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

AWARD

Rendered by an Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, President

Sir Franklin Berman, Arbitrator

Prof. Karl-Heinz Böckstiegel, Arbitrator

Martina Polasek, Secretary

Date of Dispatch to the Parties: August 27, 2009

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TABLE OF ABBREVIATIONS

1997 Contract	Agreement for the Revival of Contract Agreement for the Construction of Islamabad-Peshawar Motorway of 29 March 1997
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Award	The present award on the merits of the dispute
Bayindir	Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş.
C-Mem. J.	Bayindir's Counter-Memorial (on Jurisdiction) dated 31 March 2005
C-Mem. M.	Pakistan's Counter-Memorial (on the Merits) dated 25 August 2006
Contract	1993 Contract as revived by the1997 Contract
EOT	Extension of time
Exh. [Bay.] B	Bayindir's Exhibit filed with its RA
Exh. [Bay.] CX	Bayindir's Exhibit (Documentary Evidence)
Exh. [Bay.] CLEX	Bayindir's Exhibit (Legal Materials)
Exh. [Bay.] RP	Bayindir's Exhibit filed with its RP
Exh. [Pak.] C	Pakistan's Exhibit (Principal Contractual Documents) [Volume 2 of Mem. J.]
Exh. [Pak.] CM	Pakistan's Exhibit (Documentary exhibits) filed with its C.-Mem. M.
Exh. [Pak.] CM LEX	Pakistan's Exhibit (Legal Materials) filed with its C.-Mem. M.
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.] R	Pakistan's Exhibit (Documentary exhibits) filed with its Rej. M.
Exh. [Pak.] RB	Pakistan's Exhibit (Documentary exhibits attached to the witness statement of Raymond Bridger) [Volumes 7 to 8 of C.-Mem. M.]
Exh. [Pak.] Resp RP	Pakistan's Exhibit filed with its Resp RP
Exh. [Pak.] RL	Pakistan's Exhibit (Legal Materials) [Volume 3 to Reply J.]
Exh. [Pak.] R LEX	Pakistan's Exhibit (Legal Materials) filed with its Rej. M.
FET	Fair and equitable treatment
FWO	Frontier Works Organization
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States

IPA	Interim Payment Application
IPC	Interim Payment Certificate
M-1 Project	Pakistan Islamabad-Peshawar Motorway
Mem. J.	Pakistan's Objections to Jurisdiction dated 31 December 2004
Mem. M.	Bayindir's Memorial (on the Merits) dated 25 April 2006
MFN	Most favoured nation
NHA	National Highway Authority of Pakistan
PHB [Bay.]	Bayindir's post-hearing brief (on the Merits) dated 16 July 2008
PHB [Pak.]	Pakistan's post-hearing brief (on the Merits) dated 16 July 2008
PMC-JV	Pakistani Motorway Contractors Joint Venture
PSDP	Public Sector Development Programme
RA or Request	Bayindir's Request of Arbitration of 15 April 2002
Rejoinder J.	Bayindir's Rejoinder (on Jurisdiction) dated 17 June 2005
Rej. M.	Pakistan's Rejoinder (on the Merits) dated 24 May 2007
Reply J.	Pakistan's Reply (on Jurisdiction) of 9 May 2005
Reply M.	Bayindir's Reply (on the Merits) dated 21 February 2007
RP	Bayindir's Request for Provisional Measures of 20 July 2004
Resp RP	Pakistan's Response of 27 August 2004 to RP
Tr. P.	Transcript of the preliminary hearing
Tr. J.	Transcript of the hearing on jurisdiction
Tr. M.	Transcript of the hearing on the merits
Treaty	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
VCLT	Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969 - UN Treaty Series, vol. 1155, p. 331
WS	Witness Statement

I. THE FACTS

1. This Chapter summarizes the factual background of this arbitration in so far as that is necessary to understand the issues raised in the present case.

A. THE PARTIES

a. The Claimant

2. The Claimant, Bayindir Insaat Turizm Ticaret Ve Sanayi 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 has been represented in this arbitration by Mr. Farrukh Karim Qureshi from the law firm of Samdani & Qureshi, Islamabad. The following have acted as co-counsel: Michael Bühler, John F. Crawford, Sigvard Jarvin and Jonathan Eades from the law firm of Jones Day, Paris, France (from 21 January 2004 to 30 June 2005); Emmanuel Gaillard and John Savage from the law firm of Shearman & Sterling LLP (from 1 July 2005 to 14 July 2005); Gavan Griffith from Essex Court Chambers, London (from 18 July 2005 to 6 December 2005); and Sir Michael Wood from 20 Essex Street Chambers, London (from June 2007 to 16 November 2007).

5. In the last stage of the arbitration concerning the merits, Bayindir was represented by: Farrukh Karim Qureshi and Nudrat Ejaz Piracha, Samdani & Qureshi, Islamabad; Stanimir A. Alexandrov, Marinn Carlson and Jennifer Haworth McCandless, Sidley Austin LLP, Washington D.C; and Judge Stephen M. Schwebel, Washington D.C.

b. The Respondent

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

7. The Respondent has been represented in this arbitration by: the Hon. Malik Muhammad Qayyum, Attorney General for Pakistan (from 2007 to 2008), and by the former Attorney General for Pakistan Mr. Makdoom Ali Khan during the proceeding on jurisdiction (up until 2007). The following have acted as co-counsel: Christopher Greenwood CMG, QC (up until 5 February 2009), Samuel Wordsworth of Essex Court Chambers, London (since 19 July 2004); V. V. Veeder QC from Essex Court Chambers, London (from 19 July 2004 to 28 November 2007); Umar Atta Bandial from Umar Bandial & Associates, Lahore (from 19 July 2004 to 16 July 2005); Rodman R. Bundy, Loretta Malintoppi and Nicholas Minogue from Eversheds, Paris (since 19 July 2004), and Iftikharuddin Riaz from Bhandari; Naqvi & Riaz, Lahore, Pakistan (since 16 July 2005).

B. SUMMARY OF THE MAIN FACTS

8. The following summary is meant to give a general overview of the present dispute. It does not claim to include all factual aspects which will later turn out to be of relevance, particularly as they emerged from the extensive testimony of witnesses and experts at the hearing. The latter will be discussed, as far as relevant, in the context of the Tribunal's analysis of the disputed issues.

a. The M1 Motorway Project

9. 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 under Pakistani law with the right to sue and to be sued in its own name (Section 3(2) National Highway Authority Act 1991).

10. Among other projects, NHA planned the construction of a six-lane motorway and ancillary works known as the "Pakistan Islamabad-Peshawar Motorway" (the "M-1 Project").

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

document 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 Part I incorporated the FIDIC General Conditions of Contract for Works of Civil Engineering Construction (1987 edition), and Part II, entitled "Conditions of Particular Applications," incorporated the amendments and supplements to Part I negotiated by the parties.

12. Disputes arose under the 1993 Contract, which NHA and Bayindir resolved in 1997. As part of this resolution, the parties executed a Memorandum of Agreement on 29 March 1997 "with the objective of reviving the Contract Agreement dated 18 March 1993" (Exh. [Pak.] C-5). Under Clause 8 of the 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]

13. 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 in the Memorandum of Agreement signed on 29 March 1997.

14. For the sake of simplicity, the Tribunal will use the terminology "clause" or "sub-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), supplemented by the Conditions of Particular Applications (Conditions of Contract – Part II incorporated in the 1993 agreement), as revived and amended by the 1997 Contract. The Tribunal will refer to the (revived) contractual relationship as the "Contract."

15. The Contract contains a choice of the laws of Pakistan as the governing law.

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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).

16. 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"). Accordingly, NHA paid to Bayindir, as Mobilisation Advance, two separate amounts of USD 96,645,563.50 and PKR 2,523,009,751.70 respectively (RP, ¶ 22; Mem. J., ¶ 2.16).

17. 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., Denizbankthe A.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.[2]

18. The performance of the Contract was to be supervised by an Engineer. Under the Contract, the Engineer was to be appointed by the Employer (Part I – General Conditions – sub-clause 1.1(iv)) and to obtain the Employer's approval before exercising his authority whenever the terms of his appointment so provided (Part I – General Conditions – sub-clause 2.1(b)). The Engineer was, for instance, required to obtain the prior written approval of the Employer before deciding on a request for an extension of time by the Contractor under clause 44 of the Contract (Part II – Conditions of Particular Applications – sub-clause 2.1(e)).

19. By contrast, in those cases where the Contract required the Engineer to exercise his discretion, he was to do so "impartially within the terms of the Contract and having

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[2] The terms of the reimbursement were later modified. In June 1999, this mechanism was replaced with a rollover system; if the amount of a given month's Mobilisation Advance deduction exceeded the amount due to Bayindir under a particular Interim Payment Certificate (IPC), the difference due to Pakistan would be carried forward and deducted from the next IPC. Second, in Addendum No. 9, the fixed Mobilisation Advance repayment schedule was replaced by a percentage deduction from each IPC, as a result of which the Mobilisation Advance deduction would always be a percentage of Bayindir's IPC payment, and could never exceed the IPC payment due to Bayindir.

regard to all the circumstances" (Part I – General Conditions – sub-clause 2(6)). The issuance of the notices contemplated in sub-clauses 46.1 and 63.1(b)(ii) are examples of cases in which the Engineer was to exercise his discretion and did not need the Employer's prior approval. According to sub-clause 46.1, the Engineer was to notify the Contractor if "in the opinion of the Engineer" the rate of progress of the works in any section was too slow to comply with the agreed time for completion, for any reason other than one which would entitle the Contractor to an extension of time. Similarly, if in the Engineer's opinion the Contractor had failed to proceed with the works without a reasonable excuse, the Engineer was to issue a certificate under sub-clause 63.1(b)(ii).

20. The Engineer was entitled to appoint a representative, the "Engineer's Representative," who was to carry out the duties and exercise the authority delegated to him (Part I – General Conditions – sub-clause 2.2).

21. The Contract also set forth a multi-tier mechanism for the settlement of disputes, providing first for an Engineer's decision and then for arbitration as follows:

- Any matter in dispute must first be referred in writing to the Engineer (67.1(1) of the Contract);
- A party dissatisfied with the ensuing decision of the Engineer[3] "may give notice to the other party of his intention to commence arbitration" (67.1(3) of the Contract);
- The parties must then attempt to settle the dispute amicably and, unless they agree otherwise, cannot commence arbitration at the earliest 56 days after the notice of intention to commence arbitration;
- The dispute will then be resolved by arbitration "under the rules and provisions of the Arbitration Act [of Pakistan] 1940 as amended or any statutory modification or re-enactment thereof for the time being in force."

22. Other relevant provisions of the Contract will be referred to later in the context of the consideration of the disputed issues.

b. The origin of the present dispute

23. On 3 June 1998, the Engineer issued the order to commence construction; the original completion date foreseen was 31 July 2000.[4]

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[3] 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."

24. Between September 1999 and 20 April 2001, Bayindir submitted several claims for payment and four claims for extension of time (EOT) invoking different omissions on the part of Pakistan (in particular delays in handing over the possession of the land[5]). The first two EOT claims (EOT 01 and EOT 02) were settled by agreement during a meeting held on 18 February 2000. This agreement[6] led to the execution of Addendum No. 9 of 17 April 2000, 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 2001 (the Priority Sections).

25. It is disputed whether, after the revival of the Contract, the performance of Bayindir was satisfactory or not. However, Bayindir has not seriously disputed that before the conclusion of Addendum No. 9 in April 2000, it had almost stopped work on the site. Moreover, as will be discussed later, the evidence on the record shows that even after the conclusion of Addendum No. 9, serious concerns remained over the pace of the work and the quality of the equipment that Bayindir used on the site.

26. On 2 December 2000, the Engineer's Representative, Mr. Raymond Bridger, issued a notice pursuant to sub-clause 46.1 of the Contract advising Bayindir that "the rate of progress of the works is currently too slow to comply with the Time for Completion of the Contract" and asking it to "submit details as to the actions that [it] propose[s], in order to comply with the Time for Completion of the Contract" (Exh. [Pak.] CM-76).

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4 *See* 1997 Contract. This date was extended to 31 December 2002 by Addendum No. 9 dated 17 April 2000 (see *infra* ¶¶ 24-28).

5 During the same period, Bayindir also issued several claims for delay in the settlement of Bayindir's monthly progress payments (IPC).

6 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).

27. By letter of 11 December 2000, Bayindir disputed the sub-clause 46.1 notice and referred to a number of reasons why it was entitled to an extension of time (Exh. [Pak.] CM-78). In several letters sent shortly thereafter to Bayindir, Mr. Bridger observed that there were no significant reasons preventing Bayindir from achieving the required targets (Exh. [Pak.] RB-58) and proposed to hold a meeting with Bayindir "to discuss in detail feasible dates for completion of all remaining works in Section-I (Part-I) to ensure overall completion of Part I by March 23, 2001" (Exh. [Pak.] CM-80). By late December 2000, the Engineer's Representative further reminded Bayindir of the need to submit a revised program for the completion of the Priority Sections (Exh. [Pak.] CM-82).

28. At a contract progress meeting on 4 January 2001, Bayindir's representatives announced that a revised program was under preparation and would be submitted in the following week (Exh. [Pak.] RB-99). A few days later, on 13 January 2001, Bayindir contended however that the sub-clause 46.1 notice was unjustified and announced a detailed claim for extension for the following week. Two days later, it submitted EOT 03 for the completion of the two Priority Sections by October instead of March 2001, asserting primarily that NHA had failed “to hand over the site pursuant to Addendum No. 9” (Exh. [Bay.] B-15). At the same time, Bayindir submitted a revised program for the completion of the works.

29. At another contract progress meeting on 30 January 2001, Mr. Bridger noted that he was very much concerned about Bayindir's lack of progress, in particular in connection with the productivity levels in the Priority Sections 1 and 5. He further added that "shortage of equipment/machinery available with BCI [was] the obvious cause of delays" and that he had long been reminding this to Bayindir (Exh. [Pak.] RB-100).

30. On 26 February 2001, the President of Bayindir Construction, Mr. Sadik Can, asked the Turkish Ambassador in Islamabad to arrange an opportunity for him "to explain to H.E. the Minister for Communications and the Chairman of National Highway Authority about our continuing efforts and sincere desire to achieve the completion of this prestigious Project" (Exh. [Pak.] CM-180). The Ambassador proposed a "high level meeting between the Company and National Highway Authority" (Exh. [Pak.] CM-181 and Exh. [Pak.] CM-182), which took place on 19 March 2001. The contents of this meeting are disputed and will be discussed later. It is however established that,

following this meeting, Mr. Bridger wrote to Bayindir observing that the list of obstructions referred to by Bayindir at the meeting was "obsolete and in no way indicative of the situation at site" (Exh. [Pak.] RB-67).

31. In the meantime, Mr. Bridger had again expressed concern about the insufficient progress on the Priority Sections and mentioned that the Contract provided for liquidated damages under such circumstances (Exh. [Pak.] CM-92). Bayindir replied shortly thereafter that the delays were due to the reasons explained in EOT 03 and that the imposition of liquidated damages would be in breach of the Contract (Exh. [Pak.] CM-93).

32. The draft minutes of the contract progress meeting of 29 March 2001 referred to a joint meeting, held on 21 March 2001 at NHA headquarters, during which Bayindir had informed that "US$ 16 Million worth PIB equipment (including spares) currently on site [was] all that BCI shall be handling over to NHA upon completion and nothing more" (Exh. [Bay.] CX-153). According to this document "BCI also claimed that they are not contractually obliged to meet the shortfall as stated by PMC/NHA, PMC/NHA is presently reviewing this stand of BCI under the terms of the Contract." A few days later, Mr. Bridger requested Bayindir to revise its position on permanent equipment (Exh. [Pak.] RB-54). Bayindir replied on 7 April 2001 disputing that it was required to import any specific quantity of equipment on a permanent basis (Exh. [Pak.] RB-54).

33. On 3 April 2001, in response to Bayindir's EOT 03, a limited extension of 27 days for Part I was communicated to Bayindir (Exh. [Pak.] CM-101). Bayindir challenged such extension and referred it to the Engineer for a decision pursuant to Clause 67.1 of the Contract (Exh. [Pak.] R-20).

34. On 12 April 2001, the Chairman of NHA made a presentation to General Musharraf regarding *inter alia* the M-1 Project (Exh. [Bay.] CX-221). The content of this meeting is disputed and will be discussed later.

35. On 14 April 2001, Mr. Bridger wrote to Bayindir stating *inter alia* that it had failed to comply with the sub-clause 46.1 notice and that it had come to his attention that Bayindir was considerably behind in payments to its subcontractors (Exh. [Pak.] RB-

69). Bayindir replied *inter alia* reiterating its entitlement to a longer extension of time and referring to the pending decision of the Engineer under Clause 67.1 (Exh. [Pak.] CM-107).

36. On 19 April 2001, the Engineer certified to NHA that "pursuant to Sub-Clause 63.1/b(ii) of the Conditions of Contract in [his] opinion the Contractor without reasonable excuse has failed to proceed with the Works, within 28 days after receiving notice pursuant to Sub-Clause 46.1 of the Conditions of Contract" (Exh. [Pak.] R-22).

37. On 20 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). On the same day, Bayindir notified NHA that it had been unable to complete the Priority Sections "due to reasons beyond [its] control" and requested that "the procedure [i.e. 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). It is therefore undisputed that the two Priority Sections were not completed on the dates set in Addendum No. 9 (23 March 2001) extended under EOT 03.

38. On 23 April 2001, NHA served a "Notice of Termination of Contract" upon Bayindir requiring the latter to hand over possession of the site within 14 days (Exh. [Bay.] B-26). Thereafter, staff from the Frontier Works Organization ("FWO"), the civil engineering section of the Pakistani army, secured the site and Bayindir's personnel were evacuated.

39. 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 period of 1460 days (Exh. [Bay.] CX-29).

c. Related litigation

40. From January to July 2001, Bayindir served several notices of intention to commence arbitration pursuant to sub-clause 67.1 of the Contract. The arbitration was not pursued, although the matters remained unsettled.[7]

41. 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). A few days later, 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).[8]

42. 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. Bayindir replied on 10 April 2003 that it had already submitted the matter to ICSID and requested that the award in the ICSID arbitration be awaited (Exh. [Pak.] D-23).

43. 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 had decided to revive 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. After the Tribunal's Decision on Jurisdiction (14 November 2005), the Claimant requested the Tribunal to recommend, by way of a provisional measure, that

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[7] 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 sub-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).

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

the Respondent desist from pursuing the arbitration in Pakistan. By Procedural Order No. 12 of 14 April 2008, the Tribunal rejected Bayindir's application.

44. In the meantime, on 24 April 2001, NHA had called the Mobilisation Advance Guarantees in an amount of approximately USD 100,000,000. Bayindir 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 No. 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.

45. On 26 April 2006, NHA filed an action against Is Bank for the collection of the interest accrued (and to accrue) on the amount of part of the Mobilisation Advance Guarantees. On 14 March 2007, Is Bank filed an application before the same court requesting that no default interest be deemed to have accrued, since NHA had not sought to enforce the judgment granted in its favour. In its response dated 10 April 2007, NHA disputed Is Bank's contentions based in particular on the fact that the first encashment request was made well before the Tribunal's first decision and that immediately after the encashment request, Is Bank and Bayindir colluded to obtain an order from this Tribunal.

46. Pursuant to Procedural Order No. 11 of 14 April 2008 (PO#11), the Claimant was directed to take the steps necessary and use its best endeavours to procure the withdrawal by Is Bank of its application dated 14 March 2007. By letter of 24 July 2008, the Claimant informed the Tribunal and the Respondent that Is Bank was prepared to agree with NHA to suspend the Turkish Court proceedings over NHA's claim for interest until the Tribunal's Award. On 1 August 2008, the Respondent opposed the Claimant's proposal and requested security. The procedure following the Respondent's request is described *infra* at paragraphs 64-66.

II. PROCEDURAL HISTORY

A. INITIAL PHASE

47. 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 41 exhibits (Exh. [Bay.] B-1 to B-41). In its Request Bayindir 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;
>
> In addition to the amounts set out in paragraph 39 above Bayindir is entitled to recover 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)

48. 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.

49. After a long and extensive exchange of correspondence between Bayindir,[9] Pakistan,[10] NHA[11] 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.

50. 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 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.

51. 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

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9 In particular, on 10 February 2003, Bayindir supplemented its RA by the submission of a Volume III, with 13 exhibits (Exh [Bay.] B-41 to B-53).

10 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).

11 In particular, on 28 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 28 August 2003, p. 2, emphasis in the original).

date. The same letter informed the Parties that Mr. José-Antonio Rivas, Counsel, ICSID, would serve as Secretary of the Tribunal.[12]

B. THE PROCEEDINGS ON PROVISIONAL MEASURES

52. On 20 July 2004, Bayindir submitted a Request for Provisional Measures (RP), 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 (Resp RP).

53. The Arbitral Tribunal held a session on procedural matters and provisional measures (the "preliminary 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.).

54. 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,[13] 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 not proceed before this Tribunal rendered its Decision on Jurisdiction (Tr. P. 153:17–155:25).

55. On 29 November 2004, the Tribunal rendered its Decision on the RP (PO#1), which provided as follows:

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[12] In the course of the proceedings, Mr. Rivas was replaced by Ms. Martina Polasek, Counsel, ICSID, on 11 May 2005.

[13] As amended at the preliminary hearing, this request read 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 preliminary hearing of 24 September 2004).

> 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 ¶ 78)

56. As a threshold matter in its decision on provisional measures, the Tribunal emphasized that the reasons leading to such decision were "without prejudice to a later decision of this Tribunal on Pakistan's objection to the jurisdiction of the Tribunal" (PO#1 ¶ 40).

57. NHA later obtained a final judgment from the Turkish courts with regard to the encashment of the Mobilisation Advance Guarantees. On 26 April 2006, NHA filed an action against Is Bank for the collection of the interest accrued (and to accrue until the date of payment) on the amount of part of these Guarantees. On 14 March 2007, Is Bank filed an application before the same court requesting that no default interest be deemed to have accrued, since NHA had not sought to enforce the judgment granted in its favour.

58. On 1 November 2007, Pakistan filed a request for provisional measures seeking that Bayindir ensures the withdrawal of Is Bank's application of 14 March 2007. On 30 November 2007, Bayindir filed a response to Pakistan's request. In accordance with the directions of the Tribunal, the Parties further submitted a reply and a rejoinder, respectively, on 19 December 2007 and on 7 January 2008.

59. On 14 April 2008, the Tribunal issued Procedural Order No. 11 (PO#11) on the Respondent's request for provisional measures. The operative part of PO#11 provided as follows:

> On the basis of the foregoing reasons, having reviewed the parties' written submissions, the Tribunal issues the following order:
>
> (i) Bayindir shall take whatever steps may be necessary and use its best endeavours to procure the withdrawal by Is Bank of its application dated 14 March 2007;
>
> (ii) In accordance with the rationale of the Tribunal's decision of 29 November 2004, Pakistan shall 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 encashment of interest on the Mobilisation Advance Guarantees;
>
> (iii) The foregoing directions remain in effect until (a) an arbitral award is rendered on the merits; or (b)·they are amended or revoked by order of the Tribunal;
>
> (iv) The Tribunal will rule on the costs of this application in its decision on the merits of the dispute.
>
> (PO#11, ¶ 41)

60. At the same time, on 30 November 2007, Bayindir filed a request for provisional measures seeking in substance the Tribunal's recommendation that NHA be caused to discontinue the arbitration under way in Pakistan with regard to the Contract. On 19 December 2007, Pakistan submitted a response to Bayindir's Request seeking its dismissal. In accordance with the directions of the Tribunal, the Parties further submitted a reply and a rejoinder, respectively, on 7 and 16 January 2008.

61. Also on 14 April 2008, the Tribunal issued Procedural Order No. 12 (PO#12) on the Claimant's request for provisional measures. The operative part of PO#12 provided as follows:

> On the basis of the foregoing reasons, the Tribunal:
>
> (i) denies Bayindir's request "that Respondent should be instructed to ensure that NHA desists from pursuing the arbitration in Pakistan that was suspended under Procedural Order No. 1, which NHA has since restarted, or be caused to suspend such, proceedings pending resolution of this dispute before this Tribunal";
>
> (ii) will rule on the costs of this application in its decision on the merits.
>
> (PO#12, ¶ 30)

62. At the end of the hearing on the merits, the Respondent inquired into the implementation of PO#11 and the Claimant undertook to revert shortly to the Respondent and the Tribunal on this issue.

63. By letter of 16 June 2008, the Claimant advised that it had again urged Is Bank to act promptly to respect the Tribunal's instructions given in PO#11 and attached a copy of its letter to this effect, dated 13 June 2008, as well as an English translation.

64. By letter of 24 July 2008, the Claimant informed the Tribunal and the Respondent that Is Bank was prepared to agree with NHA to suspend the Turkish Court proceedings over NHA's claim for interest until the Tribunal's award on the merits. In accordance with the Tribunal's directions, on 1 August 2008, the Respondent filed a response in which it opposed the Claimant's proposal as insufficient and requested the Tribunal, *inter alia*, to order the Claimant to provide security for the amount of interest that may be forgone by NHA in case Is Bank's application would be successful. In accordance with the directions of the Tribunal, the Parties further submitted a reply and a rejoinder, respectively on 8 and 14 August 2008.

65. On 19 August 2008, the Tribunal denied the Respondent's request for security, and invited the Parties to revert, if possible jointly, regarding the implementation of the proposal communicated by the Claimant in its letter of 24 July 2008.

66. By letter of 29 August 2008, the Respondent stated that it could not agree with the Claimant on such implementation. The Claimant responded by letter of 4 September 2008, noting that it had again written to Is Bank in connection with PO#11. On 10 September 2008, the Tribunal invited the Respondent to clarify its position. In accordance with these directions, the Respondent clarified its position by letter of 26 September 2008, and the Claimant replied by letter of 10 October 2008. The issue raised by these submissions is addressed in section IV(E) of this Award.

C. THE JURISDICTIONAL PHASE

67. 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.

68. Pursuant to the timetable, Bayindir submitted its Counter-Memorial on jurisdiction on 31 March 2005, (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.

69. On 9 May 2005, still according to the timetable, Pakistan submitted its Reply 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).

70. 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)[14] and one volume of legal materials (Exhibits CLEX-56 to CLEX-61).

71. 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 paragraphs 101 to 104 of the Rejoinder J. on or before 15 July 2005.

72. On 7 July 2005, the Tribunal held a preparatory telephone conference to organize the hearing on jurisdiction for which the dates of 25, 26 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.

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[14] At the outset of the hearing on jurisdiction (Tr. J, 17, 29-39), Pakistan pointed out that some of these exhibits – namely Exh. [Bay.] CX-127, an internal letter dated 4 November 2000; Exh. [Bay.] CX-131, an internal letter dated 2 May 2001; Exh.[Bay.] CX-145, an internal letter of June 2001; Exh. [Bay.] CX-146, an internal letter dated May 2001; Exh. [Bay.] CX-151, an internal letter of April 2001; Exh. [Bay.] CX-152, a confidential letter from the World Bank dated 26 May 2000 to the Government of Pakistan; Exh. [Bay.] CX-153, 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., 17, 26-28). Pakistan did not however object to their production in this arbitration.

73. On 22 July 2005, Counsel for the Respondent informed the Tribunal 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. He added that the New York Convention had been enacted in the form of the Recognition of Enforcement of Arbitration Agreements and Foreign Arbitral Awards Ordinance of 2005, which had come into force with retroactive effect on 14 July 2005.[15]

74. The Arbitral Tribunal held the hearing on jurisdiction from 25 July 2005, starting at 11:00 am, to 26 July 2005, ending at 4:15 pm, at the Salons des Arts et Métiers, 9 bis avenue d'Iéna, Paris. In addition to the Members of the Tribunal[16] 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 Blcioglu
- 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
- Ms. Loretta Malintoppi; Eversheds
- Mr. Charles Claypoole; Eversheds

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

16 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 as well.

- Ms. Cheryl Dunn; Eversheds
- Ms. Victoria Forman-Hardy; Eversheds
- Mr. Nicholas Minogue; Eversheds

75. 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. At the outset of the hearing, Mr. Griffith stated on behalf of Bayindir that it was not pursuing any claims on the basis of the Contract and was henceforth only bringing claims based on the Treaty. Pakistan replied that an earlier withdrawal would have saved substantial costs and insisted that its costs incurred to defend the Contract claims be compensated.

76. 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.

77. On 14 November 2005, the Tribunal issued a decision ("Decision on Jurisdiction"), which is attached to this Award, concluding that it had jurisdiction over the claims asserted by Bayindir against Pakistan for breaches of the Treaty, namely for breaches of provisions on national and most favoured nation treatment, fair and equitable treatment and expropriation without compensation (hereinafter generally referred to as "Treaty Claims"). The operative part of the Decision on Jurisdiction stated:

> 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.
> (Decision on Jurisdiction, operative part).

D. THE PROCEEDINGS ON THE MERITS

78. In accordance with the timetable set by the Tribunal in Procedural Order No. 2 of 23 December 2005 (PO#2), on 25 April 2006, Bayindir submitted its Memorial on the merits (Mem. M.) accompanied by one volume of contractual documents (exhibits C-1 to C-18), nine volumes of documentary exhibits (exhibits CX-1 to CX-123), including

two witness statements (exhibits CX-7 and CX-68, this latter accompanied by annexures A to Z), and four volumes of legal exhibits (exhibits CLEX-1 to CLEX-47).

79. On 25 August 2006, pursuant to the same timetable, Pakistan submitted its Counter-Memorial on the merits (C-Mem. M.) accompanied by four volumes of documentary evidence (exhibits CM-1 to CM-197), three volumes of witness statements (with five witness statements, the first one being accompanied by exhibits RB-1 to RB-87) and two volumes of legal materials (Exhibits CM LEX-1 to CM LEX-15).

80. In accordance with PO#2, as amended by Procedural Order No. 5 of 18 January 2007 (PO#5) and the Tribunal's directions of 19 January 2007, on 21 February 2007 Bayindir submitted its Reply on the merits (Reply M.) accompanied by two volumes of witness statements (exhibits CX-124 to CX-127), eight volumes of documentary exhibits (exhibits CX-128 to CX-261) and two volumes of legal materials (exhibits CLEX-48 to CLEX-74).

81. On 30 April 2007, after considering the views of the Parties, the Tribunal decided to invite Mr. John Wall of the World Bank to appear as a witness to be questioned by the Tribunal on the basis of a list of questions to be submitted to him in advance. Further, in accordance with PO#5, the Parties filed their list of witnesses and experts for direct and cross-examination on 29 May 2007.

82. On 24 May 2007, according to PO#2, PO#5, and the Tribunal's directions of 4 May 2007, Pakistan submitted its Rejoinder on the merits (Rej. M.) accompanied by three volumes of documentary exhibits (exhibits R-1 to R-79), four volumes of witness statements and expert opinions with annexures and five volumes of legal materials (exhibits R LEX-1 to R LEX-50).

83. By letter of 3 June 2007, the Claimant requested *inter alia* that “the Tribunal adopt an appropriate order, in consultation with the parties, for rescheduling of the oral hearing” and that it also reschedule the telephone conference to be held on 5 June 2007.

84. On the following day, the Tribunal acknowledged receipt of Bayindir’s request for postponement and informed the Parties that it had decided to maintain the telephone

conference and to discuss the Claimant's request for postponement of the hearing at the outset of the telephone conference.

85. The telephone conference was held as scheduled. During the course of the telephone conference, the Tribunal drew the Parties' attention to the fact that a postponement of the hearing would lead to a significant delay in the proceedings, since the Tribunal's next availability for a 10-day hearing was in May 2008. Bayindir nevertheless confirmed its request and Pakistan agreed with it. It was further agreed that the Parties would jointly report to the Tribunal on the status and on the need to resume the proceedings by 10 August 2007.

86. On this basis, the Tribunal issued Procedural Order No. 8 of 20 June 2007 (PO#8) *inter alia* postponing the hearing on the merits, inviting the Parties to report on 10 August 2007 and reserving the period from 26 May to 4 June 2008 in case a hearing would be needed.

87. The Parties reported as scheduled and requested that the proceedings be resumed. They submitted a common position on the duration of the hearing and other procedural matters and separate proposals on the time allocation and the schedule of the hearing.

88. On 22 August 2007, in accordance with PO#8, the Tribunal held another telephone conference to address issues arising from the Parties' joint report of 10 August 2007. Following this telephone conference, the Tribunal issued Procedural Order No. 9 of 27 September 2007 (PO#9) giving detailed directions for the conduct of the hearing on the merits to be held from 26 May 2008 to 4 June 2008.

89. Shortly before the hearing, on 12 May 2008, the Tribunal held a preparatory telephone conference to address any outstanding organizational issues after which it issued further directions for the hearing.

90. The Arbitral Tribunal held the hearing on the merits from 26 May to 4 June 2008 at the International Centre for Dispute Resolution, in London. In addition to the Members of the Tribunal,[17] the following persons attended the hearing on the merits:

[17] With the agreement of the Parties, Dr. Jorge E. Viñuales, an attorney practising in the law firm of the President of the Tribunal, attended the hearing.

(i) On behalf of Bayindir:

- Mr. Stanimir Alexandrov; Sidley Austin LLP
- Ms. Marinn Carlson; Sidley Austin LLP
- Ms. Jennifer Haworth McCandless; Sidley Austin LLP
- Mr. Theodore Kill; Sidley Austin LLP
- Ms. Meredith Moroney; Sidley Austin LLP
- Mr. Farrukh Karim Qureshi; Samdani & Qureshi
- Mr. Nudrat Piracha; Walker Martineau Saleem
- Mr. Kamuran Çörtük; Bayindir
- Mr. Hasan Mutlu Akpinar; Bayindir
- Mr. Guray Mik; Bayindir
- Mr. Haşim Bora Ozerman; Bayindir

(ii) On behalf of Pakistan:

- The Hon. Malik Muhammad Qayyum; Attorney General for Pakistan
- Prof. Christopher Greenwood, CMG, QC; Essex Court Chambers
- Mr. Samuel Wordsworth; Essex Court Chambers
- Mr. Rodman R. Bundy; Eversheds
- Ms. Loretta Malintoppi; Eversheds
- Mr. Nicholas Minogue; Eversheds
- Mr. Iftikharuddin Riaz; Bhandari, Naqvi & Riaz

91. During the hearing, Messrs. Greenwood, Wordsworth and Bundy addressed the Tribunal on behalf of Pakistan and Mr. Alexandrov and Ms. Carlson addressed the Tribunal on behalf of Bayindir.

92. The hearing on the merits was transcribed and the transcript was distributed to the Parties at the end of each day. The complete version of the *verbatim* transcript was later distributed to the Parties (Tr. M.), one confidential portion being subject to limited distribution.

93. At the end of the hearing on merits the Tribunal directed the Parties to submit simultaneous post-hearing briefs on 16 July 2008 and cost statements on 1 September 2008. The deadline for the submission of the Parties' cost statements was later

extended to 26 September 2008. Following the hearing the Tribunal confirmed these directions in writing.

94. Accordingly, the Parties submitted simultaneous post-hearing briefs on 16 July 2008. (PHB [Bay.] and PHB [Pak.]) and cost statements on 26 September 2008.

III. THE PARTIES' POSITIONS

95. The Tribunal has deliberated and thoroughly considered the Parties' written submissions on the merits and the oral arguments delivered in the course of the evidentiary hearing. It will now summarize the positions of the Parties (III) and analyze the issues in dispute (IV) before setting out the relief granted (V).

A. BAYINDIR'S POSITION AND REQUEST FOR RELIEF

96. Bayindir's position is essentially the following:

> "[the] Respondent, acting at the highest levels of the Government of Pakistan, exercised its sovereign prerogative to change government policy about the M-1 motorway in the face of budget shortfalls, advice from international organizations, and internal opposition to the M-1 Project. While no one would contest the Government of Pakistan's right to decide that it could no longer afford a 'Mercedes' motorway, such a decision could not be made without consequences. The hearing made clear that Respondent sought to escape those consequences by dressing its policy decision in ill-fitting contractual garb in order to expel Bayindir from the Project. In so doing, Respondent engaged in unfair and inequitable conduct, it expropriated Bayindir's investment in the M-1 Project, and it treated Bayindir less favorably than the Pakistani contractors that replaced Bayindir on the same Project. Respondent's conduct in violation of the Treaty is thus manifested in, but is not limited to, the act of expelling Bayindir from the M-1 Project. Respondent's subsequent conduct – in ensuring that Bayindir was stripped of all prospects of contractual recovery, and in destroying the Bayindir Group with an unjustified call on the mobilization advance guarantees – also gave rise to Treaty breaches."
>
> (PHB [Pak.] ¶ 3)

97. More specifically, in its written and oral submissions, Bayindir advanced the following main contentions:

(i) The Respondent breached the protections afforded by the Treaty through three series of actions, involving the expulsion of Bayindir, the conduct following

Bayindir's expulsion, and the attempted encashment of the Mobilisation Advance Guarantees;

(ii) Pakistan breached the fair and equitable treatment standard to which Bayindir is entitled on the basis of the MFN clause contained in Article II(1) of the Treaty by reason of its expulsion of Bayindir for motives unrelated to Bayindir's performance of the Contract, through its efforts to frustrate and extinguish any rights Bayindir may have retained under the Contract, and through its arbitrary and unfair attempts to encash the Mobilisation Advance Guarantees.

(iii) Pakistan breached the MFN and national treatment standards contained in Article II(1) and (2) of the Treaty by reason of its expulsion of Bayindir to favour local contractors, its more favourable treatment of both local contractors and other foreign contractors, its actions following Bayindir's expulsion, and its attempts to encash the Mobilisation Advance Guarantees.

(iv) Pakistan breached the guarantee against expropriation without compensation given in Article III(1) of the Treaty by reason of its expulsion of Bayindir, its efforts to complete the deprivation of Bayindir's investment following said expulsion, and its call on the Mobilisation Advance Guarantees.

98. On the basis of these contentions, Bayindir requested in its Memorial that the Tribunal

> "[F]ind the Respondent has violated the Claimant's rights under the Treaty. The acts and omissions of Pakistan and its emanation, the NHA, for which the Respondent is internationally responsible, have denied the Claimant fair and equitable treatment, the most favored nation treatment/national treatment and have expropriated Claimant's investment without compensation. As a result of that conduct, Claimant is entitled to and request that the Tribunal award to the Claimant compensation and damages in the amount of US$ 756,196,108.00 inclusive of compound interest. The conduct of the Respondent has caused irreparable damage to the reputation of the Claimant in respect of which the Claimant reserves its right to submit an additional claim in respect thereof.
> In addition the Claimant requests that it be awarded litigation costs and expenses."
> (Mem. M., ¶ 287)

99. In its Reply, the Claimant requested the following relief:

> "In view of the above Bayindir respectfully seeks the following relief from the Tribunal:
>
> (i) Declaring that Pakistan has breached its obligations under Article II(2) of the Treaty by failing to observe obligations that it entered into with regard to Bayindir's investment.
> (ii) Declaring that Pakistan has breached its obligations under the Treaty by failing to accord to Bayindir fair and equitable treatment.
> (iii) Declaring that Pakistan has breached Article III of the Treaty by indirectly expropriating Bayindir's investment without complying with the requirements of the Treaty.

(iv) Ordering Pakistan to pay to Bayindir full compensation and damages in the amounts set forth below:

a) US$ 22,650,834 payable on account of Certified Payment Certificates;
b) US$ 60,234,608 on account of value of Works completed up till the date of Expulsion;
c) US$ 34,188,378 on account of value of Machinery, Plant, Equipment, Spare Parts etc;
d) US$ 4,265,164 on account of Costs of Camp facilities;
e) US$ 3,877,075 on account of value of Custom Guarantee letters;
f) US$ 121,770,030 on account of Loss of Profit;
g) US$ 21,474,234 on account of reimbursement of costs incurred by Bayindir in anticipation of completing the Project;
h) US$ 219,842,618 on account of Loss of opportunity;
i) US$ 96,600,000 on account of Punitive Damages;
j) Plus pre-and post-award compound interest as prayed for in the Memorial;

(v) Ordering Pakistan to return to Bayindir the Performance Bond;
(vi) Ordering Pakistan to return the Letters of Guarantee issued by the consortium of Turkish Banks;
(vii) Ordering Pakistan to pay all costs and expenses of this arbitration proceedings, including the fees and expenses of the Tribunal and the cost of Bayindir's legal representation, plus interest thereon;
(viii) Such other or additional relief as may be appropriate under the Treaty or may otherwise be just and appropriate in the circumstances of this case."
(Reply M., pp. 200-201).

100. In its post-hearing submission, the Claimant requested the following relief:

"[A]ward it compensation in the amount of US $494.6 million plus interest of 8% compounded annually. In addition, Respondent must be permanently barred from enforcing any Turkish court judgments or otherwise seeking to encash the mobilization advance guarantees. Bayindir also respectfully requests an award of its legal fees and other costs incurred in connection with this proceeding."
(PHB [Bay.] ¶ 126)

B. PAKISTAN'S POSITION AND REQUEST FOR RELIEF

101. Pakistan's position is essentially the following:

"Bayindir's claim turns on the allegation that Pakistan treated Bayindir in a way which was not fair and equitable; its allegations of other treaty breaches are little more than window dressing and its claim for expropriation flies in the face of authority and common sense. There is no legal basis on which Bayindir could succeed in its other claims if it fails on fair and equitable treatment.
In an attempt to sustain that case for unfair and inequitable treatment, Bayindir has made numerous wild allegations about conspiracy, improper motivation and bad faith [...] Bayindir bears the burden of proof on those allegations and it has failed to discharge that burden. On the contrary, the record [...] shows that there was no conspiracy and no improper motive and that both NHA and the Government of Pakistan acted in good faith throughout."
(PHB [Pak.] ¶¶ 1.17-1.18)

102. More specifically, in its written and oral submissions, Pakistan advanced the following main arguments:

(i) Bayindir's claim that it was denied fair and equitable treatment is unfounded as it is not based on any specific fair and equitable treatment clause that could be applied through the MFN clause in the Treaty, and Bayindir has failed to establish that its expulsion as well as Pakistan's acts following said expulsion were anything else than Pakistan's legitimate exercise of its rights under the Contract;

(ii) Bayindir's claims for breach of the MFN and national treatment clauses contained in Article II paragraphs (1) and (2) of the Treaty and discrimination are unfounded to the extent that Bayindir has failed to establish any conduct of Pakistan aimed at favouring local or other foreign contractors over Bayindir;

(iii) Bayindir's claim for breach of the expropriation clause contained in Article III(1) of the Treaty is unfounded, in particular because Bayindir's expulsion was in accordance with the Contract, because Bayindir retained rights under the Contract to a final settlement, and because the plant and equipment left at the site were treated in accordance with the Contract;

(iv) Bayindir's claim for breach of the expropriation clause in connection with the attempts to encash the Mobilisation Advance Guarantees is unfounded, especially because it concerns separate parties, because it is new and the Tribunal has no jurisdiction over it, and because these guarantees are in any event not an investment and have not been expropriated.

103. In reliance on these arguments, Pakistan set forth the following requests in its Counter-Memorial:

> "On the basis of the facts and legal considerations set out in this Counter-Memorial, and rejecting all contrary submissions made by Bayindir, Pakistan respectfully requests the Tribunal to adjudge and declare:
> (i) that the Respondent has not breached the Pakistan-Turkey Treaty with respect to the claims introduced by the Claimant, and that the Claimant's claims are thereby rejected; and
> (ii) that the Claimant reimburse the Respondent for the costs and expenses the Respondent has incurred as a result of this arbitration."
> (C-Mem. M., p. 175).

104. In its Rejoinder, Pakistan requested the Tribunal to conclude as follows:

> "On the basis of the facts and legal considerations set out in this Rejoinder, and rejecting all contrary submissions made by Bayindir, Pakistan respectfully requests the Tribunal to adjudge and declare:

> (i) that the Respondent has not breached the Pakistan-Turkey Treaty with respect to the claims introduced by the Claimant, and that the Claimant's claims are thereby rejected; and
> (ii) that the Claimant reimburse the Respondent for the costs and expenses the Respondent has incurred as a result of this arbitration."
> (Rej. M., p. 168).

105. In its post-hearing submission, Pakistan concluded as follows:

> "Pakistan's primary submission is that Bayindir's claim fails and that there is no liability in damages at all [...].
> On the basis of the above, the maximum sum that may be found as owing to Bayindir is $ US14,612,315, as shown in Table 2 below [...].
> It follows from Table 2 that NHA, not Bayindir, is very substantially out of pocket. If a set-off were appropriate, NHA would recover the amount of US$78,078,592.
> As Table 2 shows, this is an exceptional case, as the Claimant has been paid very considerable sums up front. That must not, however, impact on the sums that the Claimant may be awarded in damages. The reality is that Bayindir did not spend a very significant portion of the mobilisation advance on the Project, and it should not be allowed to recover on the basis that it did."
> (PHB [Pak.] ¶¶ 7.1, 7.126-128).

Pakistan's statement that it may be found to owe at most approximately US$14.6 million reflects an alternative position for the event that the Tribunal would find liability (PHB [Pak.] ¶ 7.1)

106. While Part I of this Award summarizes the main facts and Part III the main arguments of the Parties, other arguments were made and considered by the Tribunal. They will be referred to in Part IV to the extent that the Tribunal considers necessary.

IV. ANALYSIS

A. PRELIMINARY MATTERS

107. The Tribunal has reviewed all of the numerous arguments presented by the Parties. The manner in which the Claimant has pleaded its case has not facilitated the Tribunal's task. Although it has considered the entire record, the Tribunal will rely more particularly on the arguments last presented by Claimant and concentrate on those arguments that it itself regards as decisive for the outcome of the dispute.

108. Before turning to the actual issues raised by the claims, the Tribunal wishes to address certain preliminary matters, i.e., the law applicable to the merits of the present dispute

(a), the attribution of NHA's acts to the Respondent under international law (b); the applicability *ratione temporis* of the Treaty (c); the requirements for establishing a treaty claim in the context of a contractual relationship (d), the allocation of the burden of proof (e), and the relevance of previous ICSID decisions or awards (f).

a. The law applicable to the merits

109. 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 "Treaty"), which entered into force on 3 September 1997. It is common ground that the Tribunal must decide the merits of the case on the basis of the Treaty. As the Claimant notes, "[treaty claims] are analyzed under the Treaty's legal standards and advanced under the Treaty's procedures, not those of the Contract" (PHB [Bay.] ¶ 2). Similarly, the Respondent states that "... the present case turns on one question: does the conduct of Pakistan amount to a breach of the bilateral investment treaty between Pakistan and Turkey" (PHB [Pak.] ¶ 1.4).

110. In deciding these questions the Tribunal will take into account the applicable rules of international law.[18]

b. Attribution of NHA's acts

111. In their submissions on the merits, both Parties have focused their argumentation on whether the acts of NHA amounted to an exercise of sovereign authority or merely of contractual rights. Before dealing with this distinction, the Tribunal must logically first review whether the acts of NHA allegedly in breach of the Treaty are attributable to Pakistan.

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[18] See Article 42 of the ICSID Convention. See also the *Vivendi ad hoc* Committee, which held that a claim based upon a substantive provision of a BIT is "*governed by* […] *the BIT and by applicable international law*". *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3) (hereafter*, Vivendi v. Argentina*), Decision on Annulment of 3 July 2002, ¶¶ 96 and 102; *see* also *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12) (hereafter*, Azurix v. Argentina*), Award of 14 July 2006, ¶ 67; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) (hereafter*, MTD v. Chile*), Award of 25 May 2004, ¶ 87; *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) (hereafter*, Wena Hotels v. Egypt*), Award of 8 December 2000, ¶¶ 78-79.

112. When specifying in its post-hearing brief the acts in breach of the Treaty, the Claimant refers to (i) the expulsion of Bayindir, (ii) following the expulsion, the failure by NHA to proceed to a number of actions under the Contract (such as the evaluation of the works completed, the certification of certain IPAs (Interim Payment Application), the payment of certain IPCs, or the refusal to acknowledge and certify extensions of time granted by the Engineer) and NHA's claim for approximately US$ 1 billion in the Pakistani arbitration, and (iii) the actions taken in connection with the encashment of the Mobilisation Advance Guarantees.

113. In respect of each of these three series of actions, Bayindir asserts a breach of the FET, non-discrimination and expropriation protections of the Treaty (see for instance PHB [Bay.], ¶¶ 80, 94, 106, 108). From a contractual standpoint, these actions were those of NHA and not of the Government of Pakistan. The Tribunal must therefore determine whether they are attributable to the Respondent under the international law rules of attribution reflected in Articles 4, 5 and 8 of the International Law Commission's Articles on Responsibility of States for internationally wrongful acts ("ILC Articles").[19]

114. Without clearly distinguishing between each of these three series of acts, the Claimant argues in essence that the Government of Pakistan, in the exercise of its sovereign prerogatives, took the decisions that led to the violation of Bayindir's rights under the Treaty, and that these decisions were subsequently implemented by NHA through contractual means. More specifically, while acknowledging that "[t]he Contract to construct the M-1 Motorway was entered into between Bayindir and NHA" (PHB [Bay.] ¶ 20), the Claimant argues that

> "the key decisions with respect to Bayindir's ongoing involvement in the M-1 Project, including ultimately the decision to expel Bayindir, were repeatedly referred to and taken by others at the highest levels of the Government of Pakistan, including the head of state of the Islamic Republic. The involvement of these government actors, above and outside of NHA, in itself demonstrates that the decision to expel Bayindir was a sovereign and not a contractual act [...] the record is clear that decisions on the M-1 Project were referred to senior government officials and agencies above NHA, and ultimately to General Musharraf himself." (PHB [Bay.] ¶ 20)

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[19] Articles on Responsibility of States for internationally wrongful acts, with commentaries (2001), Yearbook of the International Law Commission, 2001, Vol. II, Part Two. The ILC Articles are widely regarded as expressing current customary international law, see J. Crawford, The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries, 2002.

115. Referring to the decision in *Wena Hotels*,[20] Bayindir further contends that even if the Tribunal were to conclude that the Respondent had no involvement in the Treaty-violative acts taken against Bayindir, the record shows that the Respondent "took no steps to prevent the unjustified expropriation of Bayindir's investment or the discriminatory and unfair treatment to which Bayindir was subjected" (PHB [Bay.] ¶ 33). More specifically, it asserts that

> "[t]here can be no question that the Government of Pakistan at a minimum was well aware of the expulsion of Bayindir and the attempted encashment of the guarantees. The expulsion was discussed with General Musharraf, and the attempted encashment was coordinated with Pakistan's Foreign Office. At the very least, Respondent stood by and did not act to protect Bayindir or its investment from mistreatment by entities under its control." (PHB [Bay.] ¶ 33).

116. Pakistan concedes that there was some government involvement, but insists that the decisions allegedly in breach of the Treaty were taken in the exercise of NHA's contractual rights as opposed to the exercise of sovereign prerogatives, or in the words used in the post-hearing brief:

> "the decision to expel was made by NHA, acting on its own following the issuance of a Clause 63.1 Certification by the Engineer, subsequent to 12 April 2001, albeit with the high level approval that – so far as concerns the general diplomatic fallout – it could act in accordance with the terms of the Contract [...] the case comes down to the exercise by NHA of a contractual right, divorced from interference by the State. The fact that President Musharraf might have, but did not, discourage NHA from exercising its contractual rights because of broader diplomatic reasons in no way constitutes relevant interference." (PHB [Pak.] ¶¶ 2.76, 2.78)

117. It is not disputed that it was NHA which exercised the rights under the Contract in a manner allegedly in breach of the Treaty. The debate thus hinges on the following questions: (i) whether NHA is an organ of the State; (ii) whether NHA is an instrumentality acting in the exercise of governmental powers; and (iii) whether NHA acted under the direction or control of the State. These issues were not clearly articulated in the Parties' submissions and pleadings on the merits, but they received attention in earlier phases of the proceedings. The Tribunal considers nevertheless that issues (i) to (iii) are implied in the Parties' arguments and constitute a necessary step in the Tribunal's analysis.

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[20] *Wena Hotels v. Egypt*, *supra* footnote 18, ¶ 99.

118. Given NHA's position as Bayindir's contract partner, the logical starting point for the Tribunal's analysis is question (i). In its RP, Bayindir argued that Pakistan was the proper party and that:

> "attempts to view NHA as somehow structurally or functionally distinct from the Government of Pakistan are erroneous as can be seen on review of, *inter alia*, the following:
>
> -NHA's constituting statute, which places the Prime Minister, Minister of Finance and Minister of Communications in control of this entity [...]
> -The purposes and duties of NHA are clearly national in scope, as both the name 'National Highway Authority' and the purposes of the NHA Act make plain [...]
> -In both the 1993 Contract and 1997 Contract, Bayindir contracted with 'NATIONAL HIGHWAY AUTHORITY, GOVERNMENT OF PAKISTAN' [...]
> -The February 9, 2000 Minutes of Meeting which recorded the extensions of time permitted to Bayindir for the one of the Priority Sections, were negotiated with, and then recorded by, the Government of Pakistan [...] After Bayindir had been expelled from Site, it was the Pakistani Ministry of Communications which explained on behalf of the Pakistan Government that it was to the benefit of the Government and local contractors that Bayindir was removed [...]
> - Claim concerns BIT breaches, not contractual breaches"
> (RP ¶ 129)

119. Pakistan submits that NHA is a distinct legal personality under the laws of Pakistan (Mem. J., ¶ 4.17). The Tribunal shares this view. Indeed, pursuant to section 3(2) of the National Highway Authority Act of 1991 ("NHA Act"), NHA is a "body corporate having perpetual succession and a common seal with power to acquire, hold and dispose of property, and may in its own name sue and be sued" (Exh. [Bay] RP-1). The fact that there may be links between NHA and some sections of the Government of Pakistan does not mean that the two are not distinct. State entities and agencies do not operate in an institutional or regulatory vacuum. They normally have links with other authorities as well as with the government. Because of its separate legal status, the Tribunal discards the possibility of treating NHA as a State organ under Article 4 of the ILC Articles. The Claimant also asserts, however, that NHA's conduct was in fact the mere execution of decisions taken by government officials. This argument would appear to suggest that the acts incriminated emanate from government officials, who are themselves organs of the State under Article 4 of the ILC Articles. Given that – as already indicated above – NHA is a separate legal entity and that the acts in question are those of NHA as a party to the Contract, the Tribunal considers that there are no grounds for attribution by virtue of Article 4.

120. As a next step, the Tribunal must review whether NHA's conduct may be attributable pursuant to Article 5 (State instrumentalities) of the ILC Articles. Article 5 ILC reads as follows:

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

121. It is not disputed that NHA is generally empowered to exercise elements of governmental authority. Section 10 of the NHA Act vests broad authority in NHA to take "such measures and exercise such powers it considers necessary or expedient for carrying out the purposes of this Act," including to "levy, collect or cause to be collected tolls on National Highways, strategic roads and such other roads as may be entrusted to it and bridges thereon." Other relevant provisions of the NHA Act are section 12 on "Powers to eject unauthorized occupants" and section 29 on the NHA's "Power to enter" upon lands and premises to make inspections.

122. The existence of these general powers is not however sufficient in itself to bring the case within Article 5. Attribution under that provision requires in addition that the instrumentality acted in a sovereign capacity in that particular instance:

> "If it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage."[21]

123. To determine whether NHA acted in a sovereign capacity for the different acts at issue, the Tribunal has had to review the numerous arguments and extensive evidence presented by the parties. Its detailed analysis will be found later on in this Award when dealing with the merits of Bayindir's individual claims. It will make for better readability of the Award, however, if the Tribunal were to signal at this point the first of its main findings on the question of attribution. This is that (although there are indications in the opposite direction) the Tribunal is not persuaded on the balance of the evidence presented to it that in undertaking the actions which are alleged to be in breach of the Treaty, the NHA was acting in the exercise of elements of the governmental authority. The Tribunal's conclusion is accordingly that these actions are thus not attributable to Pakistan under Article 5 of the ILC Articles.

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[21] Commentary to the ILC Articles, ad Article 5, ¶ 5.

124. Whatever the Tribunal's finding on that question may be, however, the possibility remains of attribution to the State under Article 8 of the ILC Articles. Article 8 reads as follows:

> "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

125. As before in connection with Article 5, in order to assess whether an act was carried out "on the instructions of, or under the direction or control of" the State, the Tribunal has reviewed the parties' arguments and extensive evidence. The Tribunal concludes that each specific act allegedly in breach of the Treaty was a direct consequence of the decision of the NHA to terminate the Contract, which decision received express clearance from the Pakistani Government. A detailed analysis of the connections existing between the decision of the NHA and the involvement of the Pakistani Government with respect to the termination of the Contract is provided in the Tribunal's discussion of Bayindir's FET claim, albeit its scope covers the other claims as well. On this basis, the Tribunal signals the second of its main findings on the question of attribution, namely that NHA's conduct is attributable to Pakistan under Article 8 of the ILC Articles.

126. This finding is comforted by the fact that the Respondent conceded in its oral and written submissions (see for instance Tr. M., 26 May 2008, 155, 6-23, 4 June 2008, 174, 13-22, 223, 13-16; PHB [Pak.] ¶¶ 2.76, 2.78) that the government was involved to a certain degree in the M-1 Project. So for instance, in the opening statement:

> "[O]ne of the refrains you heard this morning repeatedly was, 'The Government of Pakistan, contrary to what the Respondent is trying to tell you, kept intervening in this Contract'. The Government of Pakistan was closely interested in this Contract, as any responsible Government being asked to stump up hundreds of millions of Dollars, is going to be. But there is another reason why the Government of Pakistan was involved, and that is that the Claimant kept asking it to get involved."
> (Tr. M., 26 May 2008, 155, 6-17).

127. Or in the post-hearing brief:

> "the decision to expel was made by NHA, acting on its own following the issuance of a Clause 63.1 Certification by the Engineer, subsequent to 12 April 2001, albeit with the high level approval that – so far as concerns the general diplomatic fallout – it could act in accordance with the terms of the Contract."
> (PHB [Pak.] ¶ 2.76)

128. These statements are consistent with the evidence on record. There was indeed a certain degree of government involvement, as will be discussed in detail later. During the hearing on the merits, it became in particular clear that at a meeting held on 12 April 2001, General Musharraf gave clearance to the Chairman of NHA, General Javed, to resort to the available contract remedies, including termination (Tr. M., 29 May 2008, 74-75). Similarly, General Qazi, Minister of Communications, confirmed that the decision to terminate the Contract could not have been taken without some guidance from higher levels of the Pakistani government (Tr. M., 28 May 2008, 318-319).

129. The Tribunal also notes that attribution under Article 8 is without prejudice to the characterization of the conduct under consideration as either sovereign or commercial in nature. For the sake of attribution under this rule, it does not matter that the acts are commercial, *jure gestionis,* or contractual. The Commentary to the ILC Articles stresses this point in the following terms:

> "The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence. In such cases it does not matter that the person or persons involved are private individuals nor whether their conduct involves 'governmental activity."[22]

In other words, a finding of attribution does not necessarily entail that the acts under review qualify as sovereign acts. The Tribunal will address this latter issue in the context of the discussion of each specific claim whenever relevant.

130. Finally, the Tribunal is aware that the levels of control required for a finding of attribution under Article 8 in other factual contexts, such as foreign armed intervention or international criminal responsibility, may be different. It believes, however, that the approach developed in such areas of international law is not always adapted to the realities of international economic law and that they should not prevent a finding of attribution if the specific facts of an investment dispute so warrant.

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[22] *Id.*, ad Article 8, ¶ 2, footnotes omitted. See also *Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11) (hereafter*, Noble Ventures v. Romania*), Award of 12 October 2005, ¶ 82; I. Fadlallah, Are States Liable for the Conduct of Their Instrumentalities? ICSID Case Law, in E. Gaillard, J. Younan (eds.), *State Entities in International Arbitration*, IAI, 2008, p. 27.

c. Applicability *ratione temporis* of the Treaty

131. Another preliminary question concerns the applicability *ratione temporis* of the Treaty. Pursuant to Article IX(1), the Treaty "shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter." It is therefore clear that whether made prior to or after the entry into force of the Treaty on 3 September 1997, an investment benefits from the protections of the Treaty.

132. However, in accordance with the well-established principle of non-retroactivity of treaties and absent any indication to the contrary in the text of the Treaty itself, the protections accorded by the Treaty can only apply to acts committed after its entry into force.[23] In the present case, no issue arises in this respect as the disputes arising out of the events pre-dating the entry into force of the Treaty were settled (see Exh. [Bay.] C-17, C-8). That notwithstanding, the Tribunal considers that acts pre-dating the entry into force can be taken into account to the extent that they may assist in understanding the significance of acts which do fall within the scope of the Treaty *ratione temporis*.

d. Treaty claim in the context of a contractual relationship

133. The Parties are at odds on the significance of contract matters in the assessment of treaty claims. Referring to *Vivendi I,*[24] *SGS v. Pakistan*[25] and *Impregilo v. Pakistan*,[26] Bayindir argues in substance that

> "A breach of the Contract [...] is not a necessary precondition for this Tribunal to find that Respondent violated its Treaty obligations; these are independent inquiries. What Claimant must establish, and has established here, is one or more violations by Respondent of its Treaty obligations." (PHB [Bay.] ¶ 7)

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23 Pursuant to Article 28 of the Vienna Convention on the Law of Treaties (hereafter, VCLT), done at Vienna on 23 May 1969 (UN Treaty Series, vol. 1155, p. 331): "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." Article 13 of the ILC Articles states a similar principle in the following terms: "An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs."

24 *Vivendi v. Argentina*, *supra* footnote 18, ¶ 96.

25 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction of 6 August 2003, ¶ 147.

26 *Impregilo SpA v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction of 22 April 2005, ¶ 258, (hereafter*, Impregilo v. Pakistan*).

134. In contrast, Pakistan argues that "it is not the role of this Tribunal (as it has rightly reminded the Parties) to substitute itself for the contractual tribunal to which Bayindir could have taken its case against NHA" (PHB [Pak.] ¶ 1.4). However, it asserts that

> "a breach of Contract by the NHA is a necessary, but not a sufficient condition of a breach of the BIT. In the absence of a breach of Contract there cannot be a breach of the Treaty in this case [...] It is a well-established proposition that a breach of Contract by the State is not in itself a breach of international law. That is still more true when one looks at a breach of Contract not by a State, but by a State agency such as the NHA [...] They have got to show more than just an ordinary breach of Contract."
> (Tr. M., 26 May 2008, 164-166: 18-22, 15-20, 6-7).

135. As a threshold matter, the Tribunal recalls that its jurisdiction covers treaty and not contract claims. This does not mean that it cannot consider contract matters. It can and must do so to the extent necessary to rule on the treaty claims. It takes contract matters, including the contract's governing municipal law, into account as facts as far as they are relevant to the outcome of the treaty claims. Doing so, it exercises treaty not contract jurisdiction.

136. This approach is in conformity with international law[27] and arbitral practice. As noted by the *ad hoc* Committee in *Vivendi v. Argentina*, in assessing whether there has been a treaty breach a tribunal may review contract matters "at least so far as necessary in order to determine whether there had been a breach of the substantive standards of the BIT,"[28] adding that "it is one thing to exercise contractual jurisdiction [...] and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law."[29] This approach was confirmed in *Vivendi II*:

> "the Tribunal would not be *applying* the contract by deciding a contractual issue, determining the parties' respective rights and obligations or granting relief under the agreement. It would be doing no more than the Respondent concedes is its

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27 In *Certain German Interests in Polish Upper Silesia*, the Permanent Court of International Justice observed: "It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14, 1920. This, however, does not appear to be the case. From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention." PCIJ, The Merits, Judgment of 25 May 1926, Series A, No. 7, p. 19.

28 *Vivendi v. Argentina*, *supra* note 18, ¶ 110.

29 *Id.*, ¶ 105.

> right – *ie*, taking the contractual background into account in determining whether or not a breach of the Treaty has occurred."[30]

137. These considerations do not imply that the assessment of a treaty breach in the context of a contractual relationship requires a determination that the contract has been breached. Breach of contract and breach of treaty are separate questions giving rise to separate inquiries. Or in the words of the *ad hoc* Committee in *Vivendi v. Argentina*:

> "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."[31]

And in the same vein, *Impregilo v. Pakistan*:

> "[T]he 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. Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries."[32]

Or in the words of the tribunal in *Duke Energy*:

> "[I]n and of itself the violation of a contract does not amount to the violation of a treaty. This is only natural since treaty and contract breaches are different things, responding to different tests, subject to different rules."[33]

138. Because the enquiries are different, the fact that a State exercises a contract right or remedy does not in and of itself exclude the possibility of a treaty breach.[34] The ad hoc Committee in *Vivendi v. Argentina* stressed this consequence in the following words:

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30 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) (hereafter *Vivendi II*), Award of 20 August 2007, ¶ 7.3.9 (italics original).

31 *Id.*, ¶ 96.

32 *Impregilo v. Pakistan*, *supra* footnote 26, ¶ 258. See also *RFCC v. Morocco:* "The Tribunal must assess whether the State [...] has breached the obligations imposed on it by the substantive provisions of the Bilateral Agreement. Such a breach could of course result from a breach of the contract, but a potential breach of the contract does not amount, ipso jure and as such, to a breach of the Treaty". The Tribunal's translation of the following text in French: "Le Tribunal doit rechercher si l'Etat [...] a violé les obligations que lui imposent les dispositions matérielles de l'Accord bilatéral. Une telle violation peut certes résulter d'une violation du contrat, mais sans qu'une éventuelle violation du contrat ne constitue, *ipso jure* et en elle-même, une violation du Traité", *Consortium RFCC* v. *Kingdom of Morocco* (ICSID Case No. ARB/00/6) (hereafter*, RFCC v. Morocco*), Award of 22 December 2003, ¶ 48.

33 *Duke Energy Electroquil Partners and Electroquil SA v. Republic of Ecuador*, (ICSID Case No. ARB/04/19) (hereafter, *Duke Energy v. Ecuador*), Award of 18 August 2008, ¶ 342.

34 *See* Decision on Jurisdiction, ¶ 157.

> "[T]he passage [which concluded that it was impossible to separate the analysis of treaty breaches from that of contract breaches] appears to imply that conduct of Tucumán carried out in the purported exercise of its rights as a party to the Concession Contract could not, *a priori*, have breached the BIT. However, there is no basis for such an assumption: whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual rights."[35]

139. In conclusion, the Tribunal will take contract matters into account in its determination of whether the Respondent has breached the Treaty whenever relevant, while noting that a breach of contract is neither a necessary nor a sufficient condition for a breach of treaty.

e. Burden of proof

140. The Parties concur that the burden of proving treaty breaches lies upon Bayindir (PHB [Bay.] ¶ 7, PHB [Pak.] ¶ 1.5). They disagree, however, on the relevant standards.

141. The Claimant refers to the decision of the International Court of Justice in the *Corfu Channel Case*[36] in support of a liberal recourse to inferences of fact and circumstantial evidence when such inferences are based "on a series of facts linked together and leading logically to a single conclusion" (Tr. M., 4 June 2008, 107, 5-7). It submits this argument particularly with regard to the absence from the record of minutes of the meeting with General Musharraf on 12 April 2001, at which, according to the Claimant, the "political decision was made to get rid of Bayindir" (Tr. M., 4 June 2008, 107, 14-15). By contrast, the Respondent replies that the standard of proof is a demanding one for certain issues, noticeably conspiracy. It also finds that no adverse influence can be drawn from the lack of minutes of the meeting just referred to, in light of the Claimant's allegations of bad faith as well as of its own failure to disclose internal documents.

142. The Tribunal notes that, in its reference to the *Corfu Channel case*, the Claimant has omitted to mention that the Court expressly held that "proof may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt."[37] Hence, the Tribunal will have to assess whether or not the evidence produced by the Claimant is sufficient to exclude any reasonable doubt.

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35 *Vivendi v. Argentina*, *supra* note 18, ¶ 110.

36 *Corfu Channel Case* (UK v. Albania), Merits, Judgment of 9 April 1949, *ICJ Reports 1949*, p. 4.

37 *Id.*, p. 18.

143. The Tribunal further considers that, as argued by the Respondent, the standard for proving bad faith is a demanding one, in particular if bad faith is to be established on the basis of circumstantial evidence.

f. The relevance of previous ICSID decisions or awards

144. In support of their positions, both Parties have relied extensively on previous ICSID decisions and awards, either to conclude that the same solutions should be adopted in the present case or in an effort to explain why this Tribunal should depart from a certain solution.

145. The Tribunal is not bound by previous decisions of ICSID tribunals.[38] At the same time, it is of the opinion that it should pay due regard to earlier decisions of such tribunals. The Tribunal is further of the view that, unless there are compelling reasons to the contrary, it ought to follow solutions established in a series of consistent cases, comparable to the case at hand, but subject of course to the specifics of a given treaty and of the circumstances of the actual case. By doing so, it will meet its duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[39]

B. FAIR AND EQUITABLE TREATMENT

146. Bayindir's allegations of the many acts supporting its FET claim are loosely organized and have undergone significant variations throughout the proceedings. To structure its analysis, the Tribunal has sought to organize the earlier allegations within the framework adopted in Bayindir's post-hearing brief. It is aware that such choice may entail some repetition.

147. After discussing the admissibility of the importation of an FET obligation by operation of the MFN clause (a), the identification of the relevant FET obligation (b), and the content

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38 *See e.g.*, *AES Corporation v. the Argentine Republic* (ICSID Case No. ARB/02/17), Decision on Jurisdiction of 13 July 2005, ¶ 30.

39 On the precedential value of ICSID decisions, *see* Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, *The 2006 Freshfields Lecture*, published in Arbitration International*, Vol. 23,* 2007, pp. 357-378.

of the applicable standard (c), the Tribunal will analyze the Respondent's conduct which led to the expulsion of Bayindir (d), followed by the expulsion of Bayindir (e), and aimed at encashing the Mobilisation Advance Guarantees (f), as well as the characterization of all these acts taken together (g).

a. Importation of FET obligation by operation of MFN clause

1. Bayindir's position

148. The Claimant argues in essence that, despite the absence of a specific clause in the Treaty providing for fair and equitable treatment, an FET obligation can be derived both from the fourth paragraph of the preamble of the Treaty and from the operation of the MFN clause in Article II(2) of the Treaty (Mem. M., ¶ 142). In this latter respect, the Claimant seeks to import through Article II(2) of the Treaty the provisions on fair and equitable treatment contained in the bilateral investment treaties ("BITs" or, individually "BIT") concluded by Pakistan with France, the Netherlands, China, Australia, Switzerland and the United Kingdom. At the hearing on the merits, Bayindir added a reference to the BITs concluded by Pakistan with Lebanon, Sri Lanka and Denmark (Tr. M., 4 June 2008, 92, 9-13). It refers more particularly to the FET provision in the BIT between Pakistan and the United Kingdom[40] ("Pakistan-UK BIT") (Reply M., ¶ 255).

149. The Claimant emphasizes that the interpretation of the Treaty's MFN clause supports the importation of an FET guarantee in the light of (i) the Treaty's preamble and of its object and purpose, as directed by Article 31 of the VCLT; (ii) Article II(4) of the Treaty, which deliberately excludes some matters from the scope of operation of the MFN clause and, *a contrario*, implies that matters not excluded such as FET are covered; and (iii) the decisions in *MTD v. Chile*[41] (Mem. M., ¶ 145), *Plama v. Bulgaria*[42] and *Salini v. Jordan,*[43] which, in Claimant's submission, make it clear that the specific

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40 Agreement between the United Kingdom of Great Britain and Northern Ireland and the Government of the Islamic Republic of Pakistan of 30 November 1994, which entered into force on 30 November 1994, available at: http://www.unctad.org/sections/dite/iia/docs/bits/uk_pakistan.pdf.

41 *MTD. v Chile, supra* footnote 18.

42 *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24) (hereafter*, Plama v. Bulgaria*), Decision on Jurisdiction of 8 February 2005.

43 *Salini Costruttori SpA and Italstrade SpA v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13) (hereafter*, Salini v. Jordan*), Decision on Jurisdiction of 29 November 2004.

purpose of an MFN clause in a BIT is to "allow an investor to benefit from a more favourable substantive protection of another Treaty" (Tr. M., 4 June 2008, 92, 15-17).

2. Pakistan's position

150. The Respondent argues that reliance on the MFN clause of the Treaty to import an FET clause from another BIT is only possible if it is not excluded by the intention of the contracting parties at the time of signing the Treaty. In the present case, the intention had clearly been to exclude the FET standard to the extent that Turkey and Pakistan deliberately decided not to include an FET clause in the Treaty "notwithstanding that the preamble acknowledges the importance of fair and equitable treatment and clauses requiring such treatment [...] were already common by 1995 when the Pakistan-Turkey BIT was signed" (Rej. M., ¶ 4.7).

151. With respect to the Pakistan-UK BIT to which Claimant makes special reference, the Respondent noted at the hearing that the Claimant's interpretation would mean that the decision of Pakistan and Turkey not to include an FET guarantee, while including an MFN clause, would have had no effect at all, given that the Pakistan-UK BIT was already in force (Tr. M., 26 May 2008, 299, 1-12).

152. According to Pakistan, the Claimant's argument would amount to "precisely the kind of 'treaty shopping' against which the tribunals in cases like *Maffezini* and *Telenor* warned, albeit in the context of substantive, rather than jurisdictional, provisions" (Rej. M., ¶ 4.14).

3. Tribunal's determination

153. In its Decision on Jurisdiction, the Tribunal noted that, in the absence of a specific provision in the Treaty, it was doubtful that the sole text of the preamble would provide a sufficient basis for a self-standing FET obligation.[44] *Prima facie* for the sole purpose of jurisdiction, it then considered that through the operation of Article II(2) of the Treaty Bayindir could rely on Pakistan's obligation to act in a fair and equitable manner[45] contained in other BITs concluded by Pakistan. The Tribunal must now assess

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[44] Decision on Jurisdiction, ¶ 230.

[45] *Id*., ¶¶ 230-232.

whether or not the *prima facie* applicability of an FET obligation can be confirmed in the light of the submissions of the Parties on the merits.

154. The relevant passage of the preamble reads as follows:

> "Agreeing 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." (Exh. [Bay.] B-33).

155. In the Tribunal's view, such language is of little assistance as it does not establish any operative obligation. It is true that the reference to FET in the preamble together with the absence of a FET clause in the Treaty might suggest that Turkey and Pakistan intended not to include an FET obligation in the Treaty. The Tribunal is, however, not persuaded that this suggestion rules out the possibility of importing an FET obligation through the MFN clause expressly included in the Treaty. The fact that the States parties to the Treaty clearly contemplated the importance of the FET rather suggests the contrary. Indeed, even though it does not establish an operative obligation, the preamble is relevant for the interpretation of the MFN clause in its context and in the light of the Treaty's object and purpose pursuant to Article 31(1) of the VCLT.

156. Article II(2) of the Treaty reads in relevant part 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, whichever is the most favourable." (Exh. [Bay.] B-33)

This provision is limited by Article II(4) as follows:

> "The provisions of this Article shall have no effect in relation to following agreements entered into by either of the Parties;
> (a) relating to any existing or future customs unions, regional economic organization or similar international agreements,
> (b) relating wholly or mainly to taxation."
> (Exh. [Bay.] B-33)

157. The ordinary meaning of the words used in Article II(2) together with the limitations provided in Article II(4) show that the parties to the Treaty did not intend to exclude the importation of a more favourable substantive standard of treatment accorded to investors of third countries. This reading is supported by the preamble's insistence on FET.

158. It is further supported by the decision of the tribunal in *MTD v. Chile* regarding the application of MFN to import an FET obligation:

> "The Tribunal has concluded that, under the BIT, the fair and equitable standard of treatment has to be interpreted in the manner most conducive to fulfill the objective of the BIT to protect investments and create conditions favorable to investments. The Tribunal considers that to include as part of the protections of the BIT those included in Article 3(1) of the Denmark BIT and Article 3(3) and (4) of the Croatia BIT is in consonance with this purpose. The Tribunal is further convinced of this conclusion by the fact that the exclusions in the MFN clause relate to tax treatment and regional cooperation, matters alien to the BIT but that, because of the general nature of the MFN clause, the Contracting Parties considered it prudent to exclude. *A contrario sensu*, other matters that can be construed to be part of the fair and equitable treatment of investors would be covered by the clause."[46]

159. The fact that there is no uniform case law on MFN and procedural rights and that certain decisions, including *Maffezini v. Spain* and *Telenor v. Hungary* referred to by the Respondent, as well as *Plama v. Bulgaria* and *Salini v. Jordan*, have adopted a different view than the one applied here is of little relevance. Indeed, the *ejusdem generis* principle that is sometimes viewed as a bar to the operation of the MFN clause with respect to procedural rights does not come into play here and the words of the Treaty are clear.

160. As noted by the Respondent, the FET provision to which the Claimant more specifically referred, namely Article II(2) of the Pakistan-UK BIT, pre-dates the MFN clause in the Treaty. In and of itself that chronology does not appear to preclude the importation of an FET obligation from another BIT concluded by the Respondent. In any event, the Claimant has also referred to BITs concluded subsequently to the Treaty. The issue is therefore not whether the Claimant can invoke an FET obligation, but rather which one.

b. Identification of the FET obligation

1. Bayindir's position

161. The Claimant refers more specifically to Article II(2) of the Pakistan-UK BIT, according to which

> "Investment of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any

[46] *MTD v. Chile*, *supra* footnote 18, ¶ 104.

> way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory."[47]
> (Reply M., ¶ 255)

It has also pointed to the FET provisions included in the BITs concluded by Pakistan with France, the Netherlands, China, Australia, Switzerland, Lebanon, Sri Lanka and Denmark.

2. Pakistan's position

162. As discussed above, Pakistan objects to importing Article II(2) of the Pakistan-UK BIT into the Treaty, arguing that the Pakistan-UK BIT pre-dates the Treaty and, therefore, Turkey and Pakistan could not have intended to include that FET obligation into the Treaty.

3. Tribunal's determination

163. In its Decision on Jurisdiction, the Tribunal noted that Pakistan had not disputed that the BITs concluded by Pakistan with France, the Netherlands, China, the United Kingdom, Australia and Switzerland contained an explicit fair and equitable treatment clause.[48] At the hearing, Bayindir further referred to the BITs between Pakistan and Lebanon, Sri Lanka and Denmark. The Respondent has not specifically disputed this reference, focusing instead on the applicability of the FET provision of the Pakistan-UK BIT.

164. At the outset, the Tribunal notes that the basis for importing an FET obligation into the Treaty is provided by its MFN clause, from which it follows that the applicable FET standard is a self-standing treaty obligation as opposed to the customary international minimum standard to which the Respondent referred. That being so, whether international customary law and the observations of other tribunals in applying the minimum standard may be relevant here will depend upon the terms of the applicable FET standard.

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47 The Claimant incorrectly refers to this provision as Article III of the Pakistan-UK BIT (Reply M., ¶ 255, footnote 550), whereas the text cited by the Claimant corresponds to Article II(2) of said BIT. Later in the proceedings, in its opening statement at the hearing on the merits, the Claimant correctly referred to Article II(2) of said BIT (Tr. M., 26 May 2008, 116, 5-7).

48 Decision on Jurisdiction, ¶ 231.

165. The Claimant has especially referred to Article II(2) of the Pakistan-UK BIT, quoted above. It has also referred to Article 4 of the Agreement between the Swiss Confederation and the Islamic Republic of Pakistan concerning the promotion and the reciprocal protection of investments ("Pakistan-Switzerland BIT"),[49] which was concluded more than three months after its Turkish counterpart. In relevant part, the Pakistan-Switzerland BIT provides as follows:

> "(1) Each Contracting Party shall protect within its territory the investments made in accordance with its laws and regulations by investors from the other Contracting Party and shall not hinder through unjustified or discriminatory measures the management, maintenance, use, enjoyment, accrual, sale and, as the case may be, liquidation of such investments [...]
> (2) Each Contracting Party shall grant within its territory fair and equitable treatment to investments of investors from the other Contracting Party."[50]
> (Exh. [Bay.] CLEX-18.11)

166. A comparison between Article II(2) of the Pakistan-UK BIT and Article 4 of the Pakistan-Switzerland BIT suggests that the FET protection offered by these two provisions is very similar. There is a difference, however, between the two treaties in terms of chronology. The Pakistan-UK BIT was concluded before and the Pakistan-Switzerland BIT after the Treaty. This difference matters in connection with the Respondent's objection that, when they concluded the Treaty, Turkey and Pakistan cannot have intended to include an FET clause such as the one in the Pakistan-UK BIT or else they would have inserted an express provision. That argument only applies to clauses that pre-date the conclusion of the Treaty. It does not apply to Article 4 of the Pakistan-Switzerland BIT which was concluded after the Treaty. The fact that the latter entered into force thereafter is irrelevant to ascertain the intention of the State parties at the time of conclusion. As a result, the Tribunal cannot follow Respondent's chronological objection.

167. Hence, by virtue both of the time of its conclusion and its close similarity to Article II(2) of the Pakistan-UK BIT, Article 4 of the Pakistan-Switzerland BIT can be used as the

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49 Concluded on 11 July 1995 and entered into force on 6 May 1996.

50 Tribunal's translation of the French text provided by the Claimant as Exh [Bay.] CLEX-18.11, which states: "(1) Chaque Partie Contractante protégera sur son territoire les investissements effectués conformément à ses lois et règlements par des investisseurs de l'autre Partie Contractante et n'entravera pas, par des mesures injustifiées ou discriminatoires, la gestion, l'entretien, l'utilisation, la jouissance, l'accroissement, la vente et, le cas échéant, la liquidation de tels investissements [...] (2) Chaque Partie Contractante assurera sur son territoire un traitement juste et équitable aux investissements des investisseurs de l'autre Partie Contractante."

applicable FET standard in the present case. This said, a similar result would be reached by applying Articles 2(2) and 3(1) of the Pakistan-Denmark BIT of 18 July 1996.

c. Content of the FET standard

1. Bayindir's position

168. It is Bayindir's submission that the applicable FET standard is based on a treaty and is therefore not limited to the minimum standard under customary international law (Reply M., ¶¶ 257-280):

> "Article II(2) of the UK-Pakistan BIT contains no such limitation, either on its face or in substance. Nor do any of the other Pakistan BITs that I have just mentioned [with Lebanon, Sri Lanka, Australia and Denmark]."
> (Tr. M., 26 May 2008, 116, 19-22)

With reference to *PSEG v. Turkey,*[51] it adds that the applicable FET standard is "a free-standing obligation which does not depend for its meaning on the customary international law minimum standard of treatment" (Tr. M., 4 June 2008, 94, 5-8).

169. Regarding the content of the applicable standard of fair and equitable treatment, the Claimant has submitted that

> "Fair and equitable treatment [...] includes a number of component principles, including, the provision of a stable framework for the investment; refraining from arbitrary and discriminatory conduct; providing transparency and due process; acting in good faith; providing security for reasonable investment-backed expectations and refraining from harassment, intimidation and coercion of the investor."
> (Mem. M., ¶ 148)

170. In reliance on *Tecmed*,[52] Bayindir further submits that the FET standard protects the basic expectations taken into account by a foreign investor in making the investment, and requires the State to act in a "consistent and transparent manner so that the investor can adapt to comply with shifts in Government policies" (Tr. M., 26 May 2008, 119, 1-3) and "to maintain a stable framework for investment" (Tr. M., 26 May 2008, 119, 3-5). *Tecmed v. Mexico* defines the components of FET as follows:

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51 *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/05) (hereafter, *PSEG v. Turkey*), Award of 19 January 2007, ¶ 239.

52 *Técnicas Medioambientales Tecmed, SA v. United Mexican States* (ICSID Case No. ARB(AF)/00/2) (hereafter, *Tecmed v. Mexico*), Award of 29 May 2003.

> "[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."[53]

171. The Claimant also relies in particular on *Saluka v. The Czech Republic,*[54] *Eureko v. Poland*,[55] and *Victor Pey Casado v. Chile*[56] to submit that the unreasonable frustration of an investor's good faith efforts to solve a problem may amount to a breach of the FET standard, particularly when such frustration involves discriminatory action in favour of host State nationals (Tr. M., 26 May 2008, 119-120, 16-25, 1; 4 June 2008, 96, 4-17).

172. Finally, Bayindir contends that unfair and inequitable treatment does not need to be identified "on the basis of individual or isolated acts" (Mem. M., ¶ 149), but that the Tribunal must appreciate whether "in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable" (Mem. M., ¶ 149). It refers in this regard to *Desert Line v. Yemen*[57] (Tr. M., 26 May 2008, 120, 2-8).

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53 Decision on Jurisdiction, ¶ 237, citing *Id*, ¶ 154.

54 *Saluka Investments BV (The Netherlands) v. The Czech Republic* (hereafter, *Saluka v. Czech Republic*), *Ad Hoc* Arbitration (UNCITRAL Rules), Partial Award of 17 March 2006, available at http://www.pca-cpa.org/showpage.asp?pag_id=1029.

55 *Eureko B.V v. Republic of Poland* (hereafter, *Eureko v. Poland*), *Ad Hoc* Arbitration (Netherlands-Poland BIT), Partial Award of 19 August 2005, ¶ 233, available at http://ita.law.uvic.ca/alphabetical_list_content.htm.

56 *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2) (hereafter, *Victor Pey Casado v. Chile*), Award of 8 May 2008.

57 *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No ARB/05/17), Award of 6 February 2008.

2. Pakistan's position

173. Pakistan submits that even if the FET provision in the Pakistan-UK BIT were to be applied, the content of such provision is linked to the existing standards of customary international law (Tr. M., 26 May 2008, 300-301, 16-25, 1-3). It refers in particular to *Siemens v. Argentina*,[58] which "says that one has to look for the content of that standard in international law" (Tr. M., 26 May 2008, 303, 20-22).

174. Moreover, it is Pakistan's submission that the content of the applicable FET standard should be assessed not by reference to the *Tecmed* case, which is controversial and concerned a different situation, but rather by reference to *Thunderbird v. Mexico,*[59] which stands for the proposition that "the threshold [for a breach of FET] remains a high one" (Tr. M., 26 May 2008, 303, 18-19). It adds that *Tecmed* does not provide an authoritative statement of the general content of the FET standard and must be regarded as "the high watermark of one particular view of fair and equitable treatment" (Tr. M., 26 May 2008, 302, 23-25). It also challenges its relevance as it concerned a different situation.

175. Furthermore, Pakistan submits, following *Mondev v. United States*[60] and *ADF v. United States*,[61] that the Tribunal may not adopt its own idiosyncratic standard of what is fair or equitable without reference to established sources of law, as Bayindir seems to imply (Rej. M., ¶¶ 4.44 – 4.46).

3. Tribunal's determination

176. As an initial matter, the Tribunal notes that Article 4 of the Pakistan-Switzerland BIT makes no reference to general international law. However, as already mentioned, customary international law and decisions of other tribunals may assist in the

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58 *Siemens AG v. Argentine Republic* (ICSID Case No. ARB/02/8) (hereafter, *Siemens v. Argentina*), Award of 6 February 2007.

59 *International Thunderbird Gaming Corporation v. United Mexican States* (hereafter, *Thunderbird v. Mexico*), NAFTA Arbitration (UNCITRAL Rules), Award of 26 January 2006, available at http://ita.law.uvic.ca/alphabetical_list_content.htm.

60 *Mondev International Ltd. v. United States of America (*ICSID Case No ARB(AF)/99/2) (hereafter, *Mondev v. United States*), Award of 11 October 2002, ¶ 119.

61 *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1) (hereafter, *ADF v. United States*), Award of 9 January 2003, ¶ 184.

interpretation of this provision. This is particularly apposite here given that Article 4(2) of the Pakistan-Switzerland BIT simply states a general obligation of fair and equitable treatment. The Tribunal must therefore set forth the meaning of such a general obligation.

177. In its Decision on Jurisdiction, the Tribunal stated by reference to *Tecmed v. Mexico* that it could not rule out *prima facie* that Pakistan's fair and equitable treatment obligation comprised an obligation to maintain a stable framework for investments[62] and that "a State can breach the 'stability limb' of its [FET] obligation through acts which do not concern the regulatory framework but more generally the State's policy towards investments."[63] It must now define the contours of the FET standards for purposes of the merits.

178. The Tribunal agrees with Bayindir when it identifies the different factors which emerge from decisions of investment tribunals as forming part of the FET standard. These comprise the obligation to act transparently and grant due process,[64] to refrain from taking arbitrary or discriminatory measures,[65] from exercising coercion[66] or from frustrating the investor's reasonable expectations with respect to the legal framework affecting the investment.[67]

179. The Tribunal also agrees with the Respondent that the *Tecmed* case lays out a broad conception of the FET standard. Yet, it notes that the decision of the tribunal in *Thunderbird*, to which the Respondent refers, speaks of the *Tecmed* decision as an "authoritative precedent" with respect to the doctrine of legitimate expectations.[68] Similarly, the decision in *Siemens v. Argentina*, also cited by the Respondent, relies on

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62 Decision on Jurisdiction, ¶ 239.

63 *Id*., ¶ 240.

64 *See Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1) (hereafter, *Metalclad v. Mexico*), Award of 30 August 2000, ¶ 76.

65 Several tribunals have linked lack of arbitrariness and non-discrimination to the FET standard. *See inter alia Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) (hereafter, *Waste Management v. Mexico*), Award of 30 April 2004, ¶ 98; *Ronald S. Lauder v. Czech Republic*, *Ad Hoc* Arbitration (UNCITRAL Rules), Award of 3 September 2001, ¶ 292 (hereafter, *Lauder v Czech Republic*).

66 *Saluka v. Czech Republic*, *supra* footnote 54, ¶ 308.

67 *Duke Energy v. Ecuador*, *supra* footnote 33, ¶ 340.

68 Separate Opinion of Prof. Thomas Wälde in *Thunderbird v. Mexico, supra* footnote 60, ¶ 30.

Tecmed in its discussion of the contents of the FET standard.[69] More recently, relying in part upon *Tecmed*, the tribunal in *Duke Energy v. Ecuador* stressed that the investor's expectations are an important element of FET, while at the same time emphasizing their limitations:

> "The stability of the legal and business environment is directly linked to the investor's justified expectations. The Tribunal acknowledges that such expectations are an important element of fair and equitable treatment. At the same time, it is mindful of their limitations. To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest."[70]

180. Furthermore, because a treaty breach is different from a contract violation, the Tribunal considers that the Claimant must establish a breach different in nature from a simple contract violation, in other words one which the State commits in the exercise of its sovereign power. This view is consistent with a line of cases including *RFCC v. Morocco,*[71] *Waste Management,*[72] *Impregilo v. Pakistan,*[73] *and Duke Energy v. Ecuador,* [74] even though other tribunals have been less demanding.[75]

181. Finally, the Tribunal agrees with the Claimant that such a breach need not necessarily arise out of individual isolated acts but can result from a series of circumstances, and that it does not presuppose bad faith on the part of the State.[76]

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69 *Siemens v. Argentina, supra* footnote 58, ¶¶ 298-299.

70 *Duke Energy v. Ecuador, supra* footnote 33, ¶¶ 339-340.

71 *RFCC v. Morocco*, *supra* footnote 32, ¶¶ 33-34.

72 *Waste Management Inc. v. Mexico*, *supra* footnote 65, ¶ 115.

73 *Impregilo v. Pakistan*, *supra* footnote 26, ¶¶ 266-270.

74 *Duke Energy v. Ecuador*, *supra* footnote 33, ¶ 345.

75 *Mondev v. United States*, *supra* footnote 60, ¶ 134; *Noble Ventures v. Romania*, *supra* footnote 22, ¶ 182; *SGS v. Philippines* (ICSID Case No ARB/02/6), Decision on Jurisdiction of 29 January 2004, ¶¶ 162.

76 *See CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) (hereafter *CMS v. Argentina*), Award of 12 May 2005, ¶ 280; *Azurix v. Argentina*, *supra* footnote 18, ¶ 372 referring to *CMS v. Argentina*; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) (hereafter, *Loewen Group v. United States*), Award on Merits of 26 June 2003, ¶132*; Waste Management v. Mexico, supra* footnote 65, ¶ 93, referring to *Mondev v. United States* and *ADF v. United States; Tecmed v. Mexico, supra* footnote 52.

182. On the basis of the FET standard as defined above, the Tribunal will now examine the disputed conduct of Pakistan before (d) and after the expulsion (e), as well as in connection with the encashment of the Guarantees (f), or when all of the Respondent's acts are considered together (g). In doing so, the Tribunal will bear in mind that "a judgment of what is fair and equitable [...] must depend on the facts of the particular case"[77] and that the standard "must be adapted to the circumstances of each case."[78]

d. Conduct leading to the expulsion of Bayindir

183. The Tribunal will discuss in turn Bayindir's case relating to the frustration of its reasonable expectations (i), the existence of a conspiracy to expel it (ii), undue pressure and coercion (iii), and the lack of due process and procedural fairness (iv).

(i) Were Bayindir's reasonable expectations frustrated?

1. Bayindir's position

184. The Claimant argues in essence that its reasonable expectations that the legal framework affecting its investment would remain stable and that the Respondent would cooperate in resolving any issues that could arise under the Contract were based "on a clearly perceptible and transparent legal framework and on undertakings and representations made explicitly or implicitly by Pakistan" (Mem. M., ¶ 157), and that these expectations were frustrated particularly after General Musharraf came to power in October 1999.

185. The Claimant submits that since 1993, its investment was exposed to the "vagaries of changing political winds in Pakistan" experiencing "several drastic changes of direction" (Mem. M., ¶ 145). It explains that when the Project was revived in 1997, the then Prime Minister Nawaz Sharif "repeated assurances of Pakistan's commitment to the project" (Tr. M., 26 May 2008, 14, 20-23). It also puts forward Prime Minister Nawaz Sharif's continued interest and support for the Project in February 1999, at a time when the Respondent was allegedly having financial difficulties in pursuing the Project (Tr. M., 26 May 2008, 20, 4-17).

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77 *Mondev v. United States*, *supra* footnote 60, ¶ 118.

78 *Waste Management v. Mexico*, *supra* footnote 65, ¶ 99.

186. According to Bayindir, such assurances were frustrated when General Musharraf came to power:

> "[A]s soon as General Musharraf came to power, Pakistan seriously considered terminating Bayindir's Contract. The solution the Committee settled upon in November 1999 was to reduce the scope of the Project in view of financial difficulties." (Tr. M., 26 May 2008, 25, 16-21).

187. Months later, when Bayindir agreed to Addendum No. 9 in April 2000, it was only because it believed that "with the signing of Addendum 9, Pakistan had made a serious commitment to the M-1 Project, commitment that the M-1 Project would move forward unhindered" (Tr. M., 26 May 2008, 30, 15-18). Later, as the Respondent encountered further financial problems, Bayindir claims to have had a legitimate expectation "that Pakistan would continue to support Bayindir's investment, working collaboratively to page [sic] reasonable adjustments" (Tr. M., 26 May 2008, 123, 1-3).

2. Pakistan's position

188. The Respondent acknowledges that legitimate expectations are protected by the FET standard but refers to the decision of the a*d hoc* Committee in *MTD v. Chile*, pursuant to which such expectations "are not a substitute for the language of the Treaty itself" (Tr. M., 26 May 2008, 304, 15-17).

189. In reliance on *Aminoil,*[79] it also contends that in the context of an investment agreement, it is above all the text of the Contract itself which embodies the legitimate expectations of the Parties and that the Claimant could not reasonably expect that the terms of the Contract would not be enforced (Tr. M., 26 May 2008, 305-305, 4 June 2008, 166, 16-25).

3. Tribunal's determination

190. The Tribunal must first determine the relevant time for the formation of the investor's expectations. Several awards have stressed that the expectations to be taken into account are those existing at the time when the investor made the decision to invest.[80]

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79 *Arbitration between the Government of the State of Kuwait and The American Independent Oil Company (AMINOIL)* (hereafter, *Kuwait v. Aminoil*), Award of 24 March 1982, 21 ILM 1982, pp. 976 – 1053.

80 *See Duke Energy v. Ecuador, supra* footnote 33, ¶ 340, referring to *Occidental Exploration and Production Company v. The Republic of Ecuador* (hereafter, *Occidental v. Ecuador*), LCIA Case

191. There is no reason not to follow this view here. The result is that the expectations to be taken into account are those of the Claimant at the time of the revival of the Contract in July 1997. The Tribunal chooses this time as opposed to an earlier one, because the issues relating to the termination of the 1993 Contract had been settled, as the Claimant acknowledged in its Request for Arbitration (RA, ¶ 8). The revival of the Contract can thus be viewed as a new start. Moreover, at the hearing on the merits, the Claimant put particular emphasis on Prime Minister Nawaz Sharif's expressions of interest made at this same period (Tr. M., 26 May 2008, 14, 20-24).

192. A second question concerns the circumstances that the Tribunal must take into account in analyzing the reasonableness or legitimacy of Bayindir's expectations at the time of the revival of the Contract. In doing so, it finds guidance in prior decisions including *Saluka,*[81] *Generation Ukraine*[82] and *Duke Energy v. Ecuador* quoted above, which relied on "all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State."[83]

193. In the present case, the Tribunal is of the view that the Claimant could not reasonably have ignored the volatility of the political conditions prevailing in Pakistan at the time it agreed to the revival of the Contract. Indeed, the Claimant expressly acknowledges that it suffered severely from political changes in Pakistan during the preceding years (PHB [Bay.] ¶¶ 35-38).

194. In its submissions, the Claimant acknowledges that it was well aware of the potentially adverse impact of a change in government. It specifically refers to the fact that, after Prime Minister Nawaz Sharif was forced to resign in 1993, the new government adopted a position opposed to the Project and decided to terminate it under Clause 74 of the 1993 Contract (Tr. M., 26 May 2008, 14, 1-13; PHB [Bay.] ¶ 37). The Claimant further notes that: "[i]n 1997, winds shifted again, and Nawaz Sharif returned to power.

No. UN3467, Award of 1 July 2004, ¶ 185, *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1) (hereafter, *LG&E v. Argentina*), Decision on Liability of 3 October 2006, ¶ 127 and *Tecmed v. Mexico,* ¶ 154.

81 *See Saluka v. Czech Republic*, *supra* footnote 54, ¶ 304.

82 *Generation Ukraine v. Ukraine* (ICSID Case No. ARB/00/9) (hereafter *Generation Ukraine v. Ukraine*), Award of 16 September 2003, ¶ 20.37.

83 *Duke Energy v. Ecuador, supra* footnote 33, ¶ 340.

He immediately resurrected the M-1 Project" (Tr. M., 26 May 2008, 14, 14-16). According to the Claimant, Mr. Sharif gave "repeated assurances of Pakistan's commitment to the project" (Tr. M., 26 May 2008, 14, 20-23) based on which the Claimant agreed to enter into the Contract. However, in the light of the foregoing circumstances, the Tribunal considers that Bayindir could not ignore the fact that the future of the Project was linked to the shifts then affecting Pakistan's politics as well as to the position of Mr. Sharif. Bayindir entered into the Contract in full knowledge of these circumstances. It appears difficult to now accept that Bayindir had wider expectations of stability and predictability so as to justify protection under the FET standard.

195. When in 1999 General Musharraf took power in Pakistan, the political volatility prevailing in Pakistan was again manifest. The Claimant nevertheless chose to conclude Addendum No. 9 on 17 April 2000, although it argues in these proceedings that the government of General Musharraf was hostile to the continuation of the Project. Whether this latter assertion is sufficiently established is a matter that the Tribunal will consider later. For the purposes of the present assessment, the conclusion of Addendum No. 9 is another illustration of the fact that the Claimant elected to pursue its activities in Pakistan despite a degree of political volatility of which it was fully aware.

196. At the hearing on the merits, the Claimant asserted however that

> "Bayindir believed that with the signing of Addendum 9, Pakistan had made a serious commitment to the M-1 Project, commitment that the M-1 Project would move forward unhindered."
> (Tr. M., 26 May 2008, 30, 14-18)

197. In the opinion of the Tribunal, this latter allegation, even if proved, would not be sufficient to establish a breach of the Respondent's obligation not to frustrate the legitimate expectations of investors. As already noted, in the light of the political changes of the preceding years, the Claimant could not reasonably expect that no further political changes would occur. Moreover, in the present context of a contractual relationship between Bayindir and the NHA, as the Respondent rightly stresses, the expectations of the Claimant are largely shaped by the contractual relationship between the Claimant and NHA. In this connection, there was no basis for the Claimant to expect that NHA would not avail itself of its contractual rights. Although the

Tribunal has no jurisdiction to assess whether there has been a breach of the Contract under the Contract's proper law, the Tribunal must nevertheless take into account the terms of the Contract as a factual element reflecting the expectations of the Claimant. The allegations made by the Claimant in this regard are discussed by the Tribunal in section IV(B)(b) to (e) below.

198. This conclusion does not imply that the events which led to the expulsion of the Claimant were necessarily the result of a shift in political priorities. It is reached irrespective of whether such a shift took place as a result of the assessment of the Claimant's expectations as they stood well before the expulsion.

199. Therefore, the Tribunal is of the opinion that Bayindir's claim relating to the frustration of its legitimate expectations cannot be sustained.

(ii) Bayindir's expulsion

200. The Claimant has sought to establish, first, that its expulsion was the result of a conspiracy between different branches of the Pakistani government also involving the Engineer and its Representative acting under the Contract (1), and, second, that such expulsion was based on reasons unrelated to Bayindir's performance of the Contract, namely changing political priorities, funding difficulties, a balance of payment crisis, and conduct favouring local contractors (2).

201. These two contentions overlap to some extent, but not entirely, which is why the Tribunal will deal with them separately.

1. Was there a conspiracy to expel Bayindir?

1.1 Bayindir's position

202. Bayindir contends that for reasons unrelated to its performance of the Contract (see Reply M., ¶ 119), which will be discussed in the following section, the Respondent conspired to misuse the provisions of the Contract in order to expel Bayindir. The alleged conspiracy involved not only different divisions and officials of NHA and the Pakistani government but also the Engineer and the Engineer's Representative (see

Reply M., ¶ 55; Tr. M., 4 June 2008, 61, 12-17). In this respect, the Claimant has particularly invoked the circumstances discussed in the following paragraphs.

203. First, Bayindir extensively refers to a "discussion paper" (Tr. M., 4 June 2008, 19, 24) prepared by the then Joint Secretary of Communications, Mr. Ashraf Hayat, dated 14 October 2000 (Exh. [Bay.] CX-140). It focuses on the handwritten notes attributed to the then Secretary of Communications, Mr. Nazar Shaikh, and approved by the then Minister of Communications, General Qazi, saying:

> "[a]s for M-1 Project, we should wait for any default by the Contractor and then terminate the Project. They are likely to default in Burhan Section. NHA should ensure not to default in any way and also not entertain requests for extension."
> (Tr. M., 4 June 2008, 21, 3-8)

204. According to the Claimant, these handwritten notes evidence the existence of a conspiracy to use the provisions of the Contract to expel Bayindir for reasons unrelated to its performance. Based on the oral testimony of Mr. Shaikh, the Claimant submits that the "discussion paper was prepared for the purposes of discussion, and was in fact discussed, at an interministerial meeting held on 7 November 2000, chaired by the Minister of Communications and attended by the Secretaries of Communications, the Finance Division, the Planning and Development Division and including the Chairman of NHA" (Tr. M., 4 June 2008, 22-23, 24-25 and 1-5). Specifically, Bayindir contends that the course of action manifested in the handwritten notes lay beneath the decision taken at that meeting to continue with the Project but to bring any default of Bayindir to the notice of the government (Tr. M., 4 June 2008, 25, 2-12).

205. As a second circumstance evidencing conspiracy, Bayindir points to the preparation of a milestone review meeting held on 19 March 2001. It notes that one day before the meeting, the Chairman of NHA wrote to the Ministry of Communications and set out

> "[E]xactly how the March 19 meeting would proceed. What the Engineer will say about Bayindir, what the Engineer will say about NHA, how the limited Extension of time will be announced, and how that extension will be made contingent upon the extraction of a commitment from Bayindir."
> (Tr. M., 4 June 2008, 61, 19-20; see also Exh. [Bay.] CX-38).

206. Third, the Claimant submits that the decision to expel Bayindir was taken by General Musharraf himself at the meeting held on 12 April 2001, specifically organized on the request of General Qazi for this purpose. It considers that the steps followed thereafter by the Chairman of NHA were intended to cover this reality and to suggest that the

expulsion decision had been made by the Chairman of NHA, among others, on the basis of a brief legal opinion issued by Mr. Ebrahim on 23 April 2001 (Tr. M., 4 June 2008, 77-81).

207. As a fourth and related consideration, the Claimant asserts that the Engineer and Engineer's Representative were involved in this conspiracy, and that such involvement is what lies behind the unjustified treatment of requests for extension of time made by Bayindir as well as the issuance of the notices under sub-clauses 46.1 and 63.1(b)(ii) of the Contract.

208. Regarding the treatment of the requests for extension, Bayindir argues in essence that the Engineer and Engineer's Representative eliminated and added work to Bayindir's schedule in order to cause it to default on its obligations (Reply M., ¶ 56; see also CX-134), that contrary to sub-clause 44.1 of the Contract they did not consult the Contractor in the course of the evaluation of its requests for extension (EOT 01, 02), nor did they share with Bayindir the evaluation report of EOT 03, and that they failed to take into account that progress on the site was being prevented because of the unavailability of land and not for lack of equipment. Bayindir further argues that the evaluation of EOT 03 was orchestrated in preparation for the milestone review meeting held on 19 March 2001 (Tr. M., 4 June 2008, 43, 2-15 and 61, 12-17).

209. With respect to the issuance of the notice under sub-clause 46.1 of the Contract on 2 December 2000, Bayindir argues that there is no evidence on the record showing that the Engineer formed his opinion in a reasonable, independent and professional manner. Moreover, Bayindir further argues that the Engineer was instructed in a letter of 16 November 2000[84] to issue a sub-clause 46.1 notice, despite the fact that Bayindir had brought to the attention of the Engineer's Representative that its progress was being obstructed by reasons that were not attributable to it and that a formal request for extension would be submitted. Furthermore, the Claimant contends that as late as September 2000, the Engineer's Representative had reached the conclusion that Bayindir would find it difficult to complete the Priority Section 1 in time, but did not issue a sub-clause 46.1 notice at the time, allegedly in order to make it more difficult for

[84] In this regard, Claimant refers in paragraph 88 of its Reply on the merits to Exh. [Pak.] CM-23, which appears to be unrelated to this allegation.

Bayindir to react once the sub-clause 46.1 notice was actually issued in December 2000 (Reply M., ¶¶ 93-94).

210. Regarding the sub-clause 63.1(b)(ii) notice, the Claimant essentially asserts that such notice was improperly issued on the basis of an invalid sub-clause 46.1 notice. The purpose of this latter notice is to alert the Contractor to the need to take measures to meet the completion date. At the time of issuance of the sub-clause 46.1 notice, Bayindir's construction activities on the site were in full swing (Exh. [Pak.] CM-14). Bayindir argues that it did "proceed with the Works" and that a valid sub-clause 63.1(b)(ii) notice presupposes that the Contractor has stopped the works, as recognized by Mr. Mirza in his letter to the Chairman of NHA (see Exh. [Bay.] CX-138) and further confirmed by Mr. Pickavance, Bayindir's expert witness on construction projects (Reply M., ¶¶ 100-105).

211. Bayindir further suggests that the consultancy group of the Engineer, Pakistan Motorways Consultants (PMC), was economically dependent upon Pakistan because PMC's lead partner, ECIL, has undertaken 60 out of its 79 road sector projects for the government of Pakistan (Reply M., ¶¶ 116-118). Moreover, in Bayindir's submission, the correspondence between the Engineer and NHA with respect to Bayindir's request EOT 04 suggests subservience of the Engineer to NHA (Reply M., ¶¶ 84-86). In addition, a letter of 11 April 2001 from Mr. Mirza to NHA shows, according to Bayindir, that Mr. Mirza, in his capacity as consultant, was sympathetic towards and privy to the consideration of the various options by which Pakistan might save costs through action adverse to the interests of Bayindir, including the suggestion that the best course of action for Pakistan would be to terminate the Contract under clause 74.1, as invoking 63.1 was difficult to justify (Reply M., ¶¶ 107-111; CX-138).

1.2 Pakistan's position

212. The Respondent asserts that the allegation of conspiracy is without basis, and that it has been advanced by the Claimant to meet the more demanding requirements of a treaty breach, in what is in fact a contractual dispute:

> "In the presentation of its case, Bayindir has always been acutely aware that, even assuming in its favour that the Clause 63.1 notice was incorrectly issued, without more, with NHA acting on the basis of that notice in expelling Bayindir, the remedy for Bayindir lies under the Contract, in a challenge to a decision of the Engineer

> and ultimately arbitration pursuant to Clause 67. It is only if the notice was issued as part of a conspiracy, with the Engineer acting in bad faith with NHA and the Government of Pakistan, that a claim for breach of the Treaty could have any chance of success."
> (PHB [Pak.] ¶ 2.3)

213. In Pakistan's view Bayindir's claim rests upon the allegations that President Musharraf made a decision to expel Bayindir:

> "Bayindir's case on conspiracy ultimately turns upon the allegation that a decision to expel Bayindir was taken by the Chief Executive (President Musharraf) on 12 April 2001, and that this decision was then followed by the issue of a Clause 63.1 Certificate, which was allegedly issued in bad faith by the Engineer. That claim is simply inconsistent with the documentary (as well as oral) evidence. Bayindir has a high threshold to meet in terms of establishing the existence of a conspiracy. It has failed to meet that threshold."
> (PHB [Pak.] ¶ 2.4)

214. Pakistan further disputes Bayindir's assertion that the expulsion was decided for reasons unrelated to the performance of the Contract. It claims that the circumstances on which Bayindir relies are insufficient to establish the existence of a conspiracy and are rebutted by the evidence. In particular, the Respondent puts forward the following arguments.

215. First, Mr. Hayat's discussion paper of 14 October 2000 and the handwritten additions made by Mr. Shaikh only reflect internal discussions and cannot be interpreted as recording a decision or an instruction, and even less one aiming at the rejection of all EOT requests, whether valid or not (PHB [Pak.] ¶¶ 2.14-2.17). Moreover, the minutes of the interministerial meeting held on 7 November 2000 merely reflect the review of "an important national infrastructure project, subject to substantial delays, and also subject to particular criticisms from the World Bank and the Planning Commission" (PHB [Pak.] ¶ 2.20) and, in all events, the decision which ensued was that the project could continue.

216. Second, the Respondent argues that, contrary to Bayindir's allegations, the minutes of the milestone review of 19 March 2001 accurately reflect Pakistan's concern at Bayindir's poor performance of the Contract, which is further confirmed by the testimonies of General Javed and Mr. Bridger, and by the minutes of the Contract Progress Meeting held ten days later, on 29 March 2001 (PHB [Pak.] ¶¶ 2.35 and 2.39). Pakistan also points to Mr. Bridger's testimony that this meeting was a "turning

point" and that it was then that Mr. Bridger "lost patience with Bayindir" (PHB [Pak.] ¶ 2.35).

217. Third, with respect to the meeting with General Musharraf held on 12 April 2001 at the request of General Qazi, Pakistan argues that "[t]he reason why the involvement of President Musharraf was sought related to the particular sensitivities of Pakistan's diplomatic relations with Turkey" (PHB [Pak.] ¶ 2.48) and not because it was for General Musharraf to take the final decision on the continuation of the Project. Pakistan stresses that it was the Chairman of NHA who took the decision to expel Bayindir. For that, he formed his judgment not only on the basis of the legal opinion issued by Mr. Ebrahim on 23 April 2001, but also of the interim report of 7 April 2008 of the expert group constituted by the Chairman of NHA in coordination with the World Bank, as well as the letter to NHA of 11 April 2001 from Mr. Mirza, acting in his capacity as consultant.

218. Fourth, regarding Bayindir's allegations of bad faith on the part of the Engineer and the Engineer's Representative, Pakistan advances several arguments.

219. With respect to the treatment of the requests for extension, Mr. Shaikh explained that, in his handwritten notes on Mr. Hayat's discussion paper, by "requests for extension," he meant negotiated extensions such as the one under Addendum No. 9, and not extensions under the Contract, which were to be decided by the Engineer. Moreover, the fact that in early 2001 both the Engineer and NHA approved an extension of time for Bayindir in response to EOT 03 rules out Bayindir's allegation that a decision had been made to reject any request for extension (Rej. M., ¶ 2.15). As far as EOT 01 and EOT 02 are concerned, Mr. Bridger explained that they were not the subject of a formal determination by the Engineer because all the issues raised by these requests were agreed in Addendum No. 9 (Rej. M., ¶ 2.29). As for EOT 03, Pakistan argues that Bayindir was indeed provided with an opportunity to explain its position at a formal meeting (C-Mem. M., ¶ 2.127) and that the installation of traffic signs was not essential nor did it prevent the completion of the works (Rej. M., ¶¶ 2.34-2.39).

220. Further, Pakistan disputes having instructed the Engineer to issue a sub-clause 46.1 notice. The letter of 16 November 2000 referred to by Bayindir had nothing to do with

sub-clause 46.1. In fact, it demonstrates an instance in which the Engineer had ruled against NHA within the framework of sub-clause 67.1. In addition, Bayindir misinterprets Mr. Bridger's letter of 2 December 2000 allegedly acknowledging that equipment productivity was obstructed by the large proportion of confined working area. Contrary to Bayindir's interpretation, Mr. Bridger not only recommended an increase of 10 to 20% in equipment, but also noted the need for an increase in productivity because Bayindir was relying excessively on locally hired equipment which was sub-standard and unreliable and had even reduced the number of pieces of Bayindir-owned equipment between November 2000 and February 2001 (Rej. M., ¶¶ 2.52-2.55).

221. With respect to the steps that led to the issuance of the sub-clause 63.1(b)(ii) notice, Pakistan argues that a sub-clause 63.1(b)(ii) notice presupposes the issuance of a sub-clause 46.1 notice and that Bayindir's interpretation of the words "to proceed with the Works" in clause 63.1(b)(ii) is neither supported by the provisions of the Contract nor by the practical realities of managing a large construction project (Rej. M., ¶ 2.59). As for Mr. Mirza's letter to NHA of 11 April 2001, Pakistan stresses that this letter was written in Mr. Mirza's capacity as lead consultant to NHA rather than as Engineer, that Bayindir was fully aware that the PMC group was acting as consultants to NHA, that such double capacity is not uncommon and does not threaten impartiality, and that at no time did such letter say that proceeding under sub-clause 63.1(b)(ii) would not be justified. In addition, Pakistan refers to Mr. Mirza's supplemental witness statement confirming that the decision to issue a sub-clause 63.1(b)(ii) notice was not taken as a result of any pressure from NHA (Rej. M., ¶ 2.66). Pakistan also notes in relation to request for extension EOT 04, that it was not received until the Engineer issued the sub-clause 63.1(b)(ii) certification, and that such request had therefore no bearing on the Engineer's determination.

222. Concerning Bayindir's allegation relating to the economic dependence of the Engineer's consultancy group, Pakistan argues in reply that ECIL, PMC's lead partner, does not depend upon any one agency and that employers such as NHA are autonomous. In addition, Pakistan argues that ECIL is involved in a substantial number of international projects and that the independence of the PMC group cannot

be assessed solely in the light of ECIL's position, to the extent that the group consists of 5 firms, including an American and an Australian one (Rej. M., ¶¶ 2.71-2.74).

1.3 Tribunal's determination

223. At the outset, the Tribunal recalls that the standard for proving a conspiracy involving a bad faith component is a demanding one.

224. The Claimant has referred to the award in *Waste Management v. Mexico*, which defines conspiracy as "a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement."[85] The Tribunal considers that this definition provides good guidance.

Mr. Nazal Shaikh's notes

225. In support of its allegation of conspiracy, the Claimant first points to the handwritten notes (in particular those in paragraph 9, alternatively numbered as paragraph 273) appearing at the end of Mr. Hayat's document dated 14 October 2000 (Exh. [Bay.] CX-140). At the hearing, Mr. Hayat described this document as a "discussion paper" (Tr. M., 28 May 2008, 148, 4). The "discussion paper" focuses on a critical assessment made by the World Bank of the M-1 Project and discusses the advantages and disadvantages of putting an end to the project. The document then proposes different courses of action. The last page of the document contains handwritten notes attributed to Mr. Nazar Shaikh, the then Secretary of Communications, which read in paragraph 9 (or 273) as follows:

> "As for M-1 project, we should wait for any default by the contractor and then terminate the project. They are likely to default in Burhan Section. NHA should ensure not to default in any way and also not entertain requests for extension." (Exh. [Bay.] CX-140)

226. While the Claimant's interpretation of these notes is *prima facie* understandable, the witness testimonies did not support the thesis that the notes evidence a conspiracy. At the hearing, Mr. Hayat recognized that there were internal divergences regarding the desirability of the M-1 Project, which were discussed in his paper:

> "I think that some perspective is necessary. This Project is being viewed by many players as not a very good Project to have, and the discussion would not have

85 *Waste Management v. Mexico*, *supra* footnote 65, ¶ 138.

> prolonged for as long as it did if it were being implemented quickly, but it was just ridden with slow movement and difficulties, and was being, therefore, repeatedly questioned. So, my view was that it was worth considering, because some players think that it is a bad Project, to look at how this can be rationalised or reduced or stopped, or whatever. That was my view. It was not a view to – it was nothing more than that, and it was – and this was really a response to the World Bank's assertion that this is not a good Project."
> (Tr. M., 28 May 2008, 152-153, 12-25, 1).

227. The Tribunal does not see in such divergences, which are not an unusual occurrence among administrations, evidence of a conspiracy. More importantly, the course of action proposed in the handwritten notes cannot be viewed as reflecting either a final decision or an instruction imposed on the Engineer. Indeed, Mr. Hayat testified as follows:

> "[I]f I may add, you see, this is an internal note, and it was not a decision, it was my opinion, and it was not communicated to the NHA, I repeat, it was not communicated to the NHA as a decision at all. So this really – it was just for our internal consumption. How it got out and came in the hands of people who were not authorized to look, that is a different question."
> (Tr. M., 28 May 2008, 249-250, 21-25, 1-4)

228. This conclusion is corroborated by the testimony of the former Minister of Communications, General Qazi. The latter acknowledged that there were divergent views among the different divisions of the Pakistani government concerned with the Project. He stressed that Mr. Hayat's discussion paper had no impact on the discussions held during the meeting of 7 November 2000, at which the course of action described in paragraph 9 of the discussion paper would have allegedly been endorsed:

> "This report was not discussed, because there were people from finance, there were people from planning, and they were all expressing their views about the Project, and they were asking me to take a decision, and I recorded my decision, and my decision was; we will go ahead with the Project, and we will not take – we will not make use of further loan from the Turkish Exim Bank, which was, extremely expensive, because we would be able to fund the Project with our own money, and I said, 'Make sure that the Project is completed on time and nobody defaults', and I expressed some – also caution about not compromising with the safety [...]."
> (Tr. M., 28 May 2008, 298, 7-19).

229. The minutes of the meeting held on 7 November 2000 further confirm this conclusion. In effect, they record that the Minister of Communications decided *inter alia* that "[w]ork on the project especially the two sections Islamabad-Burhan and Rashakai-Charsadda may continue" (Exh. [Bay.] CX-201, ¶ 5(i)).

Milestone review meeting of 19 March 2001

230. As a further circumstance, Bayindir claims that the milestone review meeting of 19 March 2001 was pre-orchestrated as part of the conspiracy. It relies on the note signed by the Chairman of NHA dated 18 March 2001 (Exh. [Bay.] CX-38), which discusses the strategy to be followed during the meeting of 19 March 2001 in connection with a request for extension submitted by Bayindir. The note summarizes the strategy by referring to the "slippages in progress," NHA's "stance to abide by our part of the Contract" and its contractual remedies:

> "5. [...] the undersigned will work on the following strategy with M/s Bayindir during the meeting scheduled for tomorrow:-
>
> a. The Engineer will highlight the slippages in progress despite provision of all facilities including prompt payments by NHA. This will be in line with our committed stance to abide by our part of the Contract Agreement.
> b. The main grounds for Bayindir's extension are based on late availability of construction site which, being untrue, will be strongly contested both by the Engineer and NHA with facts and figures and photographs. The grant of extension of 27 days will not be announced but will be made contingent upon a commitment by M/s Bayindir to put their act together and increase the progress substantially.
> c. M/s Bayindir will be appropriately reminded of the rights and remedies available to NHA in the event of non-fulfilment of their contractual obligations, to which I have alluded in para. 3.
>
> (Exh. [Bay.] CX-38, para. 5)

231. On the basis of the other elements in the record, the Tribunal reaches a different understanding of this note from the Claimant. In reality, the Respondent had serious concerns about Bayindir's performance. Paragraph 1 of the note records that despite "numerous notices and reminders, both verbally and in writing [...] the pace of work did not pick up despite the scheduled completion date of priority sections by 23rd March 2001 drawing closer" (Exh. [Bay.] CX-38, par. 1). Paragraph 2 adds that "M/s Bayinder, as per their past practice, instead of gearing up their work, approached the Turkish Embassy" (Exh. [Bay.] CX-38, par. 2). These concerns are corroborated by the testimonies of General Javed and Mr. Bridger. At the hearing, General Javed testified in this connection that:

> "[...] we were paying them the state-of-the-arts rates, and one expected to see a good quality of equipment. [...], their machine mix was wrong. They didn't have the right equipment to do the job. Also, the sequencing was wrong. They didn't have a good work cycle worked out, which meant that they were wasting their time with their equipment."
> (Tr. M., 29 May 2008, 14-16)

232. Mr. Bridger, the Engineer's Representative, also stressed Bayindir's poor performance:

> "I think by and large, the people in this room should understand that delays – there was a very large area of this Project that I think we are talking about, around about 35 kilometres on Part 1, by and large the Contractor was way behind without any cause of delay from external influences."
> (Tr. M., 29 May 2008, 189, 6-12)

233. While the Tribunal found the statements of these witnesses credible, it remained unconvinced by the Claimant's representatives. Mr. Jilani, Bayindir's area manager, who was most directly concerned with the development of the M-1 Project stated that after 1999 issues of equipment and mobilisation were reported directly to Mr. Sadiq Can "because he is, by profession, a Mechanical Engineer, so that is how the construction was being managed" (Tr. M., 27 May 2008, 24, 3-7). As for Mr. Can, who was serving at the time as President of the Bayindir Construction Company, his testimony left the overall impression that the project was not being handled professionally:

> "Q: Your Project Manager, Mr. Yildirim, would he provide reports back to Ankara and to Bayindir to Head Office about how the progress on the job was going, what resources might be needed, what equipment, staffing levels, issues like that related to a large Project, would he communicate with Head Office, or send periodic reports to that effect?
> A: Yes, We used to talk to him periodically. Sometimes it was every week, sometimes I personally went to Pakistan, and I stayed there for a week or ten days, and we were working on site with him. It was not in the form of written reports, but we were in constant contact."
> (Tr. M., 27 May 2008, 253-254, 15-25, 1-3)

234. The same impression arose from the examination of Mr. Jilani, Bayindir's area manager, who was very hesitant when asked about basic aspects of the Project's management, for instance whether he had signed Addendum No. 9 in April 2000, which surprised the Tribunal knowing the importance of that document (Tr. M., 27 May 2008, 60, 9-22).

235. The existence of real concerns over the performance of Bayindir is reinforced by the minutes of the milestone review meeting (Exh. [Pak.] RB-68) and of the contract progress meeting No. 32 held on 29 March 2001 (Exh. [Bay.] CX-153). For all these reasons, the Tribunal concludes that the evidence adduced by the Claimant does not support the allegation that the milestone review meeting of 19 March 2001 was pre-orchestrated as part of the conspiracy.

Meeting of 12 April 2001

236. As an additional element of conspiracy, Bayindir asserts that the decision to terminate the Contract was taken by General Musharraf at the meeting held on 12 April 2001, while presented as having been made by the Chairman of NHA at a later time. It is true that there is evidence of the involvement of high officials of the Pakistani government, including General Musharraf, in the assessment and follow up of the Project. General Qazi, the Minister of Communications, confirmed this fact on cross-examination:

> "Q: You said a moment ago, if I am not mistaken, that if Bayindir would default, the National Highway Council would decide whether to follow the contractual terms or not. Do you mean that a decision to terminate the Contract would have to be taken bit (sic) National Highway Council?
> A: No, sir. That would be taken by the NHA. NHA is the contracting party. But National Highway Council would only come in with regard to the matter of Turkey being involved, you know, as I said, it weighed very heavily on us, because previously once the Contract was terminated by a previous Government, the Government of Turkey intervened. They did not do so this time, but still, that was on our mind, and in any case, NHA council had to be kept informed about the happenings, because that is the overall policy-making body. So if Bayindir default, the NHA counsel had to be informed. The Chairman of the council had to be told, and then whatever action there to be taken, whether it is termination, whether it is extension, whether it is this, that, that is the job of the National Highway Authority. That is not my job, or the Chief Executive's job, or anybody else's job.
> [...]
> (Tr. M., 28 May 2008, 315-319).

237. This appears unsurprising if not normal for a project of major economic importance for the development of the country. It is certainly not an indication of a conspiracy to put an end to the Contract without justification.

238. In fact, there is no direct evidence on record demonstrating that it was General Musharraf who took the decision to terminate the Contract. There are no minutes of the meeting of 12 April 2001, no other writings nor witness evidence. To the contrary, General Qazi testified plausibly that General's Musharraf's involvement was limited to the potential diplomatic repercussions of significant actions involving the M-1 Project. This is consistent with the testimony of the then Secretary of Finance of Pakistan, Mr. Afzal (Tr. M., 28 May 2008, 35, 6-11).

239. At the hearing, Bayindir argued that in the absence of direct evidence of the fact that General Musharraf had taken "the political decision [...] to get rid of Bayindir" (Tr. M., 4

June 2008, 107, 14-15), such a conclusion could nevertheless be reached on the basis of indirect evidence as "the whole series of facts, linked together, lead logically to that single and inevitable conclusion" (Tr. M., 4 June 2008, 107, 15-17). The Tribunal cannot follow Bayindir. It does not consider that the series of facts identified by the Claimant and just discussed is sufficient to establish conspiracy.

Engineer's role in conspiracy

240. The Claimant's argument necessarily entails, not just that the Engineer and the Engineer's Representative failed in their duties under the Contract, but that they were in fact part of the conspiracy, and this is what the Claimant does allege. It questions the conduct of the Engineer and the Engineer's Representative in connection with the treatment of Bayindir's requests for extension, the issuance of a sub-clause 46.1 notice, and the issuance of a sub-clause 63.1(b)(ii) notice. Although these are contractual questions, the Tribunal will review them to the extent relevant for the assessment of a breach of the Treaty.

241. The Engineer is appointed by the Employer (Part I – General Conditions – sub-clause 1.1(iv)). For certain matters, he must obtain the Employer's specific approval before exercising his authority (Part I – General Conditions – sub-clause 2.1(b)). For others, he is to exercise his discretion. In so doing, he must act "impartially within the terms of the Contract and having regard to all the circumstances" (Part I – General Conditions – sub-clause 2(6)). The "Engineer's Representative" is appointed by and responsible to the Engineer. He carries out the duties and exercises the authority delegated to him by the Engineer (Part I – General Conditions – sub-clause 2.2).

242. Sub-clause 44.1 of the Contract provides the reasons and procedure for time extensions:

> "In the event of:
> (a) the amount or nature of extra or additional work, or
> (b) any cause of delay referred to in these Conditions, or
> (c) exceptionally adverse climatic conditions, or
> (d) any delay, impediment or prevention by the Employer, or
> (e) other special circumstances which may occur, other than through a default of or breach of contract by the Contractor or for which he is responsible,
> being such as fairly to entitle the Contractor to an extension of the Time for Completion of the Works, or any Section or part thereof, the Engineer shall, after due consultation with the Employer and the Contractor, determine the amount of

such extension and shall notify the Contractor accordingly, with a copy to the Employer."
(Exh. [Bay.] C-10)

243. The Engineer or his Representative are required to obtain the written approval of the Employer before deciding an extension of time under clause 44 above (Part II – Conditions of Particular Applications – sub-clause 2.1(e)). By contrast, the issuance of notices under sub-clauses 46.1 and 63.1(b)(ii) are not subject to prior approval of the Employer.

244. The Engineer's contractual status and the provisions governing requests for extension being defined, the Tribunal first turns to EOT 03. At the hearing, the Claimant focused on a number of additional works eliminated and added to its schedule, allegedly to push it into default. It also claimed that the Engineer's Representative had failed to investigate and take into account the obstruction by landowners, which would have entitled the Claimant to a time extension.

245. The chronology with respect to EOT 03 is the following. On 15 January 2001, Bayindir requested an extension on the ground of additional works and difficulties of access to the site because of obstruction by land owners. On 22 February 2001, the Engineer sent his evaluation report on EOT 03 to the Employer recommending *inter alia* an extension of time of 49 days for the completion of Part I, Islamabad to Burhan Section, out of 208 days requested (Exh. [Pak.] CM-88)]. By letter of 15 March 2001, the Engineer's Representative informed Bayindir that EOT 03 had been evaluated and forwarded to the Employer for approval. He drew Bayindir's attention to the fact that, notwithstanding its request for extension, Bayindir's rate of progress had remained "well below the Contract requirements" and it had therefore "failed to comply with the requirements [of sub-clause 46.1]" (Exh. [Pak.] RB-58). On 17 March 2001, the Engineer's Representative revised the recommendation for time extension previously made and recommended an extension of 27 days for Part I, on the basis of further discussions with the Engineer and of the consideration of the course of action that Bayindir could follow (Exh. [Pak.] CM-96). On 2 April 2001, NHA approved the extension recommended by the Engineer (Exh. [Pak.] CM-100), which the Engineer's Representative communicated to Bayindir by letter of 3 April 2001 (Exh. [Pak.] CM-101).

246. This sequence suggests that the examination by the Engineer and the Engineer's Representative of EOT 03 followed the procedure set forth in sub-clause 44.1 of the Contract. It is true that the reduction in the days recommended for extension from 49 to 27 days may appear surprising. Yet, Mr. Bridger gave the following contemporaneous explanation:

> "Following consultation on the Extension of Time Claim with NHA and the Contractor and now having had further discussions with the Engineer, it is considered that some minor changes are warranted only to the Part I time extension consideration.
> In Section 3.10 – Delays in Approval and Revision of Drawings, I note: (a) in previous reference to the 4 cell culvert to be constructed under the Lunda Cut Flyover, I now consider that it would have been possible to construct the Flyover approach fill with only a pipe culvert installed initially and the 4-cell culvert constructed later. This would remove the 4-cell culvert from any consideration in the Extension of Time Claim. (b) the time for completing the rock excavation would be 21 days rather than 28 days; this better reflects the Contractor's approved rate of construction progress for this work. (c) that the main carriageway of the Motorway could be opened to traffic once the Underpass at Km 32+510 has been completed, and backfilled, the motorway pavement has been completed, the Flyover bridge girders launched over the pavement and the deck slab formwork fixed into position over the main carriageways."
> (Exh. [Pak.] CM-96).

247. At the hearing, the Claimant challenged the explanation just quoted. Addressing some of the obstacles that Bayindir had alleged in support of its request for time extension, Mr. Bridger stressed that:

> "I think that by and large, the people in this room should understand that delays – there was a very large area of this Project that I think we are talking about, around about 35 kilometers on Part 1, by and large the Contractor was way behind without any cause of delay from external influences."
> (Tr. M., 29 May 2008, 189, 6-12)

248. Dealing specifically with the reduction of the extension eventually granted to Bayindir, he added:

> "By reverting to the Clause 14 programme production figures for rock excavation, which I must say, in all of this Extension of Time analysis, we probably started off being maybe a little on the generous side with the Contractor, but in discussions it became obvious with NHA and the Contractor, it became obvious that we could have tightened up on things, and this is certainly one of the outcomes. After sending my letter to the Engineer, he didn't want to be caught out with another change, and we discussed what was possible with the Clause 14 programme production rates, and that is why this change came about."
> (Tr. M., 29 May 2008, 204-205, 24-25, 1-11)

249. Whatever the actual number of extension days to which Bayindir was entitled, the facts just reviewed do not warrant a conclusion that the Engineer or Engineer's

Representative acted partially or conspired with the Employer or the Respondent. This conclusion is confirmed by the observation that between November 2000 and July 2001, five out of ten decisions of the Engineer were in favour of Bayindir, and that three of these prompted the Employer to file notices to commence arbitration (PHB [Pak.] ¶ 6.25; Exh. [Pak.] CM-19 to CM-21, CM-24 to CM-26, CM-29 to CM-31, CM-33, CM-37 and CM-38).

250. This conclusion is more generally supported by Mr. Bridger's oral examination. He left the impression of a serious professional, who may well have been irritated at times by Bayindir's slow progress and other deficiencies, but who was perfectly aware of his duties as the Engineer's Representative under the Contract. This said, it is true that the Tribunal did not have the benefit of Mr. Mirza's testimony at the hearing. Yet, the record shows that Mr. Mirza considerably relied upon Mr. Bridger who was the one exercising the duties and authority of the Engineer. This was certainly so with respect to the matters reviewed here.

251. The same considerations hold true for the other acts of the Engineer and the Engineer's Representative which Bayindir challenges. Specifically, the Parties disagreed on a number of issues relating to the issuance of the notices under sub-clauses 46.1 and 63.1(b)(ii), particularly whether the completion dates for the Priority Sections under Addendum No. 9 were binding; whether expulsion was available as a remedy even after the imposition of liquidated damages under sub-clause 47.3 of the Contract (as amended by Addendum No. 6); whether a sub-clause 46.1 notice could be issued pending a request for extension of time; whether the content of the sub-clause 46.1 notice was specific enough for the Contractor to understand that it referred to the completion dates of the Priority Sections; whether the issuance of a sub-clause 63.1(b)(ii) after a sub-clause 46.1 notice presupposes an almost complete stoppage of the works.

252. In particular, the Parties have put forward competing interpretations of the meaning of sub-clauses 46.1 and 63.1(b)(ii), which are the main contractual bases for the expulsion of Bayindir. The notice under sub-clause 46.1 is indeed a precursor of the notice under sub-clause 63.1(b)(ii), which in turn provides the basis for the expulsion of the contractor. Yet, the Tribunal finds that the issuance of the notices under these sub-

clauses was based on a reasonable interpretation of the Contract, as evidenced by the written (Bridger's WS, ¶¶ 72-73, 95-102; Bridger's supplemental WS, ¶¶ 48-71, 98-115) and oral testimony of Mr. Bridger (Tr. M., 29 May 2008, 194-201). On cross-examination, Mr. Bridger noted *inter alia* that:

> "Q: Mr. Bridger, is the purpose of Clause 46.1, of a Notice under Clause 46.1 to encourage the Contractor to expedite progress in order to bring the delayed Project back on schedule?
> A: That is, strictly speaking, the purpose of it. I think even if it is not absolutely possible to bring it back on schedule, I think a reasonable client would be happy to see efforts being made that would bring it back towards the schedule, and I think the whole idea was to gear this Project up so that it wasn't going to be falling behind the way it was falling behind.
> Q: So a reasonable Contractor (sic) [client] would be happy to see that efforts were being made to bring it behind schedule, and to bring it on schedule?
> A: Substantial efforts, and real efforts. Not just bringing in equipment that didn't have the capacity to achieve the production levels, you know, we saw a lot of increases in equipment after that Notice was served, but the productivity fell, despite the increase in numbers of items of equipment."
> (Tr. M., 29 May 2008, 192-193, 12-25, 1-8).

253. Mr. Bridger's understanding of the purpose of a sub-clause 46.1 notice was confirmed by the Claimant's expert witness Mr. Pickavance, according to whom "the purpose of Clause 46.1 is to draw the Contractor's attention to the fact that he is not proceeding quickly enough in order to complete on time, and it is a precursor to the operation of Clause 63(b)(ii) in certain circumstances" (Tr. M., 30 May 2008, 221, 10-16). Mr. Pickavance opined however that the content of the notice was not precise enough, as it did not specify which works needed to be accelerated. According to Mr. Pickavance, "the Contractor has to tell the Engineer what he is going to do to put it right, but he cannot tell him what he's going to do to put it right unless he knows what it is that is wrong" (Tr. M., 30 May 2008, 221, 21-24). The experts produced by the Respondent, Prof. Uff and Mr. Chapman, were not of the same opinion. For them, "[t]he nature of the thing is to tell the Contractor he's going too slowly. It then requires him to take steps which the Engineer has to approve" (Tr. M., 30 May 2008, 222, 10-13) and "[w]hat would normally happen in the circumstance would be there would be a meeting after the receipt of a letter like this, so that the Contractor could be made clear at a meeting of the particular points where he needs to put more effort in" (Tr. M., 30 May 2008, 223, 13-18).

254. This discussion is particularly relevant when it comes to assessing Bayindir's reaction to the sub-clause 46.1 notice. Mr. Bridger's view was that Bayindir failed to proceed

with the works and that the issuance of a sub-clause 63.1(b)(ii) notice was thus justified. Asked in cross-examination why he had not proceeded as in early 2000, when before issuing such a notice he had alerted Bayindir, Mr. Bridger answered that in April 2001 the situation was different:

> "A: [...] We had been through a lot of processes up to that point, including this opportunity for dialogue, and so it was a different situation then.
> Q: A different situation where, in your assessment, a dialogue would have been counterproductive?
> A: The dialogue had taken place the second time because with extensive dialogue at the time of addendum number 9, and concessions had been made with respect to the Mobilization Advance, retrieval of the Mobilization Advance by incremental monthly payments, quite significant changes had been made to that [...]."
> (Tr. M., 29 May 2008, 226-227)

255. Bayindir's progress following the sub-clause 46.1 notice and whether it justified a sub-clause 63.1(b)(ii) notice was debated by the experts. Mr. Pickavance stated that the failure to proceed within the meaning of sub-clause 63.1(b)(ii) must be interpreted strictly (Tr. M., 30 May 2008, 160, 16-22) and confirmed the interpretation given in paragraph 7.58 of his report, namely that: "the only way in which a Contractor could be found to not have 'proceeded with the works' in accordance with 63.1(b)(ii) would be if the Contractor substantially reduced its labour to a point where there is either no progress, or the progress is de minimis" (Tr. M., 30 May 2008, 161-162, 18-25, 1-2). The Tribunal is not persuaded by this interpretation, which would not make much sense in practice, or in the words of Prof. Uff:

> "I have construed the words of the Contract in order to make what is sometimes called 'Business common sense', which always appeals to English judges and Arbitrators. It seems to me to construe the clause as Mr. Pickavance and the Claimant suggests doesn't make any sense because it would suggest that the sequence of events is that the Contractor is going too slowly, a Clause 46 Notice is served with the intention of speeding him up, but you can only act on that Notice by terminating if he actually stops altogether. That doesn't seem to be a likely sequence of events. It seems obvious to me that the clause is intended to refer to a failure to comply with the Clause 46 Notice, and I believe you can arrive at that conclusion within the words of the clause, but in any event, I suggest that the clause at the very lowest should be construed as failing to proceed with the works in accordance with the general requirements of the Contract, particularly Clause 41.1, that expressly requires the Contractor to proceed with due expedition and without delay, irrespective of whether a Clause 46 Notice has been served."
> (Tr. M., 30 May 2008, 167-168)

256. On the basis of the foregoing considerations, the Tribunal has no hesitation in ruling out a finding of conspiracy. Such a finding can in no circumstances derive solely from a divergence of views on the interpretation of certain provisions of the Contract. As to

the other factual allegations made by the Claimant in this connection, as has been shown, they are not sufficient either.

257. The additional argument advanced by Bayindir that PMC was economically dependent upon Pakistan does not change this conclusion. The fact that ECIL, the lead partner of PMC, may have worked extensively with the Pakistani government does not necessarily entail that the PMC group overall or Mr. Mirza himself were economically dependent upon Pakistan. And even if such dependence were proved, it would be insufficient to establish that the Engineer acted in bad faith. As for the alleged subservience shown in the correspondence, particularly in Mr. Mirza's letters to NHA dated 19 September 2002 (Exh. [Pak.] CM-162) and 11 April 2001 (Exh. [Bay.] CX-138), the Tribunal finds nothing in these letters suggesting bad faith on the part of Mr. Mirza. To the contrary, in his letters, Mr. Mirza specified whether he was acting in his capacity as Engineer or as consultant to NHA, thereby making it clear that he was well aware of the different roles he was playing in the context of the Contract. That the combination of these sometimes conflicting roles in one and the same person can be problematic is well-known to anyone familiar with construction contracts. But that is a different question. What matters here is that there is no concrete evidence of bias which could potentially lead to a finding of treaty breach.

258. The Tribunal thus concludes that the existence of a conspiracy to expel Bayindir for reasons unrelated to the latter's contract performance is not established. This conclusion does not preclude the possibility of an expulsion for other reasons which in and of themselves might be grounds for a treaty breach.

2. Reasons underlying the expulsion of Bayindir

2.1 Bayindir's position

259. Bayindir submits in essence that its expulsion was motivated by grounds unrelated to its performance of the Contract and, more specifically, by the following three "sovereign reasons": "to serve Pakistan's changing political imperatives, to save money in a time of acute financial difficulty, and to favour local contractors" (PHB [Bay.] ¶ 34).

260. First, regarding the changing political priorities, Bayindir argues that the Project was constantly subject to shifts in the political winds, political pressures, and the "tit-for-tat" referred to by Mr. Afzal that came with the changes in the Pakistani government (PHB [Bay.] ¶ 35). More specifically, Bayindir contends that the impact of a change of government must be assessed in light of the precedents before the revival of the Contract in 1997 (Reply M., ¶ 124), in particular the divergent positions of Prime Minister Nawaz Sharif, who was favourable to the Project, and Prime Minister Benazir Bhutto, who opposed it as a tactic to "befool the public" and "gain cheap publicity" (Exh. [Bay.] CX-16; PHB [Bay.] ¶ 37) and terminated the Contract. Moreover, Bayindir also alleges that the government of General Musharraf, which came to power in October 1999, took an aggressive stance against the Project "in the light of Pakistan's financial problems necessitating a change in policy" (Reply M., ¶¶ 129 and 132). Bayindir refers, in particular, to the answer of NHA to a question by the National Assembly of Pakistan, in which it admitted that projects, including M-1, were delayed due to changes in priorities of the subsequent governments and financial constraints (Reply M., ¶ 210; Exh. [Bay.] CX-230).

261. Second, in connection with Pakistan's financial difficulties, Bayindir alleges, that as a result of the nuclear tests in May 1998 and of General Musharraf's coup in October 1999, financial institutions were unwilling to extend credit to Pakistan (Reply M., ¶ 129; Exh. [Bay.] CX-168; PHB [Bay.] ¶ 42). Moreover, when General Musharraf came to power, he imposed a policy of fiscal discipline (Tr. M., 4 June 2008, 9, 10-5), which led to a reassessment of the Project to take into account the funding problems. To support this allegation, Bayindir relies primarily on a document entitled "Talking Points for the Prime Minister" intended for the meeting with Bayindir's Chairman on 12 October 1999 (Exh. [Bay.] CX-170-B) and to the recommendations of a committee, established by the Musharraf government in November 1999, that the M-1 Project be reduced from six to four lanes (Exh. [Bay.] CX-169). This recommendation was later approved by General Musharraf (Exh. [Bay.] CX-170-A; Tr. M., 28 May 2008, 30, 8-11). In Bayindir's submission, these documents show that with the advent of General Musharraf's government the Project came under increased scrutiny not because of a deficient performance on the part of Bayindir, but because of the financial constraints experienced by Pakistan.

262. Bayindir further argues that the Respondent's financial situation deteriorated in the year 2000. Referring to the oral testimonies of Mr. Wall, then World Bank country Director for Pakistan, and of Mr. Afzal, then Pakistan's Secretary of Finance, Bayindir points out that in the summer of 2000 Pakistan was facing a balance of payment crisis and actively seeking to conclude a standby agreement with the IMF (PHB [Bay.] ¶ 42). At the same time, Bayindir refers to the "liquidity crunch" that NHA experienced by the fall of 2000 and the lack of funds to cover the promissory notes that were coming due on the M-1 Project, a situation which prompted the Ministry of Communications to seek further funds from the Ministry of Finance (PHB [Bay.] ¶ 41).

263. Bayindir links the financial difficulties to its expulsion by referring to the following sequence of events. The standby agreement which was eventually reached in November 2000 specified revenue and expenditure targets. Being unable to meet those targets, Pakistan announced in April 2001 a revised budget in which funds available for the Public Sector Development Programme (PSDP) were substantially reduced. This reduction had an adverse impact on NHA's budgetary situation, which Bayindir describes as follows:

> "NHA received funding, including the funding for the M-1 Project, through the PSDP, and, as Mr. Afzal stated in no uncertain terms, NHA was expected to live within its PSDP allocation. As of April 11, 2001, the Secretary General of Finance was advised that NHA had Rs. 2.86 billion PSDP funds remaining for all NHA projects. Under the revised PSDP budget, however, NHA was facing a budget reduction of Rs. 3.1 billion, which would effectively place NHA in a deficit situation. However, in addition to NHA's projected remaining funds of Rs. 2.86 billion, NHA anticipated a release of Rs. 1.5 billion which had already been allocated specifically "to meet the liability of M/s Bayindir" [...] Unless NHA could avoid using the Rs. 1.5 billion release to satisfy Pakistan's obligations to Bayindir, the projected Rs. 3.1 billion PSDP budget cut would exceed NHA's remaining Rs. 2.86 billion PSDP allowance. Bayindir was owed Rs. 1.5 billion and more on account of IPC 20, IPC 21, and IPA 22. But the solution was simple enough [...] [Pakistan] stopped work on the M-1 Project, a low priority project under the Musharraf Government, and it stopped payments to Bayindir, freeing up the Rs. 1.5 billion for NHA's other PSDP project."
> (PHB [Bay.] ¶¶ 43-44)

264. In Bayindir's contention the M-1 Project was chosen as a target because it had come under severe criticism from the World Bank and the Expert Group convened by the Respondent and financed by a grant from the Japanese government administered by the World Bank (PHB [Bay.] ¶¶ 45-46) to the effect that the M-1 Project was financially unviable and that termination would result in a saving of costs (Reply M., ¶¶ 207-209; Exh. [Bay.] CX-139). It thereby strengthened the internal opposition within the

Pakistani government against the continuation of the Project. Further, according to a note prepared by NHA for the Finance Minister on 6 January 2000, the M-1 Project was specified to be a low priority project (Reply M., ¶ 151; Exh. [Bay.] CX-196).

265. It was allegedly in this context that the then Minister of Communications, General Qazi, requested a meeting with General Musharraf "to get his decision on [the] future of the M-1 project" (PHB [Bay.] ¶ 47), which was held on 12 April 2001. Bayindir emphasizes in this respect that

> "It is evident from the face of this memorandum requesting the meeting that the need for General Musharraf's intervention was not driven by contractual concerns or Project delays – the focus, as ever, was on the financial difficulties that Bayindir's M-1 Project posed for Pakistan and NHA."
> (PHB [Bay.] ¶ 47)

266. Bayindir claims that the decision to end the Project and expel it was taken by General Musharraf. It summarizes its general argument with respect to the financial reasons underlying its expulsion as follows:

> "with no funding available and an expensive, financially unviable project on its hands, the Government decided to sacrifice Bayindir in the name of sovereign financial discipline."
> (PHB [Bay.] ¶ 48)

267. Third, with respect to the alleged favouritism to the benefit of local contractors, Bayindir contends that its expulsion not only solved Pakistan's funding difficulties but also allowed the M-1 Project to proceed

> "because Pakistan could save money and still complete the M-1 motorway by engaging local contractors in Bayindir's stead. Even with the savings that Pakistan would reap, the local contractors stood to benefit from taking over the M-1 Project from Bayindir and were eager to do so. And indeed, local contractors were waiting in the wings, ready to take over the Project."
> (PHB [Bay.] ¶ 49)

268. More specifically, Bayindir points out that the completion of the Project by influential local contractors was recommended by NHA's advisors and was decided prior to the expulsion as evidenced by a number of documents and statements of NHA officials (Reply M., ¶¶ 214, 217, 219; Exh. [Bay.] CX-96, CX-139, CX-206, CX-224). According to Bayindir, Mr. Kamal Nasir Khan, the Deputy Managing Director of Saadullah Khan & Brothers (SKB), and a consortium of local contractors exerted pressure on Mr. Cörtük, Bayindir's Chairman, to assign the Project to them (Reply M., ¶ 216; Exh. [Bay.] CX-235). Eventually, the award of the Project to Pakistan Motorway Contractors Joint

Venture (PMC-JV), a local consortium led by SKB, was the result of a corrupt tender process, evidencing NHA's real motives for expelling Bayindir, namely saving cost and favouring influential local contractors (Reply M., ¶¶ 218-219). For Bayindir, NHA was in fact directly involved in the creation of PMC-JV, as evidenced by contemporaneous press reports (Exh. [Bay.] CX-106) as well as by a letter from the Vigilance Wing describing PMC-JV as "the Consortium which was constituted by concerned NHA officials through negotiations with concerned firms mainly SKB" (Exh. [Bay.] CX-236-A), and as confirmed by the oral testimony of Mr. Nasir Khan (PHB [Bay.] ¶ 52).

269. In Bayindir's submission, it is for these three reasons that it was expelled and not because of its performance under the Contract. At the hearing, Bayindir noted that the documents reviewed in this regard make little or no mention of performance problems (Tr. M., 4 June 2008, 6, 12-19).

270. Bayindir acknowledges that there were delays in the completion of the Project for reasons that are disputed. It adds that even if those delays were attributable to Bayindir, Pakistan's response was "grossly disproportionate to whatever problems existed on the Project" (PHB [Bay.] ¶ 60) and was "all the more egregious when viewed in light of Pakistan's and NHA's own culpability for the delays on the Project" (PHB [Bay.] ¶ 66) stemming mainly from Pakistan's failure to acquire and properly transfer land to Bayindir and from the assignment of additional work to Bayindir which was not contemplated when the Priority Sections deadlines were set in Addendum No. 9 (PHB [Bay.] ¶ 75).

271. In any case, Bayindir stresses that any delays or other problems relating to contractual performance were not the reason that moved the Pakistani government to take the decision to expel Bayindir. Such decision was instead the expression of governmental interference with the Contract.

2.2 Pakistan's position

272. As a general matter, it is Pakistan's case that it was truly committed to the Project and that the change of the Project's scope and completion dates was not due to its financial constraints but to Bayindir's failure to arrange a foreign currency loan and to the latter's poor contractual performance (Rej. M., ¶ 3.53).

273. The Respondent replies to Bayindir's allegations relating to the shifts in political winds that events pre-dating the entry into force of the Treaty on 3 September 1997 are not covered by the protections afforded by the Treaty and lie outside the jurisdiction of the Tribunal (C-Mem. M., ¶ 4.8). Moreover, the Pakistani government which came to power in October 1999 wished to continue the Project and retain Bayindir as the Contractor (Rej. M., ¶ 3.3). More specifically, Pakistan argues that:

> "The evidence shows that the decision to expel was made by NHA, acting on its own following the issuance of a Clause 63.1 Certification by the Engineer, subsequent to 12 April 2001, albeit with the high level approval that – so far as concerns the general diplomatic fallout – it could act in accordance with the terms of the Contract. This has two important consequences. First, and most obviously, Bayindir's case of conspiracy fails. Secondly, the case comes down to the exercise by NHA of a contractual right, divorced from interference by the State. The fact that President Musharraf might have, but did not, discourage NHA from exercising its contractual rights because of broader diplomatic reasons in no way constitutes relevant interference."
> (PHB [Pak.] ¶¶ 2.76-2.78)

In addition, Pakistan notes that General Musharraf was diplomatically and personally fond of Turkey and appreciated the fact that the Project was in the hands of a Turkish contractor.

274. In connection with Bayindir's allegations about Pakistan's financial constraints and balance of payment crisis, Pakistan notes that the "Talking Points for the Prime Minister" referred to by Bayindir do not support the Claimant's allegations. Quite to the contrary, this document shows that Bayindir had difficulties sourcing credit in the international market (Rej. M., ¶ 3.26). According to Pakistan, the contemporaneous record shows that it was Bayindir's inability to arrange the foreign exchange component of the loan that caused the financing and the scope of the Project to be revisited. As a result of Bayindir's failure to arrange the foreign currency loan, Pakistan had indeed to finance the Project itself. The position of NHA's legal advisor at the time, Mr. Farrukh Qureshi (now Bayindir's counsel), was that "[Bayindir's] letter dated 23.10.99 tantamounts to a repudiation of contract entitling NHA to accept such repudiation and terminate the contract should it consider to do so" (Exh. [Pak.] CM-52). Instead, NHA and Pakistan opted against termination and for negotiation (Rej. M., ¶ 3.28).

275. Pakistan further alleges that the very fact that Addendum No. 9 was concluded in early 2000, at a time when Pakistan was facing serious financial concerns, disproves

Bayindir's assertion that its expulsion in 2001 was motivated by financial considerations, as Pakistan's financial position at that time was more secure. NHA did not give in to the opposition from Pakistan's Planning Division or to the advice from the World Bank. It rather maintained its view that the Project should be completed by the Contractor, as evidenced by the conclusion of Addendum No. 9, which was highly favourable to Bayindir (Rej. M., ¶¶ 3.55 - 3.65). Nothing in the minutes of the 7 November 2000 meeting chaired by the Minister of Communications in any way supports the proposition that a decision was taken to discontinue the Project owing to financial constraints. In fact, it was decided that the Project might continue (PHB [Pak.] ¶ 3.2). If Pakistan nevertheless remained cautious, this was because of Bayindir's past poor performance. Similarly, General Javed testified that he made no mention of financial constraints in his presentation to the Chief Executive on 23 February 2001, and that his reference in this presentation to Bayindir's high rates was only to illustrate the incentive that Bayindir should have had to make progress swiftly (PHB [Pak.] ¶ 3.2).

276. In addition, Pakistan stresses that, contrary to Bayindir's contention, the budget available to NHA for the Project was not restricted to the PSDP allocation. NHA could rely upon another budgetary stream, the current budget, which was many times larger than the PSDP and could have been employed for the Project. NHA was provided with funds from the PSDP for the express purpose of meeting its liabilities to Bayindir for the period from April to June 2001. The provision would have covered payments not only in respect of IPCs 20 and 21, but also IPA 22. NHA did not pay IPCs 20 and 21 because, under the Contract, these IPCs were not to be paid until the final accounting at the end of the Project's Defects Liability Period (PHB [Pak.] ¶ 3.2). It took this decision on the basis of legal advice, which was subsequently confirmed by a decision of the Engineer, and, in this arbitration, further supported by the expert testimony of Mr. Chapman.

277. Pakistan argues that, in any case, Bayindir's allegation that the M-1 Project was not a priority is unsupported by the evidence on record. The note on which Bayindir relies in this regard states that priority should be given to ongoing projects which included M-1. It then concludes that the balance of the Turk-Exim Bank loan was sufficient for the current financial year and that "efforts would be made to remain within the budgetary allocations, as far as the Rupee portion was concerned" (Rej. M., ¶¶ 3.40-3.41).

278. Further, Pakistan submits that it did not anticipate any savings from the expulsion of Bayindir. Quite on the contrary, it advised NHA that the latter would probably not gain financially from an expulsion and that there was likely to be a substantial windfall to Bayindir at the end of the Defects Liability Period (Rej. M., ¶¶ 3.126 - 3.127 and 3.136 - 3.140).

279. Pakistan also rebuts Bayindir's third allegation pursuant to which the expulsion was effected to favour local contractors. It replies that neither the government nor NHA had any contacts with SKB before the expulsion (Rej. M., ¶¶ 3.153, 3.171 - 3.173), that it is not established that the decision to complete the works with local contractors preceded the one to expel Bayindir (Rej. M., ¶¶ 3.152, 3.164 - 3.170), that any suggestion of collusion is disproved by the fact that NHA's attempts to continue parts of the works with local contractors were stopped by the very contractors with whom it is supposed to have colluded (Rej. M., ¶ 3.154). Finally, Pakistan notes that the completion of the works with Bayindir's subcontractors was in any event a natural course of action expressly permitted under sub-clause 63.1 of the Contract.

280. More generally, for Pakistan it was Bayindir's poor performance under the Contract that led to the expulsion (PHB [Pak.] ¶¶ 6.56 – 6.62). Bayindir's progress was slow from the start and the financial resources it invested in the Project were inadequate (Exh. [Pak.] CM-47). General Javed referred in his statement to the minutes of the Contract Progress Meeting No. 18 for December 1999, showing that Bayindir was experiencing a lack of cash flow, which was adversely affecting its progress. Contrary to Bayindir's contention, the delays cannot be explained by the unavailability of the land. Indeed, most of the land had been properly handed over, except for an encumbered stretch of 4 kms that was *de minimis* given the overall lack of progress of Bayindir (Rej. M., ¶¶ 3.16-3.17). Moreover, the Chairman of Bayindir, Mr. Kamuran Cörtük, testified in response to a question from the Turkish Parliamentary Committee investigating the purchase of the television station Genc TV in November 1998, that 30 to 40 million dollars originating from Pakistan had been used for this acquisition (Rej. M., ¶ 3.9). In Pakistan's submission, Bayindir was itself undergoing a "credit crunch" that caused it to be constantly under-resourced, to fail to acquire adequate equipment, and to display a chronic inability to pay its subcontractors in spite of NHA's regular and prompt payment of IPCs.

2.3 Tribunal's determination

281. To assess the merits of these allegations, the Tribunal will focus on two issues: first, whether the Claimant was expelled for reasons unrelated to its performance (2.3.1); second, whether the Claimant's contractual performance had an impact on the Respondent's acts allegedly in breach of the Treaty (2.3.2).

2.3.1. Expulsion unrelated to Contract performance?

282. To answer the first issue about the reasons unrelated to performance, the Tribunal will consider whether the evidence supports the existence of political shifts (2.3.1.1), of financial difficulties (2.3.1.2), and of attempts to favour local contractors (2.3.1.3).

2.3.1.1. Political shifts

283. In its post-hearing brief, the Claimant relied on the oral testimony of Mr. Afzal to claim that it had been the victim of "political pressures" and "tit-for-tat" political dynamics between Prime Minister Nawaz Sharif and, his successor, Prime Minister Benazir Bhutto. Whereas Mr. Sharif had fully supported the Project, Ms. Bhutto had not, irrespective of Bayindir's performance. However, these events occurred prior to the entry into force of the Treaty on 3 September 1997 and the disputes arising from them have been settled (see section IV(A)(c) *supra*). These events are thus not susceptible of founding a treaty breach in these proceedings. They can merely be taken into account for a better understanding of the relevant facts.

284. With respect to the period following the entry into force of the Treaty, Bayindir argues that a further political shift occurred in October 1999 with the advent of the government of General Musharraf. The new government is said to have taken an aggressive stance against the Project. The Tribunal is, however, unpersuaded by the evidence put forward by the Claimant. The answer provided by NHA to a question of the National Assembly of Pakistan (Exh. [Bay.] CX-230), upon which the Claimant relies, does not show an "aggressive stance." While it indeed refers to delays due to changes in policy, it also mentions that "with prudent handling" most of the "sick projects" including M-1 "are now on track" (Exh. [Bay.] CX-230).

285. Asked in cross-examination when Bayindir started to perceive the alleged hostility of the new government, Mr. Jilani, Bayindir's area manager, gave inconclusive answers. He was unable to put a date on some of the assertions he made in his written statement. To a question seeking to elicit what time period he intended to cover when writing that "the correspondence that Bayindir started to receive from the NHA and the Engineer clearly revealed to me that efforts were being made to find an excuse to take the Project away from Bayindir," he replied "a very wide period" from the 1999 takeover of Pakistan by General Musharraf to December 2000 when the sub-clause 46.1 notice was received (Tr. M., 27 May 2008, 31, 19-25).

286. This answer omits the crucial fact that during that time span Bayindir was confirmed in its position of Contractor by the conclusion of Addendum No. 9. The Addendum No. 9 provided *inter alia* for a revised completion date, the reduction of the Project from six to four lanes, a rescheduling of the recovery of the Mobilisation Advance, the settlement of foreign currency payments in Pakistani rupees at the conversion rate of the date of payment, the deletion of certain works, the immediate resumption of work by Bayindir, and the handover of remaining land by NHA within a set deadline (Exh. [Bay.] C-18). The conclusion of Addendum No. 9 can hardly be seen as an "attempt to take the Project away from Bayindir" nor as an indication of an adverse political shift constituting a breach of fair and equitable treatment.

287. In this context, the Tribunal also notes General Qazi's testimony according to which Pakistan's diplomatic relations and General Musharraf's personal contacts with Turkey had a positive rather than an adverse effect on Bayindir's position (Tr. M., 28 May 2008, 313-314).

2.3.1.2. Financial difficulties

288. The evidence, including the testimony of Mr. Afzal, at the time Pakistan's Secretary of Finance, and of Mr. Wall, at the time World Bank Country Director for Pakistan, shows that Pakistan was indeed undergoing financial difficulties when General Musharraf came to power. Mr. Afzal confirmed that "the ratings suffered a shattering blow after the nuclear tests of May 1998" and "continued to be precarious" (Tr. M., 28 May 2008, 111, 11-13 and 17), and that General Musharraf's accession to power adversely affected Pakistan's access to international institutional lending (Tr. M., 28 May 2008,

56, 17-24). This evidence was corroborated by Mr. Wall, who mentioned that Pakistan faced a balance of payment crisis in the year 2000 (Tr. M., 30 May 2008, 131, 4-5).

289. In essence, Bayindir argues that these difficulties led to a reduction of the scope of the Project, while Pakistan replies that it was Bayindir's inability to arrange the foreign exchange component of the loan which led to a review of the Project's scope and finance mechanism. It is undisputed that Bayindir was not able to raise a foreign currency loan. It is disputed, however, whether Bayindir was under an obligation to do so or under a mere duty to exert best efforts. In reality, this dispute ultimately does not matter. On the facts, it cannot be denied that financial considerations played an important role in the review of the Project. But the difficulties were resolved and the Project continued.

290. The content of Addendum No. 9 concluded in 2000 leaves no doubt in this respect. Its preamble emphasizes the reason for the review:

> "WHEREAS Bayindir has informed NHA through its letter reference No. IPM/OK/NHA/292 dated October 23, 1999 that Bayindir is unable to arrange further Foreign Currency Credit for the construction of Islamabad – Peshawar Motorway Project in terms of the Agreement for The Revival of Contract Agreement for the Construction of The Islamabad – Peshawar Motorway dated 3 July 1997.
> AND WHEREAS NHA has agreed to arrange the remaining funding for the Project and has resultantly reduced the work and extended the Completion Date in view of the non-availability of the said Foreign Currency Credit."
> (Exh. [Bay.] C-18).

The Tribunal concludes that the solution reached in the form of Addendum No. 9 evidences the Respondent's willingness to continue with the Project, and not the reverse.

291. Bayindir's further argument about the influence of the World Bank's negative assessment of the viability of the Project does not appear better founded. The World Bank's opinion does not seem to have had much impact on Pakistan's decision-making processes. As noted at hearing by Mr. Afzal on cross-examination, it was seen as a mere suggestion, and often disregarded:

> "You see, look, the point I am making a little different. I am making two points. One is that the World Bank's view on the viability of the Project, even continuation at that stage, was something that they had been consistent with, ever since the inception of the Project, so incidentally was the Planning Commission. Maybe they changed it at the very end. All I am saying is that these were in the form of

> suggestions, and in my original letter, if I recall, I cited two or three cases, but let me just specify those. There was the Chashma nuclear power programme which we had assisted with the assistance of the Chinese Government in 1991, 1992, and was, you know, consistently opposed by the World Bank, right through, and this was, by the way, in the time of the policy loans. We went ahead with it, and incidentally today everybody thinks, well, we did a good job [...]. Then there was this Lady Health Workers programme, which was started in Ms. Bhutto's Government time [...] Now, when it was started, the World Bank thought, because, unfortunately, Ms. Bhutto's Government had acquired a bad reputation for, you know, giving employment where it was undeserved, even in schools, they thought this was another programme which was just there to recruit people and give jobs. In fact, it is today continuing with about 100,000 workers. We have had several assessments, including that by third parties like the Oxford Policy Management Group, and they think it is one of the most successful public health programmes in the region. So, you know, this sort of advice would come and go, and we would have a healthy exchange."
> (Tr. M., 28th May 2008, 64-65, 2-25, 1-18) [testimony of Mr Wall].

292. Bayindir also seeks to establish that the Respondent's financial situation further deteriorated throughout the year 2000 and that by the fall of 2000 NHA was facing a "liquidity crunch." It argues that the reduction of NHA's PSDP allocation prompted NHA to seek an exit strategy from the M-1 Project, which was draining a large portion of its resources and had come under severe criticism from the World Bank and parts of the Pakistani government. The Claimant thus seeks to establish a causal link between Pakistan's financial difficulties and the decision to expel it.

293. As the record stands, such a link is not established. Pakistan contends that NHA had at its disposal another budget stream larger than the PSDP. At the hearing, Mr. Afzal confirmed that "the national highways authorities, as I said, would get its budget allocation through two different streams. One is the PSDP, and one is the current budget" (Tr. M., 28 May 2008, 41, 13-16). He restated so in cross-examination:

> "Q: Right. What I am trying to understand is whether you are suggesting that the M-1 Project was funded within or outside the PSDP or both?
> A: Both."
> (Tr. M., 28 May 2008, 44, 5-8).

This testimony is corroborated, as the Respondent pointed out, by a letter from NHA to Bayindir of 17 July 2000 (Exh. [Bay.] CX-251), which suggests the existence of funds in addition to those stemming from the PSDP allocation for the financial year 2000-2001.

294. To counter this evidence, Bayindir refers to a note for the Finance Minister dated 6 January 2000, which in part reads as follows:

> "[o]n the subject of prioritization of NHA's Development Program the Finance Minister observed that first priority should be assigned to the completion of ongoing projects and within ongoing projects higher priority should be assigned to N-5 projects and then to rehabilitation/reconstruction of National Highway Network other than N-5."
> (Exh. [Bay.] CX-196).

295. There is nothing in this note suggesting that the M-1 Project was not a priority. Quite to the contrary, the priority goes to "completion of ongoing projects," which would appear to cover the M-1 Project. The M-1 Project is then discussed in more detail, but the note concludes merely that a decision from the Finance Minister is requested so that the proposals made by Bayindir (including the payment of the foreign exchange portion in cash in equivalent Pakistan rupees) can be turned into an agreement. In this context, one should note that the fact that the Project may have been viewed as a priority is in line with the country's diplomatic and General Musharraf's personal ties with Turkey (Tr. M., 28 May 2008, 313-314).

296. For these reasons, the Tribunal comes to the conclusion that the financial situation referred to by the Claimant cannot be considered a decisive cause of Bayindir's expulsion.

2.3.1.3. Local contractors

297. The same reasoning applies to Bayindir's allegation that the purpose of its expulsion was to save resources and complete the Project at lesser cost with local contractors. While it is plausible that NHA and the government considered ways of cutting costs, it is not established that this consideration triggered the expulsion of Bayindir and the decision to continue the Project with local contractors.

298. Bayindir refers to a number of documents allegedly demonstrating the intent to favour local contractors. These documents include a letter from the Vigilance Wing, press reports, and a memorandum of understanding signed by NHA with the local contractors before the launch of the tender procedure. Bayindir also relies on the testimony of Mr. Nasir Khan, all to sustain that, prior to the expulsion of Bayindir, NHA had undertaken the constitution of a consortium of local contractors to take over the Project. Bayindir claims that such conduct evidences the real motives underlying its expulsion.

299. On the basis of the documents to which the Claimant mainly refers (Exh. [Bay.] CX-96, CX-106, CX-139, CX-206, CX-224, CX-235, CX-236-A), the Tribunal agrees that NHA and the government had in mind the possibility of completing the Project with local contractors. However, this conclusion does not necessarily entail that they preferred to do so, or, even if they did, that the decision to expel Bayindir resulted from such preference. Absent any indication on record to these effects, the Tribunal cannot deem these facts established.

300. In reaching this conclusion, the Tribunal has taken into account that the record does not support Bayindir's allegation of corruption in the tendering process. Moreover, it appears to the Tribunal that any employer facing the unpleasant prospect of having to terminate a construction contract before completion would by necessity seek to identify alternative solutions. Envisaging the use of Bayindir's subcontractors to continue the works was certainly a sensible alternative. Indeed, it goes without saying that it makes more sense to try to retain the subcontractors who have already worked on the project rather than to resort to newcomers. These circumstances cannot be viewed as an indication that Pakistan's motivation for the termination was to favour local contractors and save costs.

2.3.2. Bayindir's performance

301. The foregoing conclusions are supported by a review of Bayindir's perfomance. In essence, the Claimant submits that the internal documentation of NHA and the government contained no or little mention of deficient performance on its part, while Pakistan's financial problems received far more attention. It adds that, even if its performance had not been satisfactory, expulsion was a disproportionate remedy, which is additional proof that the motivation lay elsewhere. In response, the Respondent refers extensively to contemporaneous documentation, mainly monthly progress reports and correspondence, to establish Bayindir's poor contractual performance (Tr. M., 26 May 2008, 189-236, 240-273; see also PHB [Pak.] ¶¶ 3.78 – 3.96, 3.99 – 3.106, 6.56 – 6.62).

302. As a threshold matter, the Tribunal notes that there can be no objection against relying on monthly progress reports and correspondence issued by the Engineer or its Representative, as the latter were not shown to be biased or acting in collusion with

NHA and the government. It also notes that Mr. Sadik Can, President of Bayindir Construction Company, testified that, together with reports on expenses, monthly progress reports were the main written sources regarding Bayindir's project management (Tr. M., 27 May 2009, 254-255, 22-25, 1-2).

303. The Tribunal stresses that in assessing this evidence it has taken into account the arguments advanced by the Parties in connection with the evidentiary weight of Mr. Mirza's testimony as well as the fact that Mr. Mirza was not available to appear at the hearing for cross-examination. Due to the confidential nature of the reasons alleged for Mr. Mirza's non-appearance, the positions of the Parties cannot be restated in this Award. However, the Tribunal has carefully reviewed all circumstances and concluded that, because the Claimant had no opportunity to cross-examine Mr. Mirza, the latter's written evidence could only be considered if corroborated by other evidence in the record.

304. The record substantiates the Respondent's negative assessment of Bayindir's contractual performance. Already immediately after the conclusion of Addendum No. 9, there is evidence that Bayindir's performance, particularly the level of re-mobilization and funds committed, was insufficient in the opinion of the Engineer's Representative (Exh. [Pak.] CM-65, CM-66). There is further evidence of this fact in the monthly progress reports for September and October 2000 (Exh. [Pak.] CM-8, CM-9) and in a letter from the Engineer to Bayindir of 7 October 2000 (Exh. [Pak.] CM-73).

305. It is true that the press release of the site visit of General Qazi on 12 September 2000, to which Bayindir refers (Exh. [Bay.] CX-31), states that the Minister of Communications had "expressed satisfaction over the pace of work." Yet, that press release is insufficient to establish the satisfactory performance of Bayindir or rebut strong evidence to the contrary. Government releases are often couched in prudent or diplomatic terms. More specifically, this release contains another passage to which General Qazi referred in his examination (Tr. M., 28 May 2008, 292, 16-20) and which states that "[the Minister] directed the experts to further gear up the pace of work on the project so that it could be completed at the earliest" (Exh. [Bay.] CX-31). In his oral testimony, General Qazi confirmed that, after his visit to the site, he was not satisfied with Bayindir's pace of work:

> "Based on what I had seen before the briefing, because first, we made the visit. We made the round. Then we came to the place which was – they called it, 'Camp office', and over there the briefing was given on the charts, and all. I had already visited the site. You had seen the work that was going on, and frankly, I was a bit disappointed to see that the number of machines deployed were too less, and the outfieldwork and the carting of the earth was mostly being done by donkeys, so I said, 'How can you meet the targets by such a slow-moving actions that are going on?' And I was told that, 'Well, these are the local subcontractors, and we are – 'we have deployed machines and we will deploy more machines', and they are working on other parts of the roads, that is why you could not see them. So I said, 'But all the same, I am not satisfied, the way the work is going on, because when I drove beyond the road after which I was ruled (sic) [told] to go, then I could see that large portions there was nobody working, and then they said, 'Well, we have divided up the road and people would be working on those portions also', so overall, my impression, as I carried, was not very happy one. I was a bit unhappy with the pace of work that I saw, and the amount of machines deployed that I saw, and then when the briefing was given, I was told by Bayindir that they would be able to meet the target, which was two asks (sic) [weeks] by March 2001, and the complete road by December. So, I had very serious doubts, and then the Engineer gave his assessment, and he pointed out that with the amount of work, the percentage of work they had done so far, there was no way they would be able to meet the target unless they undertook some extraordinary measures and deployed more resources and machines. So, I, at that time, told the Bayindir representative, a gentleman called Jilani, Mr. Jilani, I told him, I said, 'Listen, you better deploy more machines and bring in more resources so that you can meet the targets, because we want to make this motorway, and we want you to finish the work on time', which he promised that he would do."
> (Tr. M., 28 May 2008, 289-291).

306. Similar concerns were expressed later by General Javed, the Chairman of NHA, on the occasion of a visit to the site on 25 November 2000. These concerns are recorded in his notes, which the Engineer forwarded to Bayindir on 5 December 2000 (Exh. [Pak.] RB-43). General Javed confirmed his doubts in oral testimony:

> "The first remark that I made to the Bayindir people was that I have yet to have a critical analysis of your output, and I haven't seen any of the Engineer's reports, but they said that the critical activity appears to be the earthwork. The earthwork was the most critical activity, and I distinctly remember having told them that, 'Critical activity for you is the earthwork, unless you put your act together you will have no hope in hell to complete this section come 23rd of March'. So, certainly, this is absolutely right. They were far behind the schedule, at that point in time, with respect to the other areas, also, but earthwork, amongst the order of the works is probably the first one [...]."
> (Tr. M., 29 May 2008, 112, 5-21).

307. None of Bayindir's witnesses were examined on these facts, whereas Mr. Bridger's testimony confirmed that Bayindir's performance remained unsatisfactory in the months preceding the issuance of the sub-clause 46.1 notice at the beginning of December 2000 (Bridger's WS, ¶¶ 62 – 73; Tr. M., 29 May 2008, 189, 2-12). Referring to his

remarks in the November 2000 monthly progress reports, Mr. Bridger testified that earthwork quantities on Parts 1 and 5 combined were 45% less than the November target and that Part 1 had fallen significantly behind schedule (Bridger's WS, ¶ 71). By the end of November, Messrs. Bridger and Mirza considered that Bayindir's performance was such that they needed to issue the sub-clause 46.1 notice "before it became too late for BCI to have the opportunity to bring the Project back on program" (Bridger's WS, ¶ 72).[86]

308. After the issuance of the sub-clause 46.1 notice on 2 December 2000, Bayindir's progress remained unsatisfactory, as is evidenced by a letter from Mr. Bridger to Bayindir of 11 December 2000 (Exh. [Pak.] CM-79), and by the December 2000 monthly progress report (Exh. [Pak.] CM-11). Mr. Finn followed up with several reminders in January 2001 (Exh. [Pak.] CM-83, CM-84, CM-86). The monthly progress reports for January, February and March 2001 also show that Bayindir's progress was insufficient (Exh. [Pak.] CM-12, CM-13, CM-14). Mr. Bridger explained at the hearing that productivity decreased although Bayindir had added equipment (Tr. M., 29 May 2008, 193, 2-8).

309. Bayindir submits that, in assessing its performance over these months, the Engineer and his Representative improperly disregarded the fact that progress was being hindered by reasons attributable to the Respondent. This issue has been partly addressed in paragraphs 245-250 *supra*. Asked at the hearing about his assessment of the obstacles allegedly excusing the delays, Mr. Bridger gave the following answer:

> "Q: So they invited you to a joint inspection, you and a representative of the Employer. Bayindir witnesses have testified that you never accepted the invitation.
> A: That is absolutely right. I didn't.
> Q: You did not?
> A: I did not, but I inspected this site twice myself, once before the meeting of 19th of March, and once just before I sent out my letter [...] I went through the site with my Resident Engineers, I declined to go through with Bayindir because I didn't want the coercion – I didn't want to be pressured by Bayindir. I believe I knew exactly what Mr. Jilani said on the meeting of the 19th of March, and it was absolutely incorrect. The assertions he was making about what I had seen on site, and I did not want to go on site with them and be pressured in any way. [...]
> Q [THE PRESIDENT]: Well, can I just ask; what did you mean by being pressured by Bayindir? Would they otherwise pressure you?

[86] *See* also Mr. Bridger's statement referred to earlier that: "by and large the Contractor was way behind without any cause of delay from external influences" (Tr. M., 29 May 2008, 189, 10-12).

> A: I think they held a view that was contrary to what the actual circumstances were. They were obviously not going to back down from it, and to travel with them over 150 kilometres one way, and then back the other way 100 kilometres to my office, that is 250 kilometres, sitting with Bayindir telling me that black is white, I didn't enjoy the thought of that, so I didn't travel with them. [...]
> Q [THE PRESIDENT]: So the relationship was a difficult one?
> A: At that stage, after the 19th of March meeting it was. Up until then I had had very good relations with Bayindir. I was probably generous in the way I administered the Contract towards Bayindir because I believe that if the Contractor is treated fairly, and he gets his due payments, it is going to expedite the Contract. I had very good relations with all the – all three Project Managers, but after this 19th of March meeting, things became quite acrimonious with Bayindir, and I was going to be absolutely independent of them in every way possible.
> Q [THE PRESIDENT]: So the turning point was the 19th of March meeting?
> A: Oh, I believe that was a turning point, major turning point, yes."
> (Tr. M., 29 May 2008, 215-218)

310. At that 19 March 2001 meeting, the Employer and the Engineer's Representative had indeed expressed their concerns about Bayindir's unsatisfactory progress (Tr. M, 29 May 2008, 216, 3-8). The minutes of the meeting show that presentations were made by Mr. Bridger (pointing to Bayindir's deficient performance despite several reminders) and by Mr. Jilani (regarding the progress on the site). The minutes record that the Chairman of NHA intervened several times during Mr. Jilani's presentation to express concern about Bayindir's progress (Exh. [Pak.] CM-97).

311. Bayindir has sought to show that the minutes do not reflect the discussions held at the meeting, but to no avail. Mr. Jilani's testimony on this point at the hearing was unconvincing. Although he confirmed that the 19 March 2001 meeting was regarded as an important meeting, he stated that neither he nor Mr. Can, who attended for Bayindir, took any notes "because [the] Engineer was prepared, taking, I guess, the notes. We were not taking notes" (Tr. M., 27 May 2008, 67, 16-18). Moreover, he was unable to point to any evidence that he had asked Mr. Bridger for the draft minutes (Tr. M., 27 May 2008, 68, 12-16). Mr. Can's testimony was hardly more convincing. Asked whether he was aware of a letter sent by Mr. Bridger to Bayindir's project manager one week after the 19 March meeting, stating that the list of obstructions presented by Mr. Jilani at the meeting was obsolete (Exh. [Pak.] RB-67), Mr. Can was unable to answer whether Bayindir had replied or not, later noting that he was not involved in daily correspondence (Tr. M., 27 May 2008, 260-262).

312. Pakistan also relies on a letter that Mr. Bridger sent to Bayindir on 16 February 2001, noting that the value of the equipment permanently imported by Bayindir was well below Bayindir's commitment (Exh. [Pak.] CM-91). Mr. Bridger recalled that, at a meeting held on 21 March 2001, Mr. Jilani informed him that Bayindir would "never bring in the rest of that equipment" (Bridger's WS, ¶ 78). In his Supplemental Witness Statement, Mr. Bridger testified that he had found this statement "quite shocking" (Bridger's Supplemental WS, ¶ 110), which he confirmed orally (Tr. M., 29 May 2008, 259, 5-18):

> "Well, I think the very misguided view that Mr. Jilani gave of the obstructions, and the progress, certainly I was very disappointed in, and in fact, so much so that I made a point of convening a meeting with Mr. Jilani and others very soon after that March 19th meeting to discuss the importation of plant to get the Project really moving again, and it was in that meeting, I think it might have been just two days after the presentation on the 19th, that I was absolutely flabbergasted that there was no intention by Bayindir to bring in plant that I understood was due to come in accordance with a 1998 agreement with NHA, and I just thought it was trickery taken to the Nth degree."
> (Tr. M., 29 May 2008, 259, 5-18)

The oral testimony of Mr. Jilani appeared to confirm Mr. Bridger's statement that Bayindir did not intend to bring in additional equipment. Asked in redirect examination whether the equipment that Bayindir had on site was insufficient, Mr. Jilani gave a long answer to the effect that Bayindir was not contractually required to bring in more equipment (Tr. M., 27 May 2008, 81-85).

313. Additional criticism was voiced both by the Engineer's Representative and by the Employer shortly before the issuance of the sub-clause 63.1(b)(ii) notice on 19 April 2001. On 14 April 2001, Mr. Bridger in particular reminded Bayindir that:

> "According to any assessment, your rate of progress has remained well below the Contract requirements and you have failed to comply with our notice issued to you under Clause 46.1."
> (Exh. [Pak.] RB-69)

314. Accordingly, the facts are such that NHA's concerns about Bayindir's performance must be deemed founded, with the result that NHA was entitled to consider termination. Under these circumstances, the Tribunal can see no basis for finding a breach of the applicable FET standard.

315. In the light of the foregoing conclusion, the Tribunal will dispense with reviewing whether one or more of the three reasons invoked by the Claimant are capable of grounding an allegation of governmental interference with the Contract.

(iii) Did Pakistan exert illegitimate pressure or coercion on Bayindir?

1. Bayindir's position

316. It is Bayindir's case that it was expelled from the site under threat by armed soldiers who had surrounded the site on 24 April 2001 and prevented Bayindir's personnel from entering their offices or removing records (Mem. M., ¶ 179). Bayindir emphasizes that the time and manner in which the notice of expulsion was served upon Bayindir was deliberately planned so as to prevent Bayindir from seeking assistance or advice from its head office, or the Turkish Embassy in Islamabad, or legal counsel (Mem. M., ¶ 102). In this regard, Bayindir quotes from *Pope & Talbot v. Canada*[87] and argues that a "confrontational and aggressive" regulatory review may breach fair and equitable treatment:

> "The relations between the SLD and the Investment during 1999 were more like combat than cooperative regulation, and the Tribunal finds that the SLD bears the overwhelming responsibility for this state of affairs. It is not for the Tribunal to discern the motivations behind the attitude of the SLD; however the end result for the Investment was being subjected to threats, denied its reasonable requests for pertinent information, required to incur unnecessary expense and disruption in meeting SLD's requests for information, forced to expend legal fees and probably suffer loss of reputation in government circles.[...] In its totality, the SLD's treatment of the Investment during 1999 in relation to the verification review process is nothing less than a denial of the fair treatment required by NAFTA Article 1105, and the Tribunal finds Canada liable to the Investor for the resultant damages."[88]

317. Bayindir opposes Pakistan's allegation that the security problems on site were caused by unpaid subcontractors. It asserts that it had paid its subcontractors for the works performed until the end of December 2000 and that non-payment for works performed thereafter was due to NHA's failure to settle outstanding IPCs. According to Bayindir, the Chairman of NHA, in a press conference of 23 April 2001, upon the expulsion of

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87 *Pope & Talbot Inc v. The Government of Canada* NAFTA Arbitration (UNCITRAL Rules), Award of 10 April 2001 (hereafter, *Pope & Talbot v. Canada*).

88 *Id*., ¶ 181, quoted in Mem. M., ¶ 181.

Bayindir, assured Bayindir's subcontractors that their interests would be protected (Exh. [Bay.] CX-93). However, upon a request by Bayindir that its subcontractors be paid by NHA directly out of the certified amounts payable to Bayindir, the Engineer issued an allegedly biased decision under sub-clause 67.1, rejecting direct payment. Thus, Pakistan refused to pay Bayindir's subcontractors and directed the subcontractors to approach Bayindir for payment, which the latter did with the result that Bayindir's personnel was threatened and felt extremely insecure.

318. Moreover, Bayindir alleges that the Respondent deployed the FWO, a unit of the army, on the site. Thus, as a result of Pakistan's acts and omissions, Bayindir's expatriate personnel was compelled to leave Pakistan without securing its assets and property (Reply M., ¶¶ 242 - 243, Exh. [Pak.] CM-61, Exh. [Bay.] CX-158, CX-159).

319. Bayindir further claims that it was entitled under the Contract to seek a decision under sub-clause 67.1, followed by final adjudication by an arbitral tribunal. While such remedy was being pursued, the Respondent could not lawfully take over the site (Mem. M., ¶ 104). Bayindir has also mentioned that recourse to arbitration by the Respondent may constitute an act of coercion in breach of the FET standard as characterized in *Tecmed* (Mem. M., ¶ 183).

2. Pakistan's position

320. Pakistan's position is that the expulsion was carried out in accordance with the Contract. In particular, there was no intimidation of Bayindir's personnel. Neither was there any contemporaneous complaint by Bayindir, not even with respect to NHA's decision to use FWO personnel to secure the site and protect the equipment left by Bayindir (C.-Mem M., ¶ 4.42). Pakistan further argues that coercion as such, i.e. irrespective of any unlawful conduct, cannot give rise to an actionable breach of the FET standard (C.-Mem. M., ¶ 4.43).

321. In Pakistan's view, Bayindir's allegation of forcible expulsion comprises two elements (i) alleged coercive acts and threats by Pakistani armed soldiers; and (ii) alleged confiscation of records. In Pakistan's submission, Bayindir has failed to prove these elements. Bayindir relies heavily on Mr. Sadik Can's witness statement, who, as noted by Pakistan, was not in a position to recall what happened at the time of expulsion

because he had left the site on 25 April 2001, two days after receipt of the expulsion notice, and therefore was not present when the actual expulsion took place on 7 May 2001. Apart from Mr. Can's testimony, Bayindir has failed to substantiate its allegations. In particular, no complaints were raised at the time by any of Bayindir's representatives about coercion, threats or mistreatment at the hands of Pakistan.

322. According to Pakistan, security concerns that existed on site after Bayindir's expulsion had nothing to do with Pakistani armed soldiers, but were due to Bayindir's failure to pay its employees and subcontractors (PHB [Pak.] ¶¶ 4.1-4.3). NHA's response in arranging extra police protection and the FWO's presence were necessary to protect the site, including the equipment and Bayindir's personnel during the handing over of the Project to NHA (Rej. M. ¶¶ 3.91 – 3.124). In this connection, Pakistan notes that payment to subcontractors was the sole responsibility of Bayindir, as there was no privity of contract between NHA and Bayindir's subcontractors. In issuing the directions ruling out direct payment by NHA, the Engineer acted in conformity with his duties (Rej. M., ¶¶ 2.68-2.70).

323. Pakistan also notes that Bayindir points to no authority supporting that a State entity's recourse to an arbitration mechanism agreed in a contract can be considered as an act of coercion (C.-Mem. M., ¶ 4.44).

3. Tribunal's determination

324. The main evidentiary source of Bayindir's allegation is the witness statement of Mr. Sadik Can, President of Bayindir Construction Company (Exh. [Bay.] CX-65). The Tribunal must therefore assess Mr. Can's testimony and weigh it in the light of the other evidence in the record.

325. In his written statement, Mr. Can mentioned that in the evening of 23 April 2001, he was handed a letter which required Bayindir to vacate the site within 14 days and was urged to acknowledge receipt of this letter, which he did under protest. He further testified that he "noticed some soldiers of the Pakistani Army who were carrying guns and had taken positions at the gates and were also seen walking on the site" and that "[t]he presence of soldiers resulted in a panic amongst [his] staff who felt that they may be taken into custody or subjected to physical abuse" (Can's WS, ¶¶ 6-7). Mr. Can

added that the office site was locked, that the entrance was guarded by an armed soldier, and that he and his staff were only allowed to enter the office by the soldier who had the key, and that they were prevented from removing or copying any files. Mr. Can left Pakistan shortly thereafter reaching Turkey on 25 April 2001 (Can's WS, ¶ 9). At the hearing, he declared that:

> "On the evening of the 23rd, once we received the Notice, we were obviously – we found ourselves obviously in a very tight corner. The people at the site and I sat down. We thought about what we could do. Meanwhile, while we were talking, we realised that there were uniformed and armed soldiers on site. When we saw the soldiers we said, 'Okay, this is very serious'. We felt we needed to secure our offices on site. We also felt we needed to secure ourselves. This was something we were not quite familiar with. We had been in Pakistan for four to five years until then, and until then we had our own security forces that maintained security. This is a security force composed of professionals. We saw soldiers, and obviously this caused further unrest. Everyone, including myself, was scared. I was obviously leading the Project so I had to calm my colleagues down. I tried to calm them down. My colleagues and I said that we need to take our personal belongings and important valuables from the offices. We went to our offices but we were unable to access the offices. The soldiers came to us and they said that we cannot take anything out of the offices."
> (Tr. M., 27 May 2008, 247-248, 3-25, 1).

326. This account sounds quite dramatic. The fear and unrest among Bayindir's personnel is easily understandable and cannot be taken lightly. Yet, upon a closer review of the specific facts, the situation loses much of its drama. In reality, there are no indications that Bayindir's staff were threatened or subjected to physical violence by conduct attributable to the Respondent. To the contrary, the Respondent took steps to maintain order on the site and to protect Bayindir's staff from potential harm by the unpaid local workers hired by Bayindir. In fact, the main threat against Bayindir's personnel emanated from unpaid local workers and was handled by means of a non-fighting unit of the Pakistani army, the two, usually deployed for such tasks.

327. At the hearing, counsel for the Respondent asked Mr. Can several times whether he could point to any specific security complaint by Bayindir's staff in Pakistan. Mr. Can's answer was that he did not know (Tr. M., 27 May 2008, 268, 7-25, 272-273, 24-25, 1-9). Mr. Bridger's testimony reports the absence of security concerns. He had "not heard mention of any violence or rough tactics being used by anyone from NHA or from FWO" in his discussions with local staff (Bridger's WS, ¶ 108). Mr. Bridger further testified that he held a meeting with the Employer and Bayindir after the expulsion notice was served, and advised them of the steps that had to be taken for the orderly

expulsion of Bayindir (Bridger's WS, ¶ 104). He then confirmed the main content of this meeting in a letter of 24 April 2001 (Exh. [Pak.] CM-127). As noted by the Respondent, the letter makes no mention of any complaints regarding harassment or coercion by armed forces. With respect to security, it merely states that Bayindir was responsible for the security of the site for a period of two weeks.

328. Mr. Bridger also recalled that after the issuance of the notice of expulsion

> "large gatherings of angry people unpaid by BCI took place at the Burhan Camp and at BCI's offices in Islamabad. These crowds wanted to be paid before BCI left Pakistan. I remember that on one occasion the BCI Project Manager was trapped in his office on site by a mob of people [...] I understand that he was extricated through the efforts of NHA without being harmed."
> (Bridger's WS, ¶ 106).

329. This view of the situation immediately after expulsion is confirmed by a letter of 26 April 2001 from Askari Guards (PVT) Ltd., the security firm which Bayindir had hired to secure the site. That letter states that "the contractors and employees who have not been paid their dues are likely to react violently" and that the situation may require "special assistance [...] from law enforcing agencies" (Exh. [Pak.] R-24). This view was reinforced by the oral testimony of General Javed, who declared that:

> "The Escri(?) [Askari] Guards were already there, and I have seen it somewhere on the record that the Escri [Askari] Guard had written a letter to Bayindir that, 'Unless you supplement our resources, get outside help, additional help, we cannot guarantee the safety of your people', but before such a letter, I was conscious that here are nearly 70 or 75 plus Turkish staff, and they would be in jeopardy if we didn't try to save their life and property. The reason was that the – there was a lot of restlessness amongst the low level employees and the low level-one-concerns-type people, and most of them happened to be from the turbulent tribal areas of Pakistan, the Burhans who usually get very angry, et cetera, and can resort to any level of violence when their wages for the last six months are not paid, so I thought it was my responsibility to make sure that the process of expulsion and other related post-expulsion and post-termination events take place in a most organized manner."
> (Tr. M., 29 May 2008, 142-143, 24-25, 1-18).

330. At the hearing, Mr. Sadik Can did not offer any alternative explanation (Tr. M., 27 May 2008, 263-265). Asked whether he was aware of the warning contained in the letter from Askari Guards, Mr. Can stated "No. I was not aware of it, and I did not infer from Article 3 that additional support would be needed. I read in paragraph 3 that difficulties may arise because of unpaid salaries" (Tr. M., 27 May 2008, 264, 5-8). Bayindir contends that NHA should have paid its subcontractors out of the certified amounts

payable to Bayindir instead of directing these subcontractors to Bayindir. However, the Claimant has not established that NHA actually sought to turn the subcontractors against Bayindir in order to coerce the latter, nor has it demonstrated that NHA was responsible for paying Bayindir's subcontractors.

331. The expulsion was effected on 7 May 2001, at a time when Mr. Can was no longer in Pakistan. Mr. Bridger was not on site either when the Employer took over. The operation was reportedly performed by FWO on behalf of the Employer. According to the testimonies of Mr. Bridger and General Javed, the FWO is the construction and engineering unit of Pakistan's army and was used to secure and protect the equipment and material left on the site (Bridger's WS, ¶ 107; Tr. M., 29 May 2008, 143, 20-25). General Javed testified that there were approximately twenty to twenty-five men of the FWO, in addition to the guards hired by Bayindir, and that the FWO were deployed "because they are familiar with the job, and they had a number of contracts from NHA also" (Tr. M., 29 May 2008, 143-144, 25-2). General Javed further explained that "when this happened, not one person was even scratched, not a pin was stolen, and there was absolute order when the expulsion process took place" (Tr. M., 29 May 2008, 144, 5-8).

332. Thereafter, in response to a letter from Mr. Bridger of 7 May 2001, Bayindir identified the personnel which would carry out the joint measurement of the remaining permanent works, temporary works, and preparation of inventories as required by the Contract (Exh. [Pak.] CM-136). On this occasion, Bayindir raised no complaints as to any mistreatment of personnel by NHA's security staff. The letter only stated that "Bayindir Security shall work in parallel with NHA's additional security arrangements until complete handing/taking over of the Project takes place" (Exh. [Pak.] CM-136). The same day, Mr. Bridger answered Bayindir's letter stressing that "[u]nder the Contract it is only appropriate to have Bayindir Security personnel on hand as observers" (Exh. [Pak.] CM-137).

333. The minutes of the first joint measurement and inventory meeting, held on 10 May 2001, at which three representatives of Bayindir were present, do not record any complaints about harassment or coercion either (Exh. [Pak.] CM-138). At a meeting held the following day, Bayindir expressed the concern that the FWO may have a

conflict of interest in the measurement and inventory process and stressed its preference for engaging some other independent organisation with the necessary expertise (Exh. [Pak.] CM-141). No complaints about mistreatment were raised in this context either. By letter of 15 May 2001, Mr. Bridger advised Bayindir that an independent organisation, Jaffer Brothers (Pvt.) Ltd., had been nominated to conduct the joint inventory (Exh. [Pak.] CM-142).

334. By contrast, Bayindir did raise complaints on 16 May 2001 with respect to the taking over by NHA of the sites, offices, workshops and stores at the Burhan and Bara Banda camps, noting that "[p]olice was mobilized at all end and entry points and thus all the camps and sites were sealed on the same day" (Exh. [Pak.] CM-143). On 21 May 2001, Bayindir also complained about a one day shutdown of electricity that had taken place at its residential block on 17 May 2001; it added that such actions were "contrary to the agreement to speed up the inventorization and other important activities" (Exh. [Pak.] CM-144). Mr. Bridger replied on 24 May 2001 that he did not condone such actions, but that NHA had "the legal right to take over any or all parts of the site that they wish" and that, upon raising the matter, he had been assured that the process would be completed in a "professional manner" (Exh. [Pak.] CM-145). Two days later, Mr. Bridger wrote that access to offices and stores had been restricted for one or two days at the beginning of the inventory period, and that the issue relating to the removal of some of Bayindir's records had been solved amicably (Exh. [Pak.] RB-105).

335. Regarding Bayindir's access to files more generally, Mr. Bridger testified that records were kept "under a dual lock system requiring attendance for access by both NHA and BCI" (Bridger's supplemental WS, ¶ 122) and that, although there were tensions between the parties, he was generally able to achieve cooperation. He did not recall "ever being made aware of any occasion where BCI had been unable to resolve problems of access to any records at the Project Site Offices, when such access was necessary for the supply of information to NHA" (Bridger's supplemental WS, ¶ 123).

336. On the basis of the foregoing considerations, the Tribunal concludes that the evidence does not support Bayindir's allegation of coercion. There is no evidence showing that Bayindir was harassed or coerced by conduct of NHA or of its subcontractors attributable to the Respondent. Nor is there any evidence showing that NHA or the

Respondent failed to act when it appeared necessary to prevent harm to Bayindir's personnel. Quite to the contrary, the few instances in which Bayindir raised complaints about the treatment of its personnel appear to have been swiftly addressed and would in any event not be capable as such of sustaining a breach of the FET standard.

337. Finally, the Tribunal is also unpersuaded by the Claimant's allegation that the recourse to arbitration under the Contract constitutes an exercise of coercion or undue pressure. Bayindir has not provided any explanation, nor any authority to this effect. It appears obvious to the Tribunal that, as a rule, a party's initiation of arbitration as provided in a contract cannot constitute a treaty breach.

(iv) Was Bayindir deprived of due process and/or procedural fairness?

1. Bayindir's position

338. It is Bayindir's claim that it was denied its right to be heard and was treated in a non transparent manner because all the decisions affecting its investment were taken at the highest level without it being heard (Mem. M., ¶ 190; Reply M., ¶ 297). Bayindir relies on *Metalclad v. Mexico*,[89] *Middle East Cement v. Egypt*,[90] *Tecmed v. Mexico,*[91] and *Waste Management v. Mexico*.[92] In Bayindir's submission, these awards hold that the absence of a fair procedure or the existence of serious procedural shortcomings may constitute violations of fair and equitable treatment.

339. In Bayindir's submission, delays and disputes are common in large construction projects. Thus, Pakistan should have worked in good faith towards a resolution as required by the FET standard and held in *Saluka v. Czech Republic*.[93] Instead, Pakistan "exercised a destructive option to which it was not even contractually entitled – expulsion" (PHB [Bay.] ¶ 65).

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89 *Metalclad v. Mexico, supra* footnote 64.

90 *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6) (hereafter, *Middle East Cement v. Egypt*), Award of 12 April 2002.

91 *Tecmed v. Mexico*, *supra* footnote 52.

92 *Waste Management v. Mexico, supra* footnote 65.

93 *Saluka v. Czech Republic, supra* footnote 54.

340. In any case, Bayindir emphasizes that the dispute resolution provisions of the Contract are irrelevant, as the present claims are brought under the Treaty and are therefore distinct from contract claims.

2. Pakistan's position

341. For Pakistan, Bayindir's contentions assume some form of administrative or analogous proceedings where due process requirements apply. However, this case does not involve any such proceedings. Rather, Bayindir failed to perform under the Contract, which resulted in discussions at various levels as to the consequences of that breach (C.-Mem. M., ¶ 4.45).

342. Moreover, Bayindir had the opportunity and did in fact meet and make representations to high level governmental officials at the main junctures when the Project was in crisis. Such representations were taken into account in NHA's final decision to expel Bayindir (C.-Mem. M., ¶¶ 4.47 – 4.48).

3. Tribunal's determination

343. The Tribunal must determine whether the due process requirements that could be derived from the applicable FET standard cover situations such as the present one, in which procedural fairness was allegedly denied because the Claimant was not part of the internal decision-making of the administration concerning the management of the Contract. If so, the Tribunal must then assess whether the Claimant was in fact denied procedural fairness.

344. The Tribunal agrees with the arbitral decisions holding that a denial of due process or procedural fairness may amount to a breach of the FET standard.[94] This does not

[94] *See*, for instance, *S.D. Myers, Inc. v. Government of Canada*, NAFTA Arbitration (UNCITRAL Rules), Partial Award of 13 November 2000 (hereafter, *S.D. Myers v. Canada*); *Mondev v. United States, supra* footnote60; *ADF v. United States, supra* footnote 61, *Loewen Group v. United States*, *supra* footnote 76, *Middle East Cement v. Egypt, supra* footnote 90.

mean, however, that such guarantees are available in any given situation. As noted in *Waste Management*, to which the Claimant refers, whilst the fair and equitable treatment standard may be infringed by conduct amounting to "a complete lack of transparency and candour in an administrative process," such standard largely depends upon and must be adapted to the circumstances of each specific case.[95] The decisions which address this issue, generally do so in the context of judicial or administrative proceedings. Such was, for instance, the case in *Metalclad* and *Tecmed*. As for *Middle East Cement*, the procedural fairness requirement was applied to seizure and auction procedures, which can also be deemed administrative in nature.

345. The nature of the present issue is different. It deals with the internal decisions of NHA and the government regarding the management of the Contract. Public administrations are regularly involved in managing different types of contracts and act, in this regard, in a manner which is not fundamentally different from that in which a private corporation handles its contractual relationships. Such internal processes may include decisions required to perform contractual obligations, such as planning and releasing budgetary allocations or carrying out performance reviews. The Tribunal is aware that, in certain respects, public and private contracting are not subject to the same requirements. A typical example is the tendering processes related to public procurement contracts.

346. This said, the Tribunal considers that, under the present circumstances, the decision of NHA, in consultation with the government, to resort to certain contractual remedies and the related preparatory discussions and assessments were not as such subject to procedural requirements other than those contractually agreed. In this connection, the Tribunal has concluded, in paragraphs 240-258 and 281-314 *supra*, that the main contractual mechanisms which eventually led to the expulsion of Bayindir (particularly the issuance of notices under sub-clauses 46.1 and 63.1(b)(ii)) had not been used in a manner that amounts to a breach of the Treaty. In particular, there is no evidence that the Engineer or the Engineer's Representative were biased and deprived Bayindir of procedural safeguards.

347. More importantly, even assuming for the sake of the analysis that due process and procedural fairness govern the internal processes underlying the exercise of

contractual rights, the record shows that Bayindir was indeed given the opportunity to present its position on numerous occasions throughout the relevant period. In this regard, the Respondent has pointed to the following instances: representations to a committee formed by the Ministry of Communications (14/12/99) (Exh. [Pak.] CM-174); representations to a meeting chaired by the Secretary of Communications (19/01/00) (Exh. [Pak.] CM-175); discussions among Bayindir's President and the Chairman of NHA, the Secretary General of Finance, the Secretary of Communications, and the Engineer (09/02/00) (Exh. [Pak.] CM-176); letter from Bayindir's Chairman to President Musharraf acknowledging that several meetings had taken place between Bayindir and NHA, the Ministry of Communications, and the Ministry of Finance (26/02/00) (Exh. [Pak.] CM-177); shortly thereafter invitation of the Turkish Ambassador to Pakistan by the Chairman of NHA to participate in a meeting between the parties, which later led to the signature of Addendum No. 9 (Exh. [Pak.] CM-178); meeting between the Turkish Ambassador and the Chairman of NHA (19//12/00) (Exh. [Pak.] CM-182, CM-183); letter from the Minister of Communications to the Turkish Ambassador to inform him of Bayindir's defective performance (20/02/01) (Exh. [Pak.] CM-179); letters from the President of Bayindir to the Turkish Ambassador referring to a previous meeting with the Chairman of NHA and Minister of Communications and requesting him to arrange another meeting (26/02/01) (Exh. [Pak.] CM-180), which was done (Exh. [Pak.] CM-181, CM-182); meeting attended by representatives of the Ministries of Communications, of Finance, and Foreign affairs, as well as by a Senior Diplomat from the Turkish Embassy, the parties and the Engineer (19/03/01) (Exh. [Pak.] CM-97).

348. In summary, the Tribunal concludes that Bayindir was not denied due process or procedural fairness primarily because these requirements did not apply in the present context. Secondarily, assuming – *quod non* – that they applied, the record shows that Bayindir was in fact afforded a number of opportunities to present its position during the relevant time period.

e. Conduct following the expulsion

1. Bayindir's position

349. Bayindir alleges that after the expulsion Pakistan failed to proceed to the evaluation of the works completed pursuant to sub-clause 63.2 of the Contract or to certify IPAs 22

and 23. In Bayindir's submission, Pakistan slashed IPAs 22 and 23 to a fraction of their original value and failed to pay IPCs 20 and 21, which had been certified by the Engineer and were due and payable to the Claimant in March 2001, namely before its expulsion. Moreover, the Respondent refused to certify an extension of time granted by the Engineer (EOT 04) and claimed some US$ 1 billion in the Pakistani arbitration.

2. Pakistan's position

350. It is Pakistan's argument that Bayindir retains residual rights under clause 63 of the Contract (Tr. M., 4 June 2008, 128, 6-10). In particular, NHA did not pay IPCs 20 and 21 because these IPCs were not payable under the Contract until the final accounting at the end of the Project's Defects Liability Period (PHB [Pak.] ¶ 3.2). NHA's participation in the measuring up exercise following Bayindir's expulsion evidences its intention to comply with the final accounting provision. In any case, Bayindir has not established that NHA did not intend to apply sub-clause 63.3 at the end of the Defects Liability Period (Rej. M., ¶ 3.128).

3. Tribunal's determination

351. It was not until its post-hearing submission that the Claimant clearly identified that the "conduct following the expulsion" allegedly in breach of the FET standard consisted of "unfair and inequitable" actions in connection with the handling of IPA 23 (PHB [Bay.] ¶ 86), the lack of certification and payment of IPA 22 (PHB [Bay.] ¶ 87), and "Pakistan's self-serving and litigation-motivated reductions to the values of both IPA 22 and IPA 23" (PHB [Bay.] ¶ 88). These acts are said to be unfair and inequitable because they do not comply with the Contract and, more fundamentally, because they reflect the intention of the Respondent not to abide by clause 63 and therefore deprive Bayindir of any remaining contractual rights.

352. It is recalled that the task of the Tribunal is not to exercise jurisdiction over contractual matters but to assess whether the alleged conduct is established and, if so, whether it amounts to a breach of the Treaty.

353. It is undisputed that NHA did not pay IPCs 20 and 21. It also arises from the record that IPAs 22 and 23 have not been certified, that they have been reduced over time, and that NHA has not approved the extension of time calculated by the Engineer in response to EOT 04 (Exh. [Pak.] RB-84). The Claimant has further stressed that the Engineer and its Representative did not certify the works as required under sub-clause 63.2 of the Contract within the context of the final settlement of accounts contemplated under sub-clause 63.3 of the Contract. In his oral testimony, Mr. Bridger stated that he did not recall whether he or the Engineer had issued such certification (Tr. M., 29 May 2008, 237, 7-14).

354. The Parties provide conflicting interpretations of whether or not such conduct was in breach of the Contract. The Respondent notes, inter alia, that:

> "once it was established that there was no immediate right to payment due to the issuance of the expulsion notice, the urgency of preparing the IPCs was removed, i.e. the question of what sums were owing to Bayindir was postponed until the time of the final measure up pursuant to Clause 63.3 of the Contract."
> (PHB [Pak.] ¶ 7.25)

355. The Claimant argues that a number of steps had to be followed for the process of final settlement of accounts to be completed, and that NHA and the Engineer or the Engineer's Representative failed to take some of these steps, which amounted to a breach of the Contract. It seeks to infer from these facts the existence of an intent to deprive it in an unfair and inequitable manner of any residual rights it may have under sub-clause 63.3 of the Contract.

356. In light of the evidence, the Tribunal is not convinced by Bayindir's allegation for several reasons. First, the Respondent's expert Mr. Chapman has provided a reasonable contractual explanation of NHA's acts in respect of the treatment of IPCs 20 and 21:

> "Sub-Clause 63.3 provides that upon expulsion the Employer's obligation to pay monies to the Contractor is suspended until the expiration of the Defects Liability Period at the earliest. This means that all payments to the Contractor are instantly frozen. No further certification need be undertaken by the Engineer in respect of Interim Payment Applications (whether submitted before of (sic) after the expulsion) and any certificates issued to the Employer by the Engineer in respect of payments due to the Contractor are not to be paid."
> (Chapman's WS, ¶ 42)

The Claimant's expert Mr. Pickavance offered no specific alternative interpretation of the Contract to counter this.

357. Second, the evidence discussed in paragraphs 332-335 *supra* shows that NHA did in fact engage in a measurement and inventory process as required by sub-clause 63.2 of the Contract. In that context, it took account of Bayindir's concerns about FWO's bias (Exh. [Pak.] CM-141) with the result that an independent organization was put in charge of the joint inventory (Exh. [Pak.] CM-142). That organization reportedly completed its task on 13 May 2003 (Exh. [Pak.] R-68).

358. Third, Mr. Bridger has testified that, despite some tensions, a good level of cooperation was generally achieved, and that he did not recall "ever being made aware of any occasion where BCI had been unable to resolve problems of access to any records at the Project Site Offices, when such access was necessary for the supply of information to NHA" (Bridger's supplemental WS, ¶ 123).

359. In these circumstances, the Tribunal cannot conclude that the acts identified by Bayindir amount to a breach of the Treaty.

f. Attempted encashment of the Mobilisation Advance Guarantees

1. Bayindir's position

360. Bayindir submits that Pakistan inequitably and unfairly ruined the Bayindir Group by calling the Mobilisation Advance Guarantees without a contractual basis, the contractual justifications put forward by Pakistan (analogy with sub-clause 60.8 of the Contract as well as paragraph 3 of sub-clause 60.8 in Addendum No. 6) being ill-founded. Indeed, according to Bayindir, sub-clause 60.8 had been contractually superseded twice.[96]

[96] In June 1999, this mechanism was replaced with a rollover system if the amount of a given month's Mobilisation Advance deduction exceeded the amount due to Bayindir under a particular IPC, the difference due to Pakistan would be carried forward and deducted from the next IPC. Second, in Addendum No. 9, the fixed Mobilisation Advance repayment schedule was replaced by a percentage deduction from each IPC, as a result of which the Mobilisation Advance deduction would always be a percentage of Bayindir's IPC payment, and could never exceed the IPC payment due to Bayindir.

361. Bayindir also stresses that the Respondent's alleged contractual justifications are new, as the argument that the Mobilisation Advance was only allowed to be used for the purchase of permanently imported equipment, implying that Pakistan was entitled to recover any amounts spent on mobilization with temporarily imported equipment, was advanced for the first time at the hearing. Furthermore, this argument was said not to take into account that sub-clause 60.8 in Addendum No. 6 provides that there would be no bank guarantee for the 20% Mobilisation Advance which was to be utilized for the purchase of plant and equipment. In addition, the link between plant and equipment and the Mobilisation Advance was later superseded. The Over-Riding Conditions of Contract provided that the Mobilisation Advance – increased to 30% – would be secured by letters of guarantee from a bank and from Bayindir. This provision was then further modified by NHA's Letter of Acceptance, which confirmed that the Mobilisation Advance would amount to 30%, the full amount being secured by a bank guarantee (PHB [Bay.] ¶¶ 95-106).

362. It is Bayindir's further submission that the attempt to encash the guarantees not only lacked a contractual basis but was also unfair, if not even in bad faith. In support, Bayindir refers to NHA's request of 7 April 2001 that Bayindir renew the Mobilisation Advance Guarantees expiring on 9 May 2001. This request came shortly before Bayindir's expulsion and only days after the Ministries of Communications and Finance had decided, unbeknownst to Bayindir, to halt all payments for the Project and to request a decision on the future of the Project from General Musharraf.

363. In addition, Bayindir asserts that the encashment would unjustly enrich Pakistan to the extent that Bayindir left behind the product of the Mobilisation Advance on the site, and brought about the complete collapse of the Bayindir Group given the circumstances surrounding the attempted encashment, the magnitude of the bank guarantees and the fact that these were provided by a consortium consisting of all of the major Turkish banks, thus cutting off Bayindir's access to credit and financing.

364. Finally, Bayindir notes that Pakistan sought to encash the guarantees at their full face value, without first deducting the value of repayments due under IPCs 20 and 21.

2. Pakistan's position

365. In substance, Pakistan asserts that the call on the Mobilisation Advance Guarantees was made in accordance with the Contract. The position of the Respondent is supported by the expert testimony of Mr. Chapman (Chapman's WS, ¶ 50; Chapman's Supplemental WS, ¶¶ 60-64). According to the latter's evidence, the call complied with sub-clause 60.8 and any benefits accruing to the Employer from it would be taken into account in the final accounts. As a result, any allegation of bad faith would be doomed to fail.

366. The Respondent also contends that Bayindir did not spend the Mobilisation Advance as contractually required. It refers to Bayindir's financial difficulties and argues that a substantial part of the Mobilisation Advance Guarantee (US$ 35 million) was likely used for purposes unrelated to the M-1 Project, as suggested by the testimony of Mr. Cörtük, Chairman of Bayindir Holding Company, before a Turkish Parliamentary Committee set up to investigate the sale of Turkbank (PHB [Pak.] ¶¶ 3.107 – 3.121).

3. Tribunal's determination

367. It is common ground that NHA sought to encash the Mobilisation Advance Guarantees. As discussed in section IV(A)(b) supra, this conduct can be attributed to the Respondent, which the latter did not dispute. The Tribunal must thus determine whether the attempted encashment of the Mobilisation Advance Guarantees constitutes a breach of FET.

368. The Parties disagree on whether the attempted encashment of the Mobilisation Advance Guarantees was in conformity with the Contract. The main point of disagreement is whether sub-clause 60.8 of the Contract provides a basis for the encashment.

369. Sub-clause 60.8 entitles the Employer to call the guarantees to the extent the amount due by Bayindir as reimbursement of the Mobilisation Advance exceeds the amount due to Bayindir for work done. The mechanism for the recovery of advance payments was amended twice. First, on 24 June 1999 (Exh. [Bay.] C-16) to the effect that "[t]he recovery/deduction of the advance payment shall be made from every IPC irrespective of its value beginning from the IPC of May 1999 onward. In the event that the value of any monthly deduction/recovery exceeds the amount of any particular IPC, the

difference in amount will be carried forward and adjusted from the next IPC and so on" (Exh. [Bay.] C-16). Second, in Article 3 of Addendum No. 9, which replaced the fixed repayment schedule with a percentage deduction from each IPC (Exh. [Bay.] C-18).

370. Bayindir submits that, as a result of these two amendments, the content of sub-clause 60.8 became inoperative and that the repayment of the Mobilisation Advance should in any event have been frozen until final settlement (PHB [Bay.] ¶ 102). Pakistan responds by reference to the first expert report of Mr. Chapman according to whom:

> "In the situation where a contractor is expelled before the advance payments have been recovered in full (and thus the APG is extant) I would expect the Employer to make a call on the bond in order to recover as much of the advance payment as possible. Clause 60.8 of the Contract provides that the Contractor is obliged to repay amounts of mobilisation payments in excess of monies certified within seven days of demand and if not paid the Employer shall be empowered to call in sufficient of the APG to cover this balance. The APG is security for a loan and once the Contractor is expelled, no further payments from which the loan repayments are to be deducted will be made. Accordingly, I believe the right under Clause 60.8 to demand recovery of the loan crystallises once expulsion occurs."
> (Chapman's WS, ¶ 50)

371. In his additional report, Mr. Chapman added the following:

> "The Mobilisation Bond is 'on demand' and its execution is not dependent upon proof of fault by the Contractor nor is the operation of this bond deferred until the time of the Final Statement. The provision of on demand bonds is an onerous obligation placed on a contractor but one that has been found necessary within the construction industry to avoid the bondsman (or an arbitrator or the court) being required to determine liability for breach of performance by the Contractor which, with a resistant contractor, could take a considerable time. However, it is accepted that the Employer is not to use its right to demand payment without due cause and an implied term to this effect is recognised. That said, as long as the Employer has a genuine belief that the advance payment is not to be repaid in accordance with the terms of the Contract and that the Contractor is unable to complete its obligations under the Contract, I consider that a call on the Mobilisation Bond is justified."
> (Chapman's Supplemental WS, ¶ 63)

The Claimant's expert Mr. Pickavance offered no specific alternative interpretation of the Contract to counter this.

372. The Respondent further argues that Bayindir improperly spent the Mobilisation Advance on temporarily imported equipment as well as on matters unrelated to the M-1 Project. In this latter regard, it referred to a statement of Mr. Cörtük, Chairman of Bayindir Holding Company, before a Turkish Parliamentary Committee set up to

investigate the sale of Turkbank. In response to a question regarding the source of the funds used by Bayindir to acquire a TV station, Genc TV station, Mr. Cörtük stated:

> "We are a group (of Companies) having a monthly turnover of 70-80 million dollars. Namely if we obtain the loans or resources from other places, for instance in those days – if I remember this correctly exactly-we, in fact, obtained the money amounted to 30-40,000,000 dollars from Pakistan." (Annex 24 to WS of Dr. Birsel, submitted with Resp RP).

373. Under these circumstances, the Tribunal can see no Treaty breach. The Parties have divergent views about the interpretation and application of subclause 60.8 of the Contract. Pakistan puts forward an interpretation that is reasonable and is supported by expert evidence. Even if such interpretation were not to prevail in a contract arbitration, the related conduct would not rise to the level of a violation of the Treaty standards.

374. This said, relying on the sequence of events, the Claimant alleges bad faith on the part of Pakistan. If this allegation were founded, it would be capable of changing the conclusion just reached. Specifically, Bayindir claims that the request for the renewal of the Mobilisation Advance Guarantees, which were to expire on 9 April 2001, was made on 7 April 2001, that is:

> "shortly before Bayindir's expulsion, and only days after the Ministries of Communications and Finance had decided, unbeknownst to Bayindir, to halt all funds for the Project and request General Musharraf's decision on the future of the Project."
> (PHB [Bay.] ¶ 97)

The Claimant further observes that "a mere three weeks" after Bayindir renewed the guarantees in full, Pakistan sought to encash them.

375. The Claimant seeks to infer bad faith from its reading of the chronology. There is, however, no evidence showing bad faith. Even if it were established that Pakistan requested the renewal for the sole purpose of calling the guarantees shortly thereafter, this fact would not suffice in and of itself to demonstrate bad faith. Indeed, as a general matter, it would rather appear as good contract management to renew guarantees when they are about to expire and the liabilities secured by such guarantees are still likely to materialize. This was precisely so here. The Respondent contends that it tried to collect on the Mobilisation Advance Guarantees in order to recover as much of the advance payment as possible, Bayindir having failed to mobilize the contractually

required equipment on site. The discussion of the evidence in paragraphs 308-314 *supra*, shows that, even after the issuance of the sub-clause 46.1 notice in December 2000, Bayindir did not bring the adequate equipment to the site. This point was in particular stressed by Mr. Bridger at the hearing.

> "Q: So a reasonable Contractor (sic) [client] would be happy to see that efforts were being made to bring it behind schedule, and to bring it on schedule?
> A: Substantial efforts, and real efforts. Not just bringing in equipment that didn't have the capacity to achieve the production levels, you know, we saw a lot of increases in equipment after that Notice was served, but the productivity fell, despite the increase in numbers of items of equipment."
> (Tr. M., 29th May 2008, 192-193, 24-25, 1-8).

376. On these facts, Bayindir has not met its burden of proving bad faith. This is the more so as the standard of proof is a demanding one for this purpose.

377. For the sake of completeness, the Tribunal adds that a breach of FET requires conduct in the exercise of sovereign powers. This requirement is not met in the present situation in which the attempt to call on the guarantees appears as the act of an ordinary contract partner which was carried out on foreign territory, i.e. in Turkey, in accordance with Turkish legal procedures.

378. Finally, the arguments about the impact of the attempted encashment on the viability of the Bayindir Group and Pakistan's unjust enrichment do not change the earlier conclusions. First, the monies have not been cashed and thus the proposition of an enrichment is difficult to follow. Second, any adverse consequences of the attempted encashment on Bayindir's standing and viability, however unfortunate, are part of the business risk that any contractor assumes when entering into a contract for a major project with substantial financial exposure. This would only be different if the host state had breached a treaty protection, which is not the case here.

379. In view of the foregoing considerations, the Tribunal concludes that the applicable FET standard has not been breached.

g. Respondent's acts taken together

380. It remains for the Tribunal to review whether the Respondent's acts taken together constitute a breach of the FET standard. It is true that Bayindir does not specifically

claim that a breach of treaty could arise from the overall effect of all of Pakistan's actions. Yet, the Tribunal deems it appropriate to examine this issue as well.

381. On the basis of the evidence discussed in the preceding sections, the Tribunal has denied the existence of treaty breaches with respect to each of the Respondent's acts taken separately. Assuming for the sake of this analysis that a cumulation of non-breaches can in theory result in a breach, this is certainly not the position here. Even added up, the conduct of the Respondent does not amount to a Treaty breach. It might give rise to contract liability, but that is a different issue on which this Tribunal makes no assessment.

C. NATIONAL TREATMENT AND MFN STANDARDS

382. Bayindir claims a violation of the national treatment and most favoured nation (MFN) standards embodied in Article II(2) of the Treaty. It incriminates specific acts. The Tribunal will thus organize its discussion by reference to each of those acts first with respect to national treatment (b) and then to MFN (c). Before doing so, it will identify the applicable standards (a). At the end, it will consider whether all the acts of the Respondent taken together could amount to Treaty breaches (d).

a. Applicable standards

1. Bayindir's position

383. The Claimant invokes Article II(2) of the Treaty as the basis for its claim. It refers to *SD Myers*,[97] *Feldman v. Mexico*,[98] *Occidental v. Ecuador*[99] and *Lauder v. Czech Republic*[100] to support the argument that the test of discrimination is an objective one, which focuses on a measure's practical effect rather than on the Respondent's intent to discriminate. It also relies on these authorities to assert that there is no requirement that the differential treatment be motivated by foreign nationality and that the sole facts of discrimination and foreign nationality are sufficient (Mem. M., ¶ 206).

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97 *S.D. Myers v. Canada*, *supra* footnote 94, ¶¶ 238-257.

98 *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) (hereafter, *Feldman v. Mexico*), Award of 16 December 2002, ¶¶ 154-188.

99 *Occidental v. Ecuador*, *supra* footnote 80.

100 *Lauder v. Czech Republic*, *supra* footnote 65.

384. As to the facts relevant to a finding of discrimination, the Claimant recalls the Tribunal's Decision on Jurisdiction:

> "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 favour a local contractor, and that the local contractor was awarded longer completion time-limits, if proven, are clearly capable of founding a MFN claim."[101]

2. Pakistan's position

385. Pakistan submits that Bayindir's claim under Article II(2) requires a showing of intent, since Bayindir alleges that its expulsion from the Project was designed to benefit a pre-determined group of local contractors, which "design" necessarily comprises intent. In Pakistan's view, Bayindir's reliance on the decision in *SD Myers* is therefore irrelevant, as that case "merely suggests that protectionist intent on its own (i.e. without a practical effect) is insufficient for a finding of breach of Article 1102 NAFTA" (C.-Mem. M., ¶ 4.58).

3. Tribunal's determination

386. It is common ground that Bayindir's claim must be assessed under Article II(2) of the Treaty, which 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, whichever is the most favourable."

387. Article II(2) thus covers both national treatment and MFN obligations. Its purpose is to provide a level playing field between foreign and local investors as well as between foreign investors from different countries.[102]

388. As noted in the Decision on Jurisdiction, the Tribunal considers that the scope of the national treatment and MFN clauses in Article II(2) is not limited to regulatory treatment.[103] It may also apply to the manner in which a State concludes an investment contract and/or exercises its rights thereunder. Indeed, the Tribunal stressed that:

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101 Decision on Jurisdiction, ¶ 223.

102 Noah Rubins & N. Stephan Kinsella, *International Investment, Political Risk and Dispute Resolution – A Practitioner's Guide* (2005), pp. 225-226.

103 *See* Decision on Jurisdiction, ¶¶ 205-206, 213.

> "[t]he 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."[104]

389. To decide whether Pakistan has breached Article II(2), the Tribunal must first assess whether Bayindir was in a "similar situation" to that of other investors. The inquiry into the similar situation is fact specific.[105] In line with *Occidental v. Ecuador*,[106] *Methanex*,[107] and *Thunderbird*,[108] the Tribunal considers that the national treatment clause in Article II(2) must be interpreted in an autonomous manner independently from trade law considerations.

390. If the requirement of a similar situation is met, the Tribunal must further inquire whether Bayindir was granted less favourable treatment than other investors. This raises the question whether the test is subjective or objective, i.e. whether an intent to discriminate is required or whether a showing of discrimination of an investor who happens to be a foreigner is sufficient. The Tribunal considers that the second solution is the correct one. This arises from the wording of Article II(2) quoted above. It is also in line with the rationale of the protection as was emphasized in *Feldman v. Mexico,*[109] to which the Claimant referred:

> "It is clear that the concept of national treatment as embodied in NAFTA and similar agreements is designed to prevent discrimination on the basis of nationality, or "by reason of nationality." […] However, it is not self-evident […] that any departure from national treatment must be *explicitly* shown to be a result of the investor's nationality. There is no such language in Article 1102. Rather, Article 1102 by its terms suggests that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances.
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> […]

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104 *Id.*, ¶ 206.

105 *Pope & Talbot v. Canada*, *supra* footnote 87, ¶ 75; *see* also *S.D. Myers v. Canada*, *supra* footnote 94, ¶ 244.

106 *Occidental v. Ecuador, supra* footnote 80, ¶¶ 174-176.

107 *Methanex Corporation v. United States of America*, NAFTA Arbitration (UNCITRAL Rules), Award of 3 August 2005, ¶¶ 35, 37.

108 *Thunderbird v. Mexico*, supra footnote 59, ¶¶ 176-178.

109 *Feldman v. Mexico*, *supra* footnote 98, ¶¶ 181 and 183. *See* also *Pope & Talbot v. Canada,* footnote 87*,* in which the tribunal presumed that discriminatory treatment of foreign investors in like circumstances would be in violation of Article 1102, "unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA" (¶ 78).

> [R]equiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. […]. If Article 1102 violations are limited to those where there is explicit (presumably de jure) discrimination against foreigners, e.g., through a law that treats foreign investors and domestic investors differently, it would greatly limit the effectiveness of the national treatment concept in protecting foreign investors."

b. National treatment

391. It is Bayindir's contention that it was expelled for reasons of cost and local favouritism, as evidenced by the selective tender that followed its expulsion. The Claimant also asserts that PMC-JV, the local contractors retained, were treated more favourably, in particular with respect to the construction schedule.

392. In paragraphs 297-300 *supra*, the Tribunal has already discussed Bayindir's allegation that the expulsion was due to Pakistan's intent to favour local contractors. In the present section, the Tribunal will review whether Bayindir was indeed accorded treatment less favourable than the local contractors in breach of the national treatment standard.

1. Bayindir's position

393. In Bayindir's submission, "the PMC-JV Contract forms a near perfect comparator against which to judge Pakistan's treatment of Bayindir" (Tr. M., 26 May 2008, 125, 15-17). Bayindir further asserts that it is objectively established that the Respondent accorded more favourable time schedules to PMC-JV and reacted more leniently to PMC-JV's unsatisfactory performance. Specifically, Bayindir alleges that

> "PMC-JV was granted much more time to do the remaining work on the M-1 than Bayindir had been granted for the entire motorway, and when PMC-JV fell far behind even in this generous schedule, PMC-JV was allowed to continue on the Project. This is in stark contrast to the treatment Bayindir received, and in stark contradiction to Pakistan's claims that Bayindir had to be expelled out of concern for the timely completely [sic] of the M-1 Project." (Tr. M., 26 May 2008, 125-126)

394. In support of its allegation of less favourable treatment, the Claimant refers to the following facts: PMC-JV was granted 1460 days to complete the remainder of the M-1 Project, whereas Bayindir had been granted only 730 days in 1993 and 1095 days in 1997 to complete the entire motorway; in March 2001, Bayindir had been granted only

27 additional days to complete the two Priority Sections, whereas PMC-JV was granted 18 months to complete the remaining portion of the two Priority Sections, now for six lanes; PMC-JV was permitted seven reviews of its work schedule, yet failed to achieve the construction targets it proposed, whereas, as of the date of its expulsion from the Project, Bayindir had completed 90% of the work on the two Priority Sections on the areas which were free from obstructions; PMC-JV was not expelled for far more significant delays than Bayindir ever experienced, even though PMC-JV's performance was worryingly behind schedule, its progress very slow, and several sub-clause 46.1 notices had been issued. Bayindir adds that differences in performance between itself and PMC-JV must be appraised taking into account that Bayindir had to prepare the site, while PMC-JV started work on a site already prepared and developed by Bayindir.

395. In its post-hearing brief, Bayindir further referred to a series of acts such as the alleged expropriation of Bayindir's contractual rights and the attempted encashment of the Mobilisation Advance Guarantees (see paragraphs 349 and 360-364 *supra*) as discriminatory and in breach of the Treaty. However, Bayindir did not specify the manner in which these series of acts breached the national treatment/MFN clauses.

2. Pakistan's position

396. Pakistan maintains that the expulsion was lawful and later developments therefore irrelevant. It also denies that Bayindir's residual investment was in a "similar situation" to the investment of the local contractors (C.-Mem. M., ¶ 4.51). It adds that there is no room for a discrimination claim such as the one raised by Bayindir in a purely contractual context (Tr. M., 26 May 2008, 293-294).

397. To demonstrate that the investments were not in "similar situations," Pakistan points to differences in the financial terms;[110] the level of experience and expertise;[111] the scope of work;[112] and in the commitment of the two entities to progressing with the works after

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110 In particular, Pakistan notes that PMC-JV received no mobilisation advance and did not benefit, as Bayindir, from having a foreign exchange component of its payments being settled by NHA in rupees at highly favourable exchange rates.

111 Unlike Bayindir, PMC-JV was a consortium of diverse local Pakistani contractors with no equivalent experience on projects of the magnitude of M-1.

112 In July 2003, shortly after the contract with PMC-JV had been signed, the scope of works was converted back to a six-lane motorway, and works also involved repair and rectification of works performed by Bayindir.

being issued sub-clause 46.1 notices.[113] Pakistan further notes that the position of NHA had changed as a result of Bayindir's expulsion, because NHA could neither avail itself of the large Mobilisation Advance given to Bayindir nor collect on the guarantees, and had to pay over Rs. 1 billion in order to alleviate the problem of Bayindir's sub-contractors. Under such different circumstances, Pakistan argues that NHA was fully justified in establishing new completion dates and, more generally, that it was justified in treating the two situations differently (PHB [Pak.] ¶¶ 5.53-5.99).

398. Pakistan finally insists that it was normal practice that the works be completed by a group of Bayindir's sub-contractors:

> "[t]heir bid was lower, they were already on site, and it is what Bayindir wanted. These kinds of facts differentiate the present case from past cases of discrimination. It was also in Bayindir's interest under Clause 63.3 of the Contract that the cheapest option for a new contractor be chosen."
> (PHB [Pak.] ¶ 5.2).

3. Tribunal's determination

399. The Tribunal will first determine whether Bayindir's investment was in a "similar situation." If so, it will then assess whether Bayindir's investment was accorded less favourable treatment than PMC-JV and whether the difference in treatment was justified.

400. In respect of the first requirement, the Tribunal must start by determining whether there is a relevant comparator to be used for the assessment of NHA's treatment of Bayindir and PMC-JV. In its Decision on Jurisdiction, the Tribunal did not rule out that the contracts with PMC-JV and Bayindir may be similar, as they both related to the same project.[114] The Tribunal must now go further and look at the terms and circumstances of the contractual relationships between, on the one hand, NHA and Bayindir, and, on the other hand, NHA and PMC-JV.

401. The Respondent has argued that, after its expulsion, Bayindir retained only residual rights under sub-clause 63.3 of the Contract and, therefore, Bayindir's contractual situation was not comparable to that of the local contractors who took over the Project.

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[113] In particular, Pakistan notes that, unlike Bayindir, PMC-JV had no prior history of shutting down the works when it was faced with sub-clause 46.1 notices.

[114] Decision on Jurisdiction, ¶ 216.

The Tribunal is unpersuaded by this argument, which seems to assume that two situations can only be "similar" if they are contemporaneous.

402. Turning to the terms and circumstances of the two contractual relationships, Pakistan raises a number of differences especially in the financial terms; the constitution of the two entities; their level of experience and expertise; the scope of work; and the commitment of the two entities to progressing with the works after receiving a sub-clause 46.1 notice. In contrast, Bayindir focuses on the identity of business sector and project. The Claimant is right that the project and business sectors are the same. This may be relevant in a trade law context. Under a free-standing test, however, such as the one applied here, that degree of identity does not suffice to displace the differences between the two contractual relationships.

403. The Claimant does not seriously dispute the existence of divergences in the financial terms. The contract between NHA and PMC-JV did not involve a foreign currency component. This difference must not be underestimated. The history of the dispute between the Parties over the availability of foreign currency for the continuation of the Contract illustrates this point. Indeed, as the Claimant emphasizes in its opening statement at the hearing (Tr. M., 26 May 2008, 16-29), the foreign currency issue was one of the main reasons why by the end of 1999 "Bayindir had nearly stopped work in the Project" (Tr. M., 26 May 2008, 27, 6-7). The dispute was then resolved by the conclusion of Addendum No. 9 in which Bayindir accepted payment in rupees for half of the Contract price. It is disputed whether Addendum No. 9 was more favourable to the Claimant or for the Respondent. What is clear is the role played by the foreign currency component.

404. Not surprisingly, the lack of a foreign currency component in the new contract price discouraged foreign contractors from participating in the tender, a fact acknowledged by the Claimant (Reply M., ¶ 219). Furthermore, the minutes of an NHA meeting held on 13 November 2002, regarding *inter alia* the award of the balance works of the M-1 Project (Exh. [Bay.] CX-99) confirm the importance of the foreign currency issue. In paragraph 24.1 of this document it is stated indeed that: "keeping in view the past unpleasant experience in M-1 project as also some other projects, it was made

absolutely clear to all the prospective bidders at the pre-qualification stage that no payment in foreign currency would be allowed" (Exh. [Bay.] CX-99).

405. Another difference in financial terms relates to the mobilization advance. The Claimant does not seriously contest that, unlike Bayindir, PMC-JV did not benefit from a large mobilisation advance. Under the terms of the Contract, Bayindir was to benefit from a Mobilisation Advance of 30% of the value of the Contract price, which was to be paid half in rupees and half in dollars. By contrast, the mobilisation advance contemplated in Part II of the conditions of contract between NHA and PMC-JV was far lower and paid exclusively in rupees (Exh. [Bay.] CX-240A).

406. One might think of explaining the differences in advance payments by reference to the equipment which Bayindir left on site. That explanation would be ill founded. The evidence shows that such equipment was not fit for use (Exh. [Pak.] CM-170). Mr. Nasir Khan, confirmed this point:

> "Even though NHA had done an excellent job in preserving the equipment, machinery and plant left behind by Bayindir (including the dump trucks, motor graders, asphalt plants and crushing plants), the fact is that a large quantity of the equipment, machinery and plant was old, in bad condition and in some cases just not functioning."
> (Nasir Khan's WS, ¶ 36)

407. Asked on cross-examination about a presentation made by Colonel Azim in November 2002 to the NHA Executive Board (Exh. [Bay.] CX-224) stating that "the 300 pieces of Plant and Equipment have been parked in two camps and kept in perfect working conditions through regular maintenance by NHA's field staff," Mr. Nasir Khan confirmed his earlier testimony that the maintenance was good, but the plant was bad. He added that with the plant that was handed over PMC-JV "would not have been able to complete the project until today."[115]

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[115] Quoting the passage in full: "the maintenance and, I mean, the owning of the machine was in a very professional way, but it cannot change the status of the plant. Like, if – I mean, just I will give you an example, there was two small plant installed, one was installed at end of NWFP province, a camp which is called Barabanda – there were two camps. One was Burhan and one was Barabunda. One was in Punjab and one was in NWFP. The Punjab plant was definitely – they brought it second-hand. Used. Very used plant. [...] That plant, when we took over, we never were able to get it – capacity even 10%, so then we installed another small part in replacement of that plant because that plant was not able to produce the production, the same was with the crushing plant, and the same was with batching plants, because when we assess the condition, and the capacity of plant and equipment, which was there, that according to that plant and

408. Likewise, the record confirms the existence and relevance of other differences in particular regarding the scope of work and the contractors' expertise and experience.

409. The scope of works was different to the extent the Contract as amended by Addendum No. 9 provided for four lanes and the contract with PMC-JV six. Mr. Nasir Khan explained the change in the following terms:

> "this Contract was four-lane motorway and it was converted into six-lane after the award. Now, what happened was that there was some job done by Bayindir, and then we immediately start our job and we have done some job. Once it was converted to six lane, so we have to redo a lot of work. Now, that redoing a lot of work, it is not taken into consideration that that was a major factor of affecting our physical progress [...] So, we took considerable time and definetely method of doing this, because usually we don't do this on ongoing Project."
> (Tr. M., 30 May 2009, 93-94)

410. The expertise and experience of the contractors constitutes another difference. Bayindir benefited from considerable experience in handling large projects, while PMC-JV did not. This difference which was reflected in the higher rates charged by Bayindir, played a role in the expectations that NHA formed with respect to each contractor. So testified General Javed:

> "The expectation that I had [from Bayindir], when I understood the Project was, that there would be a reasonable number of such high-tech equipment and machinery, because remember, we were paying them the state-of-the-art rates, and one expected to see a good quality of equipment."
> (Tr. M., 29 May 2008, 14-15, 25, 1-5)

411. As a result, the Tribunal comes to the conclusion that the two contractual relationships are too different for Bayindir and the local contractors to be deemed in "similar situations." Consequently, the first requirement for a breach of the national treatment clause embodied in Article II(2) of the Treaty is not met. It thus makes no sense to pursue the analysis of the other requirements.

c. MFN

1. Bayindir's position

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equipment with you was handed over to us by NHA, we would not have been able to complete the Project until today, and maybe, maybe a year more, so then we supplement with new plant and equipment, with additional plant and equipment, and the plant and equipment was not able to produce efficiently, with just abandoned that plant, and it is still abandoned today."(Tr. M., 30 May 2008, 63-64).

412. In support of its claim under this heading, Bayindir refers to a press report of 17 September 2004 (Exh. [Bay.] CX-119) in which Pakistan's Minister of Communications stated that out of 35, only six projects of NHA had been completed in time during the years 1999 to 2003, the remaining 29 projects having been delayed for several years. In spite of these delays and of the use of the FIDIC form of contract for allegedly all of these other projects, only two other clause 63 notices were issued, and no contractor other than Bayindir was expelled (Tr. M., 26 May 2008, 97-98). In its Memorial on the merits, Bayindir referred more specifically to the M-2, Islamabad-Murree Dual Carriageway, and to the M-3 projects to contend that the treatment of Bayindir, when compared to the contractors in these other projects, was unfavourable and thus discriminatory.

2. Pakistan's position

413. Pakistan understands the Decision on Jurisdiction as denying jurisdiction over this head of claim. For the event this understanding would prove incorrect, Pakistan contends that Bayindir has not established that, as noted by the Tribunal in the Decision on Jurisdiction, an objectively different situation is the result of unequal treatment rather than of the existence of reasons to treat the two situations differently (R. Rej., ¶ 4.3). The Respondent argues that Bayindir has failed to provide the information relevant to the contracts with which it seeks to compare its situation, including information on the contract terms, performance, and reasons for the delays (C.-Mem. M., ¶¶ 4.63, 4.66).

414. The Respondent also objects that NHA was under no obligation to grant identical contract terms to different investors, because "[t]he protections of investment treaties do not extend to insuring investors against the potentially adverse effects, or the less than optimal nature, of the terms that they agree to in their investment contracts" (C.-Mem. M., ¶ 4.67).

3. Tribunal's determination

415. At the outset, the Tribunal notes that Pakistan misinterprets the Decision on Jurisdiction. That decision merely noted that Pakistan's objection pursuant to which "[o]ther projects must be examined on their merits and in the light of the factual and contractual context" (Reply J., ¶ 4.96) could *prima facie* apply to Bayindir's contention

that it was the only contractor expelled in 29 out of 35 projects which suffered delays as a result of problems similar to those faced by M-1.[116] Bayindir's contention was not discarded and remained to be substantiated in the merits phase.

416. The Tribunal must thus review whether the Claimant has substantiated its allegation of breach of the MFN clause. For this purpose, it must start assessing the similarity of the situations to be compared. As with national treatment, such similarity must be examined at the level of the contractual terms and circumstances.

417. The Tribunal is in no position to proceed to any meaningful comparison between the different situations at issue. To do so it would have needed sufficiently specific data on the terms and the performance of the different contracts involved. It is true that Bayindir, which carries the burden of proof, requested the production of several categories of documents in connection with its allegation of less favourable treatment than other foreign investors. In Procedural Order No. 4 of 27 November 2006, the Tribunal granted some requests and denied others as insufficiently substantiated.

418. That said, the evidence on record is clearly insufficient to support this claim. This is so even if one were to assume that the press report of 17 September 2004 is entirely accurate. In effect, that report referred to 29 out of 35 projects of NHA not being completed on time during the five preceding years (Exh. [Bay.] CX-119). Beyond this statement, it also mentions that "delay occurred due to multifarious reasons including revision in scope of work, change in design parameters, delay in release of funds, land acquisition and removal and relocation of utilities" and "action [was being] taken against the contractors in case the delay occur due to shortcomings on their part." Hence, this report is of no assistance to Bayindir. Moreover, the unproven allegation that all contracts are FIDIC-based is not very helpful either. Supposing it were right, it would still not provide any data on terms that are essential to a meaningful comparison, such as payment, funding, or completion periods.

419. The Tribunal is aware that it was not easy for the Claimant to discharge its burden of proof on this claim. A shift of such burden, if at all permissible, would, however, have

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[116] Decision on Jurisdiction, ¶ 216.

required a higher degree of substantiation on the part of the Claimant, at least by reference to one potential comparator.

420. Consequently, the Tribunal finds that one of the necessary requirements of a breach of Article II(2), the similarity of the situations, is not met, which rules out a breach of the MFN standard.

d. The Respondent's acts taken together

421. Bayindir further claims that the acts attributable to the Respondent taken together constitute a breach of the national treatment and MFN standards.

422. Regardless of whether the cumulation of non-breaches may result in a breach, such a conclusion would in any event be precluded here by the lack of similar situations in the context of both the national treatment and MFN claims. Lacking similarity, even taken together, the acts at issue cannot found a breach of these standards.

423. For all the foregoing reasons, the Tribunal holds that the Respondent has not breached the national treatment and MFN clauses contained in Article II(2) of the Treaty.

D. EXPROPRIATION

424. Bayindir has claimed that Pakistan breached Article III(1) of the Treaty by expropriating its contractual rights, its plant and equipment, and the Mobilisation Advance Guarantees (Mem. on Merits, ¶ 222).

425. After determining the applicable standard for a finding of expropriation (a), the Tribunal will discuss in sequence the alleged expropriation of Bayindir's contractual rights (b), plant and equipment (c), and Mobilisation Advance Guarantees (d). The Tribunal will further discuss whether all the acts referred to by Bayindir taken together may amount to an expropriation (e).

a. Applicable standard

1. Bayindir's position

426. Bayindir contends that Article III(1) of the Treaty adopts a broad definition of expropriation including any interference with an investor's property that deprives such investor of the use or value of that property, whether such interference is direct or indirect, in the context of nationalization or otherwise, insofar as the measure has an effect similar to expropriation or nationalization (Mem. M., ¶¶ 215, 217).

427. In Bayindir's submission, the definition does not cover tangible property alone, such as plant and equipment, but also contractual rights. In this regard, Bayindir refers to *Vivendi II*,[117] which stated that "[t]here can be no doubt that contractual rights are capable of being expropriated" (Tr. M., 4 June 2008, 103, 7-13). On the basis of this and other authorities, namely the *Chorzów Factory* case,[118] as well as the *Orinoco*[119] and *Shufeldt*[120] arbitrations, Bayindir further argues that an expropriation of contractual rights may arise in contexts other than nationalization measures (Tr. M., 4 June 2008, 102-103).

428. With reference to *Vivendi II*[121] and *Siemens v. Argentina*,[122] Bayindir stresses that expropriation may occur when a government "terminates a Contract for wilful, discriminatory, or policy reasons" (Tr. M., 4 June 2008, 103, 16-18) and that "where a State's breach of contractual rights does not consist of 'simple commercial acts' a finding of expropriation is warranted" (Tr. M., 4 June 2008, 104, 2-5). Based on the decision of the Iran-US Claims Tribunal in *SeaCo*,[123] Bayindir argues that it suffices to show that contract rights were breached and that such breach was the result of government directives in order to prove an expropriation of contract rights (Mem. M., ¶ 221).

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117 *Vivendi II*, *supra* footnote 30, ¶ 7.5.4.

118 *Factory at Chorzów (Germany v. Poland)*, Judgment (Merits), 13 September 1928, PCIJ *Series A*, No. 17 (1928).

119 *Orinoco Steamship Company Case*, Award of 25 October 1910, The Hague Court Reports, *1st series*, 1916, p. 228; 11 UNRIAA 227.

120 *Shufeldt Claim* (U.S. v. Guatemala), Award of 24 July 1930, 2 UNRIAA 1079.

121 *Vivendi v. Argentina II*, *supra* footnote 30.

122 *Siemens v. Argentina*, supra footnote 58, ¶¶ 271-272.

123 *SeaCo Inc v. Islamic Republic of Iran* (hereafter *SeaCo v. Iran*), Award of 25 June 1992, Case No 260, Iran-US CTR 28 (1996):198.

429. The Claimant also asserts that an expropriation may take place "when the effect of the action is deprivation of property regardless of the intent" (Tr. M., 4 June 2008, 105, 6-9). It emphasizes, however, that intent matters in this case, among other reasons, because "discriminatory action is a strong indication that the action is expropriatory" (Tr. M., 4 June 2008, 105, 11-12). In support, it refers to *Eureko v. Poland*[124] to claim that a government's discriminatory termination of contractual rights may constitute expropriation.

430. With reference to the decision in *Wena Hotels v. Egypt*,[125] it also notes that "forcible eviction of an investor is a strong indication of an expropriation" (Mem. M., ¶ 237).

2. Pakistan's position

431. In substance, Pakistan's argument is that there can be no expropriation of a party's contractual rights when such party is treated in accordance with the contract (Tr. M., 26 May 2008, 306-307).

432. Pakistan further asserts that, even in the event of a breach of contract, such breach would not be sufficient to establish an expropriation (Tr. M., 26 May 2008, 307-308). It refers to *Azinian v. Mexico*, according to which:

> "Labelling is, however, no substitute for analysis. The words 'confiscatory', 'destroy contractual rights as an asset', or 'repudiation' may serve as a way to describe breaches which are to be treated as extraordinary, and therefore as acts of expropriation, but they certainly do not indicate on what basis the critical distinction between expropriation and an ordinary breach of contract is to be made. The egregiousness of any breach is in the eye of the beholder – and that is not satisfactory for present purposes."[126]

433. Pakistan also points to certain reasons in *Waste Management*, which read as follows:

> "The Tribunal concludes that it is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation. In the present case the Claimant did not lose its contractual rights, which it was free to pursue before the contractually

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124 *Eureko v. Poland, supra* footnote 55, ¶¶ 242-243.

125 *Wena Hotels v. Egypt*, supra footnote 18.

126 *Robert Azinian and Others v. United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award of 1 November 1999, ¶ 90. The Respondent further refers to Prof. Ian Brownlie's Principles of Public International Law, who states that: "the general view is that a breach of contract (as opposed to its confiscatory annulment) does not create State responsibility on the international plane." Ian Brownlie, *Principles of Public International Law*, 6th edition, 2003, pp. 522-523.

> chosen forum. The law of breach of contract is not secreted in the interstices of Article 1110 of NAFTA. Rather it is necessary to show an effective repudiation of the right, unredressed by any remedies available to the Claimant, which has the effect of preventing its exercise entirely or to a substantial extent."[127]

434. In this respect, the Respondent underlines that the cases which have dealt with a taking of contract rights, such as *Aminoil*,[128] *Texaco Calasiatic v. Libya*,[129] *BP v. Libya*,[130] *LIAMCO v. Libya*,[131] *Aramco v. Saudi Arabia*,[132] and *Sapphire*,[133] all concerned the "abrogation of the Contract by a State that was engaging in a policy of nationalisation" (Tr. M., 26 May 2008, 308, 20-21) and cannot be transposed to the present circumstances.

435. Similarly, Bayindir's reference to *Wena*[134] and *SeaCo*[135] is said to be inapposite as the facts of such cases have nothing in common with those of the present one.

436. With respect to *Wena*, the Respondent considers that forcible eviction of an investor as such is not a strong indication of expropriation, as "an investor may remain on a site unlawfully, and it may be perfectly lawful to evict, using force as appropriate" (C.-Mem. M., ¶ 4.76). Whether the use of force may be an indication of an expropriation depends upon the circumstances.

437. As to the *SeaCo* case, the Respondent stresses that it concerned a situation of alleged expropriation by a State of a lease agreement between two third parties having no relation to the State. It opposes Bayindir's interpretation of this decision as contrary to

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127 *Waste Management v. Mexico, supra* footnote 65, ¶ 175.

128 *Kuwait v. Aminoil*, *supra* footnote 79.

129 *Texaco Overseas Petroleum Company (Topco) and California Asiatic (Calasiatic) Oil Company v. Government of the Libyan Arab Republic*, Award of 19 January 1977, 17 ILM 1978, p. 1.

130 *BP Exploration Co (Libya) Ltd v. The Government of the Libyan Arab Republic*, Award of 10 October 1973, 53 ILR 297.

131 *Libyan American Oil Company (Liamco) v. Libya*, Award of 12 April 1977, 20 ILM 1.

132 *Arabian American Oil Company (Aramco) v. Saudi Arabia,* Award of 23 August 1958, 27 ILR 117.

133 *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.*, Award of 15 March 1963, 35 ILR 136.

134 *Wena Hotels v. Egypt, supra* footnote 18.

135 *SeaCo v. Iran, supra* footnote 124.

the Decision on Jurisdiction, in which the Tribunal stated with reference to *Impregilo v. Pakistan*:[136]

> "[O]nly 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."[137]

438. If a showing of breach of contract resulting from governmental directives were sufficient to constitute expropriation, then any "governmental act would by definition be one of *puissance publique*" (C.-Mem. M., ¶ 4.77), a proposition that Pakistan considers unfounded. More specifically, Pakistan argues that:

> "[I]n circumstances where (i) a State entity enters into a contract, (ii) that contract was negotiated between the investor, the State entity and given governmental departments and (iii) those governmental departments remain involved in monitoring the performance of the contract, indeed, their input is actively sought by the investor, it would not in any event be an act of puissance publique for the governmental departments to recommend or even direct that the contract should be terminated because of the investor's breach. Such a recommendation or decision would constitute nothing more than a decision taken in the implementation or performance of the given contract." (C.-Mem. M., ¶ 4.77)

439. Finally, Pakistan contends that a finding of expropriation generally requires, in addition to the loss of the investment, arbitrary conduct or an intentional deprivation on the part of the State (C.-Mem. M., ¶ 4.79; Rej. M., ¶ 4.49).

3. Tribunal's determination

440. The basis for the assessment of Bayindir's expropriation claim is Article III(1) of the Treaty, which reads as follows:

> "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."

441. The Tribunal concurs with the Claimant when it asserts that Article III(1) adopts a broad concept of expropriation, potentially applicable not only to tangible property but also to contractual and other rights, even outside the context of a nationalization.

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136 *Impregilo v. Pakistan*, *supra* footnote 26, ¶ 281.

137 Decision on Jurisdiction, ¶ 257.

442. The first step in assessing the existence of an expropriation is to identify the assets allegedly expropriated. In the present case, the assets identified by the Claimant, namely its contractual rights, plant and equipment, and the Mobilisation Advance Guarantees, are within the scope of Article III(1) of the Treaty, and may potentially be subject to an interference amounting to expropriation.

443. Having identified the assets, the next step is to identify the allegedly expropriatory conduct. As stated in the Decision on Jurisdiction, expropriation may arise out of a simple interference by the host State in the investor's rights with the effect of depriving the investor of its investment.[138] A critical issue in this regard concerns the intensity or the effect of such conduct with respect to the investor's property. The Tribunal concurs with *Tecmed*, *CMS*,[139] and *Telenor*,[140] that an expropriation might occur even if the title to the property is not affected, depending on the level of deprivation of the owner[141]:

> "[I]t is understood that the measures adopted by a State, whether regulatory or not, are an indirect *de facto* expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that "…any form of exploitation thereof…" has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed. Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary. The government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects. To determine whether such an expropriation has taken place, the Arbitral Tribunal should not:
> [...] restrict itself to evaluating whether a formal dispossession or expropriation took place, but should look beyond mere appearances and establish the real situation behind the situation that was denounced."[142]

444. The third step in this inquiry consists in examining whether the alleged interference with the property or the rights of the investor has been made in the State's exercise of its

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138 Decision on Jurisdiction, ¶ 255.

139 *CMS v. Argentina*, *supra* footnote 77, ¶ 260-264.

140 *Telenor Mobile Communications AS v. Republic of Hungary* (ICSID Case No. ARB/04/15), Award of 13 September 2006.

141 *Starrett Housing Corp. v. The Government of the Islamic Republic of Iran*, Interlocutory Award of 19 December 1983, 4 Iran-US CTR 122; *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award of 22 June 1984, 6 Iran-US CTR 219.

142 *Tecmed v. Mexico, supra* footnote [53], ¶ 116.

sovereign powers. As noted for instance in *Impregilo v. Pakistan* cited in lieu of others, such as *Siemens v. Argentina*,[143] or *RFCC v. Morocco*[144]:

> "[O]nly 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."[145]

445. In the present case, the Claimant has suggested that a breach of the Contract as a result of governmental directives would suffice for a finding of expropriation. The Tribunal disagrees. First, not every contract breach deprives an investor of the substance of its investment. Second, even where it does and the breach stems from a governmental directive, it would not necessarily follow that the contractual breach is the result of a sovereign act, as a directive of the State may be given in the framework of the contract.

446. The fourth step in assessing the existence of an expropriation in breach of the Treaty is the analysis of the conditions specified in Article III(1), namely (i) the lack of a public purpose, (ii) discrimination, (iii) the absence of payment of prompt, adequate and effective compensation, and (iv) a breach of "due process of law and the general principles of treatment provided for in Article II of this Agreement."

b. Contractual rights

1. Bayindir's position

447. Bayindir submits that Pakistan expropriated the investment indirectly in a clandestine manner under the pretext of exercising contractual rights, in order to give effect to a governmental change in policy towards Bayindir. In Bayindir's submission, Pakistan acted in an arbitrary and discriminatory manner with the intention of permanently depriving it of its contractual rights. More specifically, through its forcible expulsion pursuant to the notice of 23 April 2001, it was deprived of the benefits it expected to derive from the Contract as well as from payment for works executed until the expulsion.

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143 *Siemens v. Argentina*, *supra* footnote 59, ¶ 253.

144 *RFCC v. Morocco*, *supra* footnote 32, ¶¶ 65-69, 85-89.

145 *Impregilo v. Pakistan*, *supra* footnote 26, ¶ 281.

448. Pakistan's argument that Bayindir keeps a residual right to a final settlement of accounts as such does not prevent a finding of expropriation, as was recognized in *Wena Hotels v. Egypt*, *SPP v. Egypt* and *Middle East Cement v. Egypt* (Reply M., ¶¶ 320-325).

449. In any event, the Respondent's conduct after the expulsion leaves no doubt on its intention not to give effect to the final settlement of accounts under the Contract and, therefore, to permanently deprive Bayindir of its contractual rights. Indeed, according to Bayindir, Pakistan's interpretation of sub-clause 63.3 of the Contract is untenable, as it was well understood from the beginning that Bayindir's expulsion would result in substantial savings and would in any event require Bayindir to wait seven to eight years (until works are completed by the local contractors) for a settlement and probably, at this time, a dispute might arise regarding the amounts of the settlement. Thus, sub-clause 63.3 cannot be relied upon by Pakistan to justify the absence of a prompt and adequate compensation, in accordance with the BIT (Reply M., ¶¶ 42-45).

450. Moreover, according to Bayindir, sub-clause 63.3 of the Contract does not apply to amounts already certified by the Engineer on the date of expulsion, but only to works that the Contractor was in the process of performing. Thus, there was no justification for withholding payment under payment certificates Nos. 20 and 21 (Reply M., ¶¶ 48). Furthermore, Bayindir argues that several acts attributable to the Respondent which were accomplished after the expulsion (see paragraph 349 *supra*) show that there was no intention on the part of the Respondent to give effect to sub-clause 63.3 of the Contract.

451. Bayindir further submits that the decision to expel Bayindir was the result of governmental directives given by General Musharraf himself and based *inter alia* on national policy and compliance with World Bank recommendations. In addition, Pakistan acted in the exercise of its sovereign powers when it complied with the directives and served the notice of expulsion upon Bayindir, and used the Pakistani Army to ensure that Bayindir left the site.

2. Pakistan's position

452. Pakistan submits that the expulsion of Bayindir pursuant to the Contract cannot be considered expropriatory of Bayindir's contractual rights, as such rights are limited by the Contract itself.

453. Moreover, even if there had been a breach of the Contract, such breach would not amount to expropriation. In Pakistan's submission, a finding of expropriation would require proof of an improper motive for the expulsion (C.-Mem. M., ¶ 4.80). It would also require a showing of deprivation, which is not the case given the rights which Bayindir keeps under sub-clause 63.3 of the Contract.

454. Pakistan also disputes that the expulsion was an act of "*puissance publique*" rather than one carried out in the performance of the Contract. More specifically, it asserts that:

> "[I]n circumstances where (i) a State entity enters into a contract, (ii) that contract was negotiated between the investor, the State entity and given governmental departments and (iii) those governmental departments remain involved in monitoring the performance of the contract, indeed, their input is actively sought by the investor, it would not in any event be an act of puissance publique for the governmental departments to recommend or even direct that the contract should be terminated because of the investor's breach. Such a recommendation or decision would constitute nothing more than a decision taken in the implementation or performance of the given contract." (C.-Mem. M., ¶ 4.77)

455. Pakistan also notes that Bayindir's complaints about the threat of force is neither established nor an indicator on its own of an unlawful measure, as it may be perfectly lawful to evict an investor who remains on site unlawfully.

3. Tribunal's determination

456. Following the steps of the analysis set forth above (see paragraphs 442 *et seq*. *supra*), the Tribunal starts by observing that the assets allegedly subject to expropriation are Bayindir's rights under the Contract, including those relating to the payment for works completed. Such rights have an economic value and can potentially be expropriated.

457. As a second step, the Tribunal finds that the measures through which Pakistan allegedly deprived Bayindir's contractual rights of their economic value are in essence the notice of expulsion and the taking over of the site.

458. Third, the Tribunal must review whether Pakistan has interfered with Bayindir's contractual rights to an extent amounting to a deprivation of the economic substance of such rights. In this regard, the fact that Bayindir was expelled is obviously not enough. As rightly pointed out by the Respondent, if the expulsion was lawful under the Contract, then there would be no taking of or interference with Bayindir's rights. Moreover, even if the expulsion was conducted in breach of the Contract, that would not as such be enough for a finding of expropriation under the Treaty. Bayindir submits that its expulsion was contrary to the terms of the Contract as well as in breach of the Treaty. While not a contract judge, the Tribunal must review those facts related to contract interpretation and performance and here particularly related to the exercise of certain contractual remedies to the extent necessary to rule on the Treaty claim. In this regard, the Tribunal has already discussed at length in paragraphs 240-256 and 351-359 *supra* that there is a reasonable interpretation of the Contract according to which the mechanisms leading to Bayindir's expulsion as well as those regarding measures subsequent to the expulsion were used in conformity with the Contract. On the basis of such considerations, the Tribunal concluded that there was no breach of the applicable FET standard. For the same reasons, the Tribunal cannot accept that there is a breach of the treaty provision on expropriation.

459. The critical element for a finding of expropriation is the economic effect of the measure rather than the intent underlying it. This is so even though Bayindir's claim focuses on the Respondent's improper intent. The Tribunal has in any event already found that the record does not show an intent on the part of Pakistan to permanently deprive Bayindir of its residual contractual rights (see paragraphs 351-359 *supra*).

460. Bayindir's contractual rights are defined by the terms of the Contract. To establish an expropriation of its rights as a result of NHA's exercise of its own contractual rights, Bayindir must start by proving that its contractual rights were not limited by NHA's contractual rights or that NHA took an action that, although allegedly based on the Contract's terms, was in fact clearly in breach of such terms. Absent such proof, there can be no deprivation of the economic substance of Bayindir's rights, as the scope of such rights is limited by NHA's own rights under the Contract. The foregoing analysis of the Contract (see in particular paragraphs 240-258, 301-314, 331-335, 346-347,

351-359, and 367-376 *supra*) shows that Bayindir has not succeeded in adducing proof of these facts.

461. In addition, even if the expulsion violated the Contract and deprived Bayindir of the economic substance of its contract rights, a finding of expropriation would only be founded if the acts at issue were sovereign acts. The evidence does not point in this direction. To the contrary, it shows that Pakistan can reasonably justify the expulsion by Bayindir's poor performance (*see* paragraphs 301-315 *supra*) with the consequence that the expulsion must be seen in the framework of the contractual relationship, not as an exercise of sovereign power. This conclusion is not contradicted by the close involvement of the Pakistani government in the M-1 Project. As noted in section IV(A)(b) *supra*, governmental involvement is not necessarily equivalent to the exercise of sovereign power when it is grounded on legitimate contractual considerations.

462. For the foregoing reasons, the Tribunal concludes that Pakistan has not expropriated Bayindir's contractual rights in breach of Article III(1) of the Treaty.

c. Machinery, plant, equipment, material, spare parts and office inventory

1. Bayindir's position

463. Bayindir claims that, following its expulsion from the site, Pakistan's armed forces confiscated its machinery, plant, equipment, material, spare parts and office inventory. It argues that such confiscation occurred despite the fact that it disputed the sub-clause 63.1 certificate and the notice of expulsion. It adds that no contractual provision required Bayindir to raise a separate dispute in connection with the expropriation of its assets under sub-clause 63.2 of the Contract.

464. More specifically, Bayindir considers that, since the certification under sub-clause 63.1(b)(ii) was invalid, all acts carried out on this basis were unlawful and were equivalent to an expropriation of its assets.

465. In Bayindir's submission, the expropriation of its tangible property occurred without prompt and adequate compensation, and in a discriminatory manner through an act of *puissance publique*. Bayindir further contends that the record shows that Pakistan does not intend to repay Bayindir for its confiscated property.

2. Pakistan's position

466. In substance, Pakistan's position is that the actions of NHA were entirely justified under the Contract. It refers to sub-clause 6.2 of the Overriding Conditions of Contract attached to Addendum No. 6 and sub-clause 63.1 of the Contract to support its allegation that Bayindir had agreed that all permanently imported equipment would eventually become property of NHA and that "given that NHA had issued a valid notice [under sub-clause 63.1] it was expressly entitled to use the Contractor's Equipment, Plant, Temporary Works and materials" (C.-Mem. M., ¶ 4.83).

467. Pakistan further argues that Bayindir "never questioned the retention of its Equipment, Plant, Temporary Works and materials on Site after it was expelled in May 2001" (C.-Mem. M., ¶ 4.84) and participated in the measuring up and inventory process carried out pursuant to sub-clause 63.2 of the Contract.

468. Finally, the Respondent contends that NHA's acts were not undertaken in the exercise of sovereign powers.

3. Tribunal's determination

469. The Tribunal's reasoning on this head of the expropriation claim is in line with the considerations set forth in connection with the claim for the expropriation of the contract rights. It is true that this claim deals with tangible as opposed to intangible property and that the controversial measures consist in the seizure and confiscation as opposed to the notice of expulsion and the taking over of the site. These differences have no bearing, however, on the assessment of the existence of an expropriation.

470. With respect to the contractual matters relevant for the assessment of a breach of the Treaty, the Tribunal set out in paragraphs 240-256 and 351-359 *supra* that there is a reasonable interpretation of the Contract under which the mechanisms leading to Bayindir's expulsion as well as those regarding subsequent measures were used in conformity with the Contract.

471. Moreover, the Respondent has offered a reasonable contract basis for the seizure and use of Bayindir's property left on the site, with reference to sub-clause 6.2 of the

Overriding Conditions of Contract attached to Addendum No. 6 and sub-clause 63.1 of the Contract. Indeed, sub-clause 6.2, as subsequently amended, provides that:

> "The Contractor shall be allowed to import construction machinery, equipments and related spare parts to be incorporated into and used for the Work without all taxes and duties (custom duty, surcharge [...] and others) payable to customs department on the condition that all such equipments, machinery and spares shall be transferred without cost to the Employer after the completion of the Work on an as is where is basis."
> (Exh. [Pak.] C-3)

This provision must be read together with sub-clause 63.1, as modified by the Conditions of Contract – Part II, which provides that:

> "[T]hen the Employer may, after giving fourteen day's notice to the Contractor, enter upon the Site and expel the Contractor therefrom without thereby voiding the Contract, or releasing the Contractor from any of his obligations or liabilities under the Contract, or affecting the rights and powers conferred on the Employer or the Engineer by the Contract, and may himself complete the Works or may employ any other contractor to complete the Works. The Employer or such other contractor may use for such completion so much of the Contractor's Equipment, Plant, Temporary Works and materials, which have been deemed to be reserved exclusively for the execution of the Works, under the provisions of the Contract, as he or they may think proper, and the Employer may, at any time, sell any of the said Contractor's Equipment, Temporary Works and unused Plant and materials and apply the proceeds of sale in or towards the satisfaction of any sums due or which may become due to him from the Contractor under the Contract."
> (Exh. [Bay.] C-11)

472. Furthermore, the record evidences that the measurement and inventory process took place in relatively good conditions (see paragraphs 331-336 *supra*). NHA took account of the concerns then expressed by Bayindir, that the FWO may be biased (Exh. [Pak.] CM-141), resulting in the nomination of the independent organization in charge of conducting the joint inventory (Exh. [Pak.] CM-142), which reportedly completed its task on 13 May 2003 (Exh. [Pak.] R-68).

473. In any event, even if a taking of Bayindir's machinery, plant, equipment, material, spare parts, and office inventory in breach of the Contract could be established, such action would not amount to a deprivation of the economic substance of Bayindir's remaining investment.

474. Finally, even if one were to reach a contrary conclusion, it would still be necessary to demonstrate that the conduct under review was effected in the exercise of sovereign

power. For the reasons explained above, the Tribunal does not regard this requirement as met (see paragraph 461 *supra*).

475. For the foregoing reasons, the Tribunal concludes that Pakistan has not expropriated Bayindir's property left on the site in breach of Article III(1) of the Treaty.

d. Mobilisation Advance Guarantees

1. Bayindir's position

476. Bayindir argues in substance that through a series of acts attributable to the Respondent which are set forth above and relate to the call of the Mobilisation Advance Guarantees (see paragraphs 360-364 *supra*), the Respondent expropriated the amounts covered by these guarantees. In Bayindir's submission, the guarantees fall within the definition of 'investment' of the Treaty, as the Tribunal noted in the Decision on Jurisdiction (Reply M., ¶ 331).

477. Moreover, the Claimant argues that its reputation and creditworthiness were destroyed by the call on the guarantees, which caused the destruction of its value as a company (Tr. M., 26 May 2008, 127-128).

2. Pakistan's position

478. Pakistan submits that this claim had not been raised at the time of the jurisdictional phase, and that the Tribunal thus lacks jurisdiction over it. In connection with jurisdiction, it argues that "Bayindir has never suggested that the mobilisation advance guarantees themselves constitute an investment falling within Article I(2) of the Treaty, and they would not correctly be characterized as such" (C.-Mem. M., ¶ 4.87).

479. On the merits, Pakistan objects that the acts under review were in conformity with the Contract (see paragraphs 365-366 *supra*). It also counters that the Mobilisation Advance Guarantees constitute contracts between the Turkish banks and NHA. Thus, the Contract, on the one hand, and the Mobilisation Advance Guarantees, on the other, are between different parties and are juridically distinct (C.-Mem. M., ¶ 4.85).

480. Pakistan further contends that the guarantees remain in effect, albeit in abeyance and that there has been no payment under the guarantees, with the result that no expropriation can have occurred (C.-Mem. M., ¶ 4.88).

3. Tribunal's determination

481. At the outset, the Tribunal notes that it does not consider that Bayindir's claim for expropriation of the Mobilisation Advance Guarantees is a new claim. In its Decision on Jurisdiction, it held that it had jurisdiction over Bayindir's claims for breach of the Treaty, including for the alleged expropriation of Bayindir's investment. Although Bayindir did not then clearly articulate the claim for the expropriation of the Mobilisation Advance Guarantees, the latter can be deemed to form part of the overall investment. Therefore, the Tribunal is of the opinion that this claim is within its jurisdiction as it was affirmed in the Decision on Jurisdiction.

482. The Tribunal has already discussed the acts alleged by the Claimant under this claim in connection with FET (see paragraphs 367-379 *supra*) and concluded that they did not amount to a breach of the FET standard. The reasons which prevailed on FET apply *mutatis mutandis* to the present head of claim. In essence, the Tribunal found that Pakistan's contractual explanation was reasonable enough to disprove Bayindir's allegations in connection with the misuse of the terms of the Contract. Even if such breach could be established, this would not suffice for a finding of expropriation. There is no evidence that such actions were undertaken in bad faith or for sovereign reasons, particularly taking into consideration that the attempts to encash the Mobilisation Advance Guarantees were conducted in accordance with the legal procedures of another State within that State's territory. Moreover, the monies have not been cashed. As to the adverse consequences of the attempted encashment on Bayindir's standing and viability, however unfortunate, they are part of the business risk that any contractor assumes when entering into a contract for a major project with substantial financial exposure. Investment treaties are not meant to protect against business risks.

483. On this basis, the Tribunal concludes that the attempted encashment of the Mobilisation Advance Guarantees does not amount to an expropriation in breach of Article III(1) of the Treaty.

e. Respondent's acts taken together

484. The question that remains is whether, despite the findings that the Claimant has failed to establish the existence of a breach of Article III(1) of the Treaty in the context of each of the specific acts so far considered, the evidence with respect to all the acts taken together may support the existence of a violation of the Treaty.

485. The Tribunal considers that the aggregation of the different components of Bayindir's expropriation claim cannot reverse its earlier findings. This is because such reasons for the Tribunal's conclusions in the preceding sections go well beyond the amounts of the alleged deprivation and concern, *inter alia*, the very characterization of the acts under review as neither constituting a deprivation nor sovereign acts.

486. For the foregoing reasons, the Tribunal finds that the Respondent has not breached Article III(1) of the Treaty.

E. PROVISIONAL MEASURES

487. The Tribunal deems it useful to recall that, pursuant to paragraph (ii) of the operative part of PO#1, the Tribunal ordered among others 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."
> (PO#1, at No. 78)

488. On 14 April 2008, the Tribunal then issued PO#11, in which it ordered that:

> "(i) Bayindir shall take whatever steps may be necessary and use its best endeavours to procure the withdrawal by Is Bank of its application dated 14 March 2007;
>
> (ii) In accordance with the rationale of the Tribunal's decision of 29 November 2004, Pakistan shall 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 encashment of interest on the Mobilisation Advance Guarantees;
>
> (iii) The foregoing directions remain in effect until (a) an arbitral award is rendered on the merits; or (b)·they are amended or revoked by order of the Tribunal; [... .]"

(PO#11, at No. 41)

489. As provided in the operative parts of both PO#1 and PO#11, these measures were to remain in effect until the issuance of an award on the merits. For the avoidance of doubt, the Tribunal confirms that the measures recommended in PO#1 and PO#11 will cease to be in effect as of the date of the notification of the present Award. The Tribunal also notes, in connection with the subsequent dispute over the potential impact of Is Bank's application dated 14 March 2007 on NHA's recovery of default interest on part of the Mobilisation Advance Guarantees, that it is for NHA to seek redress before a competent forum and under the proper law of such guarantees.

F. COSTS

490. In the exercise of its discretion in matters of allocation of costs, the Tribunal finds it fair that the Parties bear the costs of the arbitration in equal shares and that each Party bears its own legal and other costs expended in connection with this arbitration. In reaching this decision, the Tribunal has pondered all the circumstances of the case, including in particular the withdrawal of the Contract claims, the outcome on jurisdiction in favour of Bayindir and on the merits in favour of Pakistan, the results achieved by each Party on provisional remedies, and the fact that Bayindir's treaty claims, even if they did not succeed on the merits, presented genuine issues which could legitimately be brought before an investment tribunal.

V. RELIEF

For the reasons set forth above, the Tribunal issues the following Award:

a. The Respondent has not breached the fair and equitable treatment standard applicable through the operation of Article II(2) of the Treaty;

b. The Respondent has not breached the national treatment and most favoured nation standards contained in Article II(2) of the Treaty;

c. The Respondent has not expropriated the Claimant in breach of Article III(1) of the Treaty;

d. The measures recommended in PO#1 and PO#11 shall no longer be in effect as of the date of the notification of the present Award;

e. The Parties shall bear the costs of the arbitration in equal shares;

f. Each Party shall bear its own legal and other costs;

g. All other claims are dismissed.

Sir Franklin Berman

Date: 20 August 2009

Prof. Karl-Heinz Böckstiegel

Date: 24 August 2009

Prof. Gabrielle Kaufmann-Kohler

Date: August 14, 2009

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 Blcioglu
- 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

[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

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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, ¶

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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

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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).

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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.

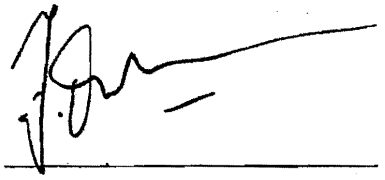
consequences of Bayindir's initial choice to raise both Treaty and Contract Claims and of its late decision to abandon the Contract Claims.

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



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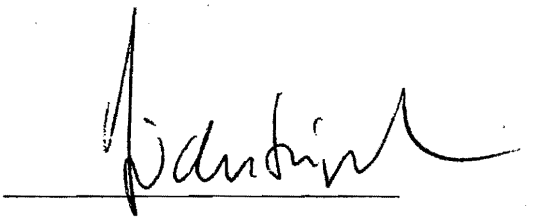

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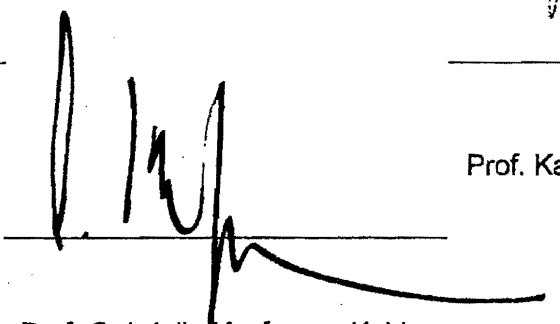

Prof. Gabrielle Kaufmann-Kohler