*Dawn*":

- A first article – published on 26 April 2002, that is three days after Bayindir's expulsion – quoting a spokesman for the NHA saying that "the project will now be completed by the Pakistani construction companies [...] by December 31, 2002" (Exh. [Bay.] CX 101).
- A second article, published on 7 May 2001, observing that the contract put the country in a "difficult position in respect to foreign reserves" and suggesting that the Prime Minister at the time of the revival of the contract "took personal interest to ensure the execution of the project" (Exh. [Bay.] CX 98).
- A third article, published on 17 June 2001, quoting information from "official sources" that "Islamabad is hoping to save several hundred million dollars by executing the Islamabad-Peshawar motorway (M-1) project through local construction firms" (Exh. [Bay.] CX 99).

209. According to Pakistan, these allegations are "false and unsubstantiated" (Reply J., p. 70, ¶ 4.94). Pakistan did not indicate why and to what extent the information reported in the press was not true but merely insisted on the fact that these press reports do not constitute a sufficient basis to substantiate Bayindir's allegation for the purposes of jurisdiction. Relying on the decisions of the International Court of Justice in the

[85] See also the developments regarding the scope of the obligation of fair and equitable treatment (see *infra* NNo. 240-240).

Hostages case[86] and in *Nicaragua*[87], Pakistan affirms that international courts and tribunals invariably treat such press reports with great caution and accept them merely as corroborative evidence.

210. This Tribunal notes that the decisions cited in both the *Hostages* and *Nicaragua* cases were concerned with decisions *on the merits*, to which the corresponding standard of proof therefore applied. The position is obviously different where, as here, the tribunal is merely applying a *prima facie* standard for the purpose of determining whether it has jurisdiction.

211. Accordingly, irrespective of the evidentiary weight of these press reports on the merits, the Tribunal considers that they constitute a sufficient basis for the purpose of establishing jurisdiction. Additional elements support this *prima fa*cie basis. Indeed, in connection with the Constitutional Petition, Pakistan submitted that the 1997 Contract was a "bonanza" for Bayindir and was "highly favorable to the petitioner and against the [...] economic and social interests of Pakistan" (Exh. [Bay.] CX 30). Moreover, Bayindir's alleged expulsion appears to have been decided after reports by the World Bank indicating that the most economic course of action would be to stop the M1 Project (see *infra* No. 247). Whatever the weight that they may carry when the Parties will have fully briefed the merits and presented their evidence, at this preliminary stage these elements are a sufficient basis to establish jurisdiction.

bb. More favourable timetables were accorded to Pakistani contractors

212. Bayindir alleges that Pakistan breached the MFN clause because it awarded PMC JV, the local contractor that replaced Bayindir, a four-year extra 'time and space', while it was itself expelled having requested an EOT for a much shorter period. It also argues that, although the project is still not terminated, the local contractor remains in place and continues to benefit from Pakistan's leniency as to delays.

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86 *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment of 24 May 1980; ICJ Reports 1980, p. 3, 10 (Exh. [Pak]RL-2).

87 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment on the Merits of 27 June 1986; ICJ Reports 1986, p. 14, 40 (Exh. [Pak]RL-3).

213. Having concluded that the MFN clause is not limited to regulatory treatment (see *supra* Nos. 205-206), it is clear that awarding an extended timetable to the local investor can fall within Article II(2) of the BIT.

214. Pakistan objects that:

> [t]he periods for the completion of the project and the employer's remedies for a failure to complete on time, just like questions of remuneration, are matters that fall within the scope of a given construction contract. They are not matters of a treaty.
>
> (Tr. J., 96:11 *et seq.*)

215. The Tribunal can certainly agree with the first sentence. However, the very fact that these questions are governed by specific contractual provisions does not necessarily mean that they have no relevance in the framework of a treaty claim. One cannot seriously dispute that a State can discriminate against an investor by the manner in which it concludes an investment contract and/or exercises the rights thereunder. Any other interpretation would consider treaty and contract claims as mutually exclusive, which would be at odds with the well-established principles deriving from the distinction between treaty and contract claims as discussed above (see *supra* Nos. 148 *et seq.*).

216. Pakistan's main contention in this respect is that Bayindir's claim is "untenable", in particular because "[o]ther projects must be examined on their merits and in the light of their factual and contractual context" (Reply J., p. 71, ¶ 4.96). *Prima facie*, this argument may well apply to Bayindir's contention that it was the only contractor expelled when 29 out of 35 projects were delayed as a result of problems very similar to those faced at M-1, (see in particular the projects listed in C-Mem. J., pp. 34-37, ¶¶ 116 *et seq.*), but not to the contract with PMC JV, which relates to the very same project from which Bayindir was expelled. Indeed, and this is not disputed by Pakistan, PMC JV was awarded the contract for the remaining works on the M-1 Project with a four year (1460 days) completion deadline (Exh. [Bay.] CX 29).

217. Moreover, the memorandum of understanding between NHA and PMC JV provided that the time of completion would be "agreed between the parties depending upon the situation of NHA cashflow" (Exh. [Bay.] CX 132). The mere allegation that NHA's financial difficulties were due to the fact that it "has already paid up to date Bayindir insofar as the works on the project, and has already paid to Bayindir the very, very

substantial advance mobilisation payment" (Tr. J. 98:28-35) does not appear to explain the difference in treatment with respect to the completion deadlines.

218. Failing an explanation or particular insight about the reasons for the extended timetable agreed with PMC JV, Bayindir's allegation of discrimination with respect to the construction schedules cannot be considered as untenable under the applicable *prima facie* standard.

cc. Selective tendering

219. Bayindir further contends that Pakistan did not follow a bid procedure to replace it for the completion of the remaining works. Relying on several press reports, Bayindir submits that it was only after the memorandum of understanding had been signed with PMC JV that Pakistan organized a "selective tendering" (limited to two governmental organizations) as a later stage "cover-up" (C-Mem. J., p. 46, ¶¶ 159-160).

220. Again Pakistan does not contest that a selective tendering in favor of local contractors could constitute a violation of the MFN clause. What Pakistan disputes is the alleged irregularity of the process. In particular the parties disagree on the interpretation of the NHA Minutes of Meeting of 13 November 2002, during which NHA's Vigilance Wing stated:

> PMC-JV was the Consortium which was constituted by concerned NHA officials through negotiations with concerned firms mainly SKB and this aspect was reported by us at that time. Now through the process of manipulation as reported by insiders the contract is being awarded to the same.
>
> (Ex. [Pak.] 70)

221. Pointing out that the Executive Board of NHA did not question the remarkable assertion that PMC JV was actually "constituted by concerned NHA officials", Bayindir submits that the wording "at that time" proves that Pakistan already intended to bring in the local consortium led by SKB, *prior to* Bayindir's expulsion (Rejoinder J., p. 27, ¶¶ 87-88). At the jurisdictional hearing, Pakistan strongly challenged Bayindir's reliance on "these minutes to show that NHA had already organised a replacement consortium of local contractors prior to Bayindir's expulsion from the site in April 2001" (Tr. J. 97:26-31).

222. It would be both premature and inappropriate for the Tribunal to express any views as to the regularity of the tendering process on these (and other) materials. Whatever their

weight on the merits, it is clear that NHA informed the press immediately following the expulsion of Bayindir that a local consortium would complete the works. Under these circumstances, Bayindir's allegations as to the openness of the tendering cannot be deemed untenable for jurisdictional purposes.

223. The fact remains that, taken together, Bayindir's allegations in respect of the selective tender, and that the expulsion was due to Pakistan's decision to favor a local contractor, and that the local contractor was awarded longer completion time-limits, if proven, are clearly capable of founding a MFN claim[88].

224. As a final matter, and irrespective of the circumstances of the case, the Tribunal wishes to emphasize that it is generally difficult to prove that an objectively different situation is the result of unequal treatment rather than of the existence of reasons to treat the two situations differently. At this preliminary stage this reinforces the Tribunal in its conclusion that it has jurisdiction to hear Bayindir's most favored nation claims on the merits.

c. Bayindir's fair and equitable treatment claim

225. In its RA, Bayindir asserted that "Pakistan failed to promote and protect Bayindir's investment in violation of Article II of the BIT [and] failed to ensure the fair and equitable treatment of Bayindir's investment, in violation of Article II (2) of the BIT (RA, p. 11, ¶ 37). In summary, Bayindir's fair and equitable treatment claim is based on Pakistan's alleged "failure to provide a stable framework for Bayindir's investment" (C-Mem. J., pp. 41-43, ¶¶ 140 *et seq.*) and on the alleged fact that "Pakistan's expulsion of Bayindir was unfair and inequitable" (C-Mem. J., pp. 43-47, ¶¶ 150 *et seq.*).

226. Pakistan's case is that there is no obligation of equitable treatment in the BIT and, even if there were, there would be no violation of fair and equal treatment.

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88 At the hearing Bayindir noted that "[i]t is an aggregation of matters which we say if not answered form a basis for the Tribunal to make inferences" (Tr. J., 150:19-21); "that is information to the Tribunal which has not been denied and possibly when we get to the merits we can require some document to establish that" (Tr. J., 156:12-15).

aa. Is there an obligation of equitable treatment?

227. In its objections to jurisdiction, Pakistan pointed out that Article II (2) contains no requirement of fair and equitable treatment:

> Bayindir is presumably seeking to rely upon some form of argument based on the most favoured nation provisions of Article II(2). If that is the case, then, first one would have expected that argument to have been pleaded in the Request and particulars given. Secondly, in the absence of such particulars, all that is before the Tribunal is the reliance on a provision of the BIT which on its terms plainly does not impose the duties invoked by Bayindir.
>
> (Mem. J., p. 58, ¶ 4.53)

228. Bayindir expanded on the legal basis of the equitable treatment claim in its Counter-Memorial on Jurisdiction:

> The applicability of a fair and equitable treatment obligation to Bayindir's investment arises out of both the BIT preamble and the most favored nation clause.
>
> (C-Mem. J., p. 38, ¶ 129)

229. The preamble describes the objectives which Turkey and Pakistan pursued in entering into the BIT as follows:

> The Islamic Republic of Pakistan […] and the Republic of Turkey […] agre[e] that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources.

230. Despite the use of the verb "agree", it is doubtful that, in the absence of a specific provision in the BIT itself, the sole text of the preamble constitutes a sufficient basis for a self-standing fair and equitable treatment obligation under the BIT. It remains however for the Tribunal to consider whether, through the most favoured nation clause contained in Article II(2) of the BIT, Bayindir is entitled to rely on Pakistan's obligation to act in a fair and equitable manner contained in other BITs concluded by Pakistan. Article II(2) of the BIT reads as follows:

> Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, which ever is the most favourable.

231. Neither in its Reply nor at the jurisdictional hearing, did Pakistan dispute Bayindir's assertion that the investment treaties which Pakistan has concluded with France, the Netherlands, China, the United Kingdom, Australia, and Switzerland contains an explicit fair and equitable treatment clause (C-Mem. J., p. 38, ¶ 131-132).

232. Under these circumstances and for the purposes of assessing jurisdiction, the Tribunal considers, *prima facie*, that Pakistan is bound to treat investments of Turkish nationals "fairly and equitably."[89]

233. For the event that the Tribunal were to accept an obligation of fair and equitable treatment, Pakistan disputed that it violated it (Reply J., p. 70, ¶ 4.94):

> It was Bayindir's default under the Contract and not any alleged unfair or inequitable treatment on the part of the Government of Pakistan which led to Bayindir's withdrawal from the site.
>
> (Reply J., p. 67, ¶ 4.81)

234. The fact that an act is, or may be, in accordance with the Contract would not in and of itself rule out a treaty violation. The real question for present purposes is whether the facts alleged by Bayindir are capable of constituting a violation of Pakistan's obligation to treat Bayindir's investment fairly and equitably.

235. Accordingly, the Tribunal will review Bayindir's main allegation, namely that (i) Pakistan failed to provide a stable framework for Bayindir's investment and that (ii) Pakistan's expulsion of Bayindir was unfair and inequitable.

bb. Alleged failure to provide a stable framework for Bayindir's investment

236. In summary, Bayindir alleges that NHA was highly unstable for reasons of "lack of management continuity" as well as "malpractice and corruption" (C-Mem. J., p. 41, ¶ 143). More importantly, Bayindir contends that the government of Pakistan itself was unstable during the project:

> [E]ach time there was a change of government, Pakistan's attitude towards Bayindir's investment changed, commencing with the initial contract in 1993, its cancellation in 1994, the contract renewal in 1997, and finally the expulsion in 2001.
>
> (C-Mem. J., p. 42, ¶ 146)

237. The contents of the obligation to provide fair and equitable treatment were described in *Tecmed v. Mexico,* to which both Parties refer (see, for instance, C-Mem. J., p. 39, ¶

[89] As to the general possibility to "import" a fair and equitable treatment provision contained in another BIT, see, for instance *Pope & Talbot Inc. v. Government of Canada,* Decision of 10 April 2001, ¶¶ 111, 115.

134; Tr. J. 101:20 et seq.)[90]. Reasoning "in light of the good faith principle established by international law", the tribunal held that the concept of fair and equitable treatment obliges the State:

> [t]o provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e., without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.

238. Pakistan does not dispute that it has an obligation to maintain a stable framework for investment, but it argues that governmental instability as such does not amount to a breach of the obligation to afford fair and equitable treatment (Tr. J., 102:9-21). The Tribunal agrees thus far, and endorses Pakistan's submission that "[a]n investor can never have an expectation that governments or government personnel would not change over the course of a given project" (Tr. J., 103:6-8). However, Bayindir claims that the changes in government had a direct influence upon Pakistan's conduct towards Bayindir's investment, which is a question that should clearly be decided on the merits.

239. The Tribunal considers that, in the light of the above-quoted terms of the BIT's preamble and for purposes of establishing jurisdiction, it cannot *prima facie* be ruled out that Pakistan's fair and equitable treatment obligation comprises an obligation to maintain a stable framework for investment.

240. It is true that Pakistan asserted that the obligation to afford fair and equitable treatment as expressed in *Tecmed v. Mexico*[91] relates to "changes to the regulatory framework in

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[90] The Tribunal further notes that at the hearing this approach was implicitly endorsed also by Pakistan when declaring: "What matters so far as fair and equitable treatment is concerned is the actions of the government and whether there was an arbitrary refusal to grant a licence, or an arbitrary revocation of an existing permit" (Tr. J., 103:4-7).

which an investment has been made" and that "Bayindir can point to no equivalent regulatory changes in this case and of course there are none" (Tr. J., 102:7-9). However, the general definition of fair and equitable treatment in *Tecmed* refers not only to "all rules and regulations that will govern [the] investments" but also to "the goals of the relevant policies and administrative practices or directives"[92]. Hence, the fact that in *Tecmed* the change concerned a failure to renew a necessary operating permit does not rule out that a State can breach the 'stability limb' of its obligation through acts which do not concern the regulatory framework but more generally the State's policy towards investments.

241. Under these circumstances, the Tribunal considers that, if proven, Pakistan's alleged change in its general policy toward Bayindir's investment is capable of constituting a breach of Pakistan's obligations to accord fair and equitable treatment.

cc. The allegedly unfair and inequitable expulsion

242. Bayindir's "central allegation" (Rejoinder J., p. 20, ¶ 62) concerning the fair and equitable treatment claim is that the expulsion was motivated by "local favouritism" and that the alleged delays in completion were merely a pretext (C-Mem. J., p. 47, ¶ 164). In this respect, Bayindir's fair and equitable treatment claim coincides with its most favoured nation claim. Hence, the Tribunal refers to the discussion above (see *supra* Nos. 208 *et seq.*).

243. Besides the allegation of local favouritism, Bayindir contends that "[t]he circumstances of Bayindir's expulsion and the awarding of the contract to Pakistani contractors further indicates inequity and bad faith" (C-Mem. J., p. 45, ¶157) as the "actual motivation for ending Bayindir's employment [was] the World Bank's strong opposition to the Project" (Rejoinder J., p. 23, ¶ 73) and related "budgetary reasons" (Tr. J., 129:3-9):

> [T]here is enough to show that these elements of government action for a pre-determined result to get direct advantages both from the point of view we say of World Bank inputs and coercion, direct results for the Republic of Pakistan so far as saving money and its view of national interest is concerned. Real results for delay when it just did not have the money, particularly did not have US$, real

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[91] *Técnicas Medioambientales, Tecmed S.A., v. The United Mexican States*, Case No. ARB (AF)/00/2, Award of 29 May 2003, ¶ 154; unofficial translation (Exh. CLEX 34); ICSID Review (2004), vol. 19, no. 1, also available at http://www.worldbank.org/icsid/cases/laudo-051903%20-English.pdf.

[92] *Tecmed v. Mexico* [supra No. 237], ¶ 154.

> results for its desire to establish local industry, real saving of over $100m on the contract price at a later date, and an attempt which is still being actively pursued to recover $104m of money from our guarantees that we will be responsible to fund the roadway.
>
> (Tr. J., 150:4-17)

244. In conjunction with the selective tender process discussed above, Bayindir further suggests that "it is now public knowledge that the award of Bayindir's investment to the Pakistani consortium was riddled with corruption" (C-Mem. J., p. 46, ¶157).

245. Pakistan does not contest that the expulsion could amount to a violation of fair and equitable treatment. It alleges, however, essentially that "any suggestion that Bayindir was expelled from the site at gunpoint in implementation of some Pakistan political or economic agenda is simply wrong" (Reply J., p. 68, ¶ 4.84). More specifically, it insists that (i) Bayindir's allegations are largely based on press reports, (ii) Bayindir's claim presupposes corruption on the part of Pakistan – which cannot be readily inferred by an international tribunal, and (iii) the delays were real and NHA had a right to expel Bayindir (Tr. J., 106:32-107:10).

246. Whether Bayindir's contested allegations are true or wrong, is a question for the merits. At this stage, the only relevant issue is whether it cannot be ruled out, at least *prima facie*, that the alleged unfair and inequitable expulsion is, if proven, capable of falling within the Scope of Pakistan's obligation to accord fair and equitable treatment.

247. With specific regard to the actual reasons for the alleged expulsion, Bayindir relies on two letters of the World Bank recommending that the Project to be stopped (letter dated 26 May 2000, (Exh. [Bay.] CX 152); letter dated of 5 June 2000, (Exh. [Bay.] CX 153)) and on two notes of the Ministry of Communication and Railways (note dated 4 November 2000) (Exh. [Bay.] CX 127); note dated 2 April 2001, (Exh. [Bay.] CX 151). The letters from the World Bank emphasized that the M1 Project was financially unattractive and considered that stopping it appeared to be the most economic course of action. The notes of the Ministry appear to show that, following these letters, the financial status of the contract was addressed "at the highest level".

248. At the outset of the hearing on jurisdiction, Pakistan pointed out that these documents constitute "confidential and privileged legal materials which have apparently been taken from the files of the Government of Pakistan" (Tr. J., 18:3-5) and reserved all its rights

in this regard (Tr. J., 17:21-24). Upon a specific request by Pakistan to clarify how these documents were obtained, Bayindir explained that these document "turned up in the files of the claimant being files removed on its expulsion from Pakistan" but had "no further capacity to explain how they got there" (Tr. J., 38:29-33). Insisting on the fact that the veracity of the documents was not at stake, Bayindir informed the Tribunal that in the event Pakistan should formally challenge these documents, it would reply "by making an application under rule 34.2 that the tribunal call upon the respondent to produce these documents" (Tr. J., 39:16-19). As already mentioned, Pakistan did not formally request the Tribunal to strike these documents from the record[93]. Hence, the Tribunal considers that the documents referred to in paragraph 247 above are part of the record in this arbitration.

249. On this basis, the Tribunal considers that Bayindir's claim does not appear *prima facie* untenable.

250. Having considered that the allegedly unfair motives of expulsion, if proven, are capable of founding a fair and equitable treatment claim under the BIT, the Tribunal concludes that it has jurisdiction to hear Bayindir's claims based on Pakistan's obligation to accord fair and equitable treatment to foreign investment.

251. Hence, there is no need for the Tribunal to discuss Bayindir's additional allegations of corruption at this stage. In any event, it bears noting that the question would not be – as erroneously suggested by Pakistan – whether the Tribunal is ready or not to infer corruption and/or conspiracy in the decision to expel Bayindir and to replace it with a local contractor (see Tr. J., 106:24-32). The question would simply be whether, assuming that corruption and/or conspiracy were proven, this would fall within the scope of the fair treatment guarantee.

252. As a final matter, the Tribunal notes that Bayindir's "concerns about the independency of the Pakistani judiciary" (Rejoinder J., p. 24, ¶ 78) and "its lack of confidence in receiving due process in Pakistan" (Rejoinder J., p. 25, ¶ 81) has become moot, insofar

93 Later during the jurisdictional hearing, Pakistan's Counsel maintained the reservation over these documents and added: "they are obviously before the tribunal for what they are worth and we shall have to get instructions from the Government of Pakistan as to what our next steps should be" (Tr. J. 39:7-11). To this date, the Tribunal did not receive any request regarding these documents.

as the possible pursuit of the Contract Claims in the Pakistani arbitration is concerned. As to the allegation of lack of due process in respect of the Constitutional Petition (see for instance (Rejoinder J., p. 25, ¶ 81), the Tribunal finds that Bayindir cannot infer a breach of due process simply from NHA's Chairman writing to the Minister of Communication that "[o]ur legal counsel will defend the case and get [a favourable outcome] after appearing in Court" (Exh. [Bay.] CX 131). Moreover, as correctly pointed out by Pakistan, a claim based on failure of natural justice in judicial proceedings must take into account the system of justice as a whole, not only an individual decision in the course of proceedings (Tr. 108:13-19 referring to *Waste Management. v. Mexico*[94]). In the present case, there is no evidence whatsoever supporting, even on a *prima facie* basis, Bayindir's allegation that "the lack of independence of Pakistan's judiciary is notorious" (Rejoinder J., p. 24, ¶ 77).

d. Bayindir's expropriation claims

253. Article III (1) of the BIT states the following in connection with expropriation:

> Investments shall not be expropriated, nationalized or subject, directly or indirectly to measures of similar effects except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article II of this Agreement.

254. Bayindir contends that the following actions of Pakistan constitute an expropriation within the meaning of Article III (1) of the BIT:

(i) Pakistan's expulsion of Bayindir from the site, enforced by armed units of the Frontier Works Organization, was "a large-scale taking of Bayindir's Motorway investment [including a right to payment for several months of Interim Payment Certificates and works in progress], for the purpose of transferring property and interests into government hands before being passed along to PMC N" (C-Mem. J., pp. 49-50, ¶ 173).

(ii) On the ground that Bayindir did not re-export equipment within the time limit set by the applicable Pakistani regulation, Pakistan's Customs services encashed bank guarantees issued by Standard Chartered Bank ("SCB") securing unpaid import customs duties on behalf of Bayindir (Rejoinder J., pp. 30-31, ¶ 101-102).

94 *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award of 30 April 2004, ¶ 97 (Exh. [Pak]L-15 = Exh. [Bay]CLEX 54); available at http://www.investmentclaims.com/decisions/WasteMgmt-Mexico-2-FinalAward-30Apr2004.pdf.

255. It is not disputed that expropriation is not limited to *in rem* rights and may extend to contractual rights. More generally, the Tribunal considers that, in the absence of a specific definition in the BIT, expropriation can take place also where the measure is not technically a regulatory act. As it has been consistently held in investment cases, expropriation may arise out of a simple interference by the host State in the investor's rights with the effect of depriving the investor – totally or to a significant extent – of its investment (*RFCC v. Morocco*, [*supra* Fn. 71], ¶ 64)

256. Again, Pakistan's main contention is that the alleged taking of the investment was a mere contractual termination and that "there was no appropriation of rights or interests by the Government of Pakistan" (Reply J., p. 75, ¶ 4.108). At the jurisdictional hearing, Pakistan summarized its case as follows:

> [I]n terms of the taking of contractual rights, a party which maintains that its contractual partner has failed to perform its bargain and therefore purports to exercise its power to repudiate a contract or to terminate it is doing what any contractual party does. […] It is not acting in a sovereign capacity at all. It is quite different from something like the legislative abrogation of contractual rights which one had in Iran in 1980, which one found, for example, with the Libyan legislation abrogating concession contracts in the early 1970s.
>
> (Tr. J., 78:12-24)

257. It is common ground, as the tribunal in *Impregilo* explicitly held, "that only measures taken by Pakistan in the exercise of its sovereign power ("*puissance publique*"), and not decisions taken in the implementation or performance of the Contracts, may be considered as measures having an effect equivalent to expropriation"[95].

258. True it is that the tribunal in *Impregilo* considered that the claims based on 'unforeseen geological conditions' did "not enter within the purview [of the expropriation clause of the BIT]" and declined jurisdiction in this regard[96]. Geological conditions, let alone when unforeseen, are – by their very nature – not attributable to an act of State. Thus, the tribunal in *Impregilo* had no hesitation over excluding them from its jurisdiction[97]. It is clear that, in counsel for Pakistan's words, this kind of claim "would fail at the jurisdictional threshold" (Tr. J., 75:23-31).

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95 *Impregilo v. Pakistan* [*supra* No. 74], ¶ 281 (referred to, for instance, in Tr. 75:23-31).

96 *Impregilo v. Pakistan* [*supra* No. 74], ¶ 282.

97 *Impregilo v. Pakistan* [*supra* No. 74], ¶ 283.

259. The situation is very different where, as in this case, a party invokes an action by the State, which may or may not have been taken in *puissance publique*. Unlike the case of geological conditions, it is difficult to rule out *puissance publique* upon a *prima facie* analysis at the jurisdictional stage. Significantly, the tribunal in *Impregilo* asserted jurisdiction over Impregilo's other claims based on "alleged breaches of contract" because it was not then in a position to decide whether or not these could be considered as breaches of Article 5 of the BIT [i.e., expropriation]"[98]. Similarly, the tribunal in *Siemens* considered that "the issue whether the breach of the Contract may or may not be an act of expropriation is a matter related to the merits of the dispute"[99]. Indeed, Pakistan's argument that "expropriation of contract rights […] goes beyond the exercise or purported exercise of contractual powers and capacities" relies on the *Waste Management* case (Tr. J., 202:16-33), which was an award *on the merits*[100].

260. In the present case, and without in any manner prejudging its eventual determination of the relevant facts, the Tribunal cannot rule out that there may have been a sufficient involvement by the State in the alleged taking of Bayindir's investment so as to amount to an expropriation under the BIT.

261. The Tribunal is reinforced in this conclusion by the unchallenged fact that Bayindir's equipment was retained on site following the expulsion. In the Tribunal's understanding,

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98 *Impregilo v. Pakistan* [*supra* No. 74], ¶ 284. The tribunal concluded this passage noting that "only after a careful examination of those alleged breaches will the Tribunal be able to determine whether the behaviour of Pakistan went beyond that which an ordinary Contracting party could have adopted".

99 *Siemens v. Argentine* [*supra* Fn. 80], ¶ 182.

100 *Waste Management. v. Mexico* [*supra* Fn. 94], ¶ 174; in the relevant section the tribunal was dealing with the question "Was there conduct tantamount to an expropriation of Acaverde's contractual rights?". This Tribunal observes that this question was not dealt with in the Decision on Jurisdiction (see *Waste Management, Inc. v. Mexico* ICSID Case No. ARB(AF)/98/2, Decision on Jurisdiction of 2 June 2000; available at http://www.investmentclaims.com/decisions/WasteMgmt-Mexico-2-Jurisdiction-26Jun2002.pdf). For the sake of completeness, it is useful to observe that at the jurisdictional stage the tribunal held that "it is clear that one and the same measure may give rise to different types of claims in different courts or tribunals. Therefore, something that under Mexican legislation would constitute a series of breaches of contract expressed as non-payment of certain invoices, violation of exclusivity clauses in a concession agreement, etc., could, under the NAFTA, be interpreted as a lack of fair and equitable treatment of a foreign investment by a government (Article 1105 of NAFTA) or as measures constituting "expropriation" under Article 1110 of the NAFTA. In any case, it is not the mission of the Tribunal, at this stage of the proceedings, to make an in-depth analysis of alleged breaches of the NAFTA invoked by the Claimant, since that task, should it become necessary, belongs to an analysis of the merits of the question" (*ibid.*, ¶ 27(a)).

Bayindir's claim for taking of its investment includes the retention of the equipment. Pakistan objects that this retention was provided for in the Contract (Reply J., pp. 69-70, ¶¶ 487-491), including a mechanism for compensating Bayindir for the equipment:

> Any issue relating to amounts due to Bayindir for the value of such equipment, if any, shall be calculated and paid after the completion of the project in accordance with Clause 63.3 of the Conditions of Contract.
>
> (Reply J., p. 70, ¶ 4.91)

262. Here again, this argument neglects the principle of the possible coincidence of treaty and contract claims. Moreover, in the Tribunal's view, such a payment may qualify as "compensation" within the meaning of Article III of the BIT. Whether such compensation would be "prompt, adequate, and effective", which may render an expropriation of the equipment lawful under the BIT, is a question for the merits.

e. Conclusion

263. For all these reasons, the Tribunal concludes that it has jurisdiction over the Treaty Claims raised in these proceedings. The Tribunal emphasizes that this decision is not equivalent to joining the question of jurisdiction to the merits as contemplated by Rule 41(4) of the ICSID Arbitration Rules[101]. Rather, it holds that Bayindir's claims are capable of constituting a violation of the BIT. As it emphasized on several occasions, the threshold at the jurisdictional level, which implies a *prima facie* standard, is different from the standards which the Claimant will have to discharge on the merits to show an actual treaty breach.

E. SHOULD THE TRIBUNAL STAY THE CURRENT PROCEEDINGS?

264. Pakistan finally asserts that even if *quod non* the Tribunal would have jurisdiction to determine the Treaty Claims, because of their intrinsic contractual nature, the current proceedings for breach of treaty should be stayed until the arbitral tribunal provided in the Contract has determined the contractual issues.

265. This approach has been adopted in the much-debated *SGS v. Philippines* case. Faced with the situation where the Philippines' responsibility under the BIT – a matter which

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[101] From this point of view, the Tribunal cannot share the approach adopted by the tribunal in *Impregilo v. Pakistan* [*supra* No. 74], ¶ 285.

did fall within its jurisdiction – was subject to ”the factual predicate of a determination” by the Regional Trial Court of the total amount owing by the respondent, the tribunal held that:

> [t]hat being so, justice would be best served if the Tribunal were to stay the present proceedings pending determination of the amount payable, either by agreement between the parties or by the Philippine courts in accordance with Article 12 of the CISS Agreement.[102]

266. The view that an ICSID tribunal has the power to stay proceedings pending the determination, by some other competent forum, of an issue relevant to its own decision, explicit in *SGS v. Philippines*, is also present, though impliedly, in the discussion in *SGS v. Pakistan*[103]. The Tribunal agrees with Pakistan's view that this "course of action […] would not involve a refusal to exercise jurisdiction (of the kind condemned by the ad hoc committee in the *Vivendi* Annulment decision)" (Reply J., p. 23, ¶ 2.49; see also Tr. J., 88:4-19).

267. Pakistan recognizes that its position was rejected by the tribunal in *Impregilo* (Reply J. p. 23, ¶ 2.50) where, "drawing upon the approach that was adopted in *SGS v. Philippines*[104], Pakistan submit[ed] that th[at] Tribunal should stay these proceedings, in order to allow the contractual dispute resolution mechanisms to take their course"[105].

268. In *Impregilo*, the tribunal held, *inter alia*, that:

> [w]hilst arguably justified in some situations, a stay of proceedings would be inappropriate here, for a number of reasons. Firstly, such a stay if anything, would confuse the essential distinction between the Treaty Claims and the Contract Claims as set out above. Since the two enquiries are fundamentally different (albeit with some overlap), it is not obvious that the contractual dispute resolution mechanisms in a case of this sort will be undermined in any substantial sense by the determination of separate and distinct Treaty Claims. Indeed, this is all the more so in a case such as the present, where (*unlike SGS v. Philippines*) the parties to these proceedings (Impregilo and Pakistan) are different from the parties to the contract arbitration proceedings (GBC and WAPDA).
>
> Further, if a stay was ordered, as Pakistan has sought, it is unclear for how long this should be maintained; what precise events might trigger its cessation; and what attitude this Tribunal ought then to take on a resumed hearing to any proceedings or findings that may have occurred in the interim in Lahore.[106]

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102 *SGS v. Philippines* [*supra* Fn. 78], ¶¶ 174-175

103 *SGS v. Pakistan* [*supra* Fn. 32], ¶¶ 185-189.

104 *SGS v. Philippines* [*supra* Fn. 78].

105 *Impregilo v. Pakistan* [*supra* No. 74], ¶ 234.

106 *Impregilo v. Pakistan* [*supra* No. 74], ¶¶ 289-290

269. According to Pakistan, on the facts of the present case, there are compelling reasons for departing from the solution adopted by *Impregilo*. This allegedly "follows both from considerations of logic and a practical concern for the orderly settlement of disputes" (Reply J., p. 22, ¶ 2.48). As to the latter, Pakistan contends that the (contractual) arbitral tribunal sitting in Pakistan is already seized of the dispute between NHA and Bayindir and that (subject to a stay in these ICSID proceedings and to the latter tribunal's own decision on Bayindir's challenge to jurisdiction), it is obliged to proceed to the merits, regardless of extraneous factors.

270. In the Tribunal's view its jurisdiction under the BIT allows it – if this should prove necessary – to resolve any underlying contract issue as a preliminary question. Exactly like the arbitral tribunal sitting in Pakistan, this Tribunal should proceed with the merits of the case. This is an inevitable consequence of the principle of the distinct nature of treaty and contract claims. The Tribunal is aware that this system implies an intrinsic risk of contradictory decisions or double recovery. In this respect, in *Camuzzi v. Argentina* – a case where it was explicitly held that "the claim was […] founded on both the contract and the Treaty" – the tribunal noted that "this is an issue belonging to the merits of the dispute" and for which "international law and decisions offer numerous mechanisms for preventing the possibility of double recovery"[107].

271. In any event, accepting that it has discretion to order the stay of the present proceedings as requested by Pakistan, that discretion is to be exercised only if there are truly compelling reasons. In the present case, the Tribunal cannot see any compelling reason to stay the current arbitration.

272. The Tribunal is sympathetic towards the efforts of the tribunal in *SGS v. Philippines* "to give effect to the parties' contracts while respecting the general language of BIT dispute settlement provisions"[108]. However, to do so raises several practical difficulties. In particular, it may be very difficult to decide, at this preliminary stage, which contractual issues (if any) will have to be addressed by the Tribunal on the merits.

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107 *Camuzzi v. Argentina* [*supra* Fn. 67], ¶ 89.

108 *SGS v. Philippines* [*supra* Fn. 78], ¶ 134.

273. Moreover, as a leading commentator recently put it, in practice the decision to stay the ICSID proceedings "results in the BIT tribunal having jurisdiction over an empty shell and depriving the BIT dispute resolution of any meaning"[109].

F. COSTS

274. In its Counter-Memorial, Bayindir made the following submission with respect to costs:

> Before both the courts in Pakistan and Turkey, the GOP has sought to benefit from the fact that Bayindir had seized ICSID, without revealing that it would be resisting ICSID's jurisdiction regarding Bayindir's claims. Under the circumstances, it would seem unfair that Bayindir should bear the costs of this first part of the proceedings. While Bayindir accepts that the Tribunal may wish to reserve its decision on costs until the Final Award, it submits that the costs for the jurisdictional phase of the arbitration should be borne by Pakistan.
>
> (C-Mem. J. p. 89 ¶ 314)

275. In a letter of its counsel dated 16 August 2005, Pakistan drew the Tribunal's attention to the waste of costs due to Bayindir's late abandonment of its Contract Claims and requested the following relief:

> [D]eal with the issues of principle and apportionment relating to costs in its award/decision, including the wasted costs due to Bayindir's late change in position, and to award the Government of Pakistan its costs and expenses incurred as a result of these proceedings.

276. At the jurisdictional hearing (Tr. J., 13:2-4), Pakistan noted that Bayindir's decision to abandon its Contract Claims in this arbitration after a double exchange of written submissions, has engendered a substantial waste of costs. It also submitted that a significant amount of preparation work in view of the jurisdictional hearing became redundant, not only for Pakistan but also for the members of the Tribunal.

277. When invited to respond, Bayindir submitted that "the issue of costs should be a matter for submission after the award on objections to jurisdiction" (letter of counsel dated 26 August 2005).

278. At this stage, the Tribunal takes due note of the parties' positions and requests with respect to costs. It decides, however, to deal with costs at the merits stage, which will allow it to make an overall assessment of costs. It will then also take into account the

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109 E. GAILLARD, Investment treaty Arbitration and Jurisdiction Over Contract Claims – the SGS Cases Considered, in: T. Weiler (Ed) International investment law and arbitration: leading cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, London, 2005, p. 334.

consequences of Bayindir’s initial choice to raise both Treaty and Contract Claims and of its late decision to abandon the Contract Claims.

DECISION ON JURISDICTION

For the reasons set forth above, the Tribunal makes the following decision:

a) The Arbitral Tribunal has jurisdiction over the dispute submitted to it in this arbitration.

b) The Tribunal denies Respondent's application to suspend these proceedings.

c) The Tribunal will, accordingly, make the necessary order for the continuation of the proceedings on the merits.

d) The decision on costs is deferred to the second phase of the arbitration on the merits.

Done on 14 November 2005

[signed]

Sir Franklin Berman

Prof. Karl-Heinz Böckstiegel

Prof. Gabrielle Kaufmann-Kohler