

**INTERNATIONAL CENTRE FOR THE SETTLEMENT  
OF INVESTMENT DISPUTES  
WASHINGTON, D.C.**

**IN THE PROCEEDINGS BETWEEN**

**IMPREGILO S.p.A.**  
(Claimant)

v.

**ISLAMIC REPUBLIC OF PAKISTAN**  
(Respondent)

ICSID CASE No. ARB/03/3

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**DECISION ON JURISDICTION**

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Mr. Toby T. Landau

**Secretary of the Tribunal**

Ms. Martina Polasek

**Acting Secretary of the Tribunal**

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## I. PROCEDURAL HISTORY

1. On 21 January 2003, the International Centre for Settlement of Investment Disputes (“ICSID” or “the Centre”) received a request for arbitration dated 17 January 2003 (the “Request”) from Impregilo S.p.A. (“Impregilo” or “the Claimant”), a company organized under the laws of Italy, against the Islamic Republic of Pakistan (“Pakistan” or “the Respondent”). The Request invoked the provisions of the Agreement between the Government of the Italian Republic and the Government of the Islamic Republic of Pakistan on the Promotion and Protection of Investments signed on 19 July 1997 (the “BIT” or “Treaty”), and those of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”).
2. On 3 March 2003, the Acting Secretary-General of ICSID registered the Request pursuant to Article 36(3) of the ICSID Convention and, on the same date, notified the Parties of the registration of the Request and invited them to proceed to constitute an Arbitral Tribunal as soon as possible. The Parties agreed that the Tribunal was to consist of three arbitrators, one arbitrator appointed by each party and the third, the President of the Tribunal, to be appointed by agreement of the Parties. The Parties further agreed that, in the event they were unable to agree on the President, the presiding arbitrator was to be appointed by the Secretary-General of ICSID.
3. On 30 April 2003, the Claimant appointed Mr. Bernardo M. Cremades and on 5 May 2003, the Respondent appointed Mr. Toby T. Landau. The Parties were subsequently unable to agree on the President of the Tribunal within the time limit agreed upon and, therefore, on 12 June 2003, the Claimant requested the Secretary-General of ICSID to appoint the President. Having consulted the Parties regarding the appointment of the presiding arbitrator, on 15 August 2003 the Centre announced the appointment of Judge Gilbert Guillaume. The Parties were also notified on 15 August 2003 that the Tribunal was constituted and that the proceedings had begun on that date in accordance with Article 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”).

4. With the agreement of the Parties, the first session of the Tribunal was held in Paris on 7 November 2003. On that occasion, the Parties expressed their agreement that the Tribunal had been properly constituted and also agreed on a number of procedural matters reflected in the minutes signed by the President and the Secretary of the Tribunal. Among other items, it was agreed that the procedural language would be English and that the legal place of proceedings would be Washington D.C. but that, in principle, the Tribunal would hold hearings in Paris.
  
5. The Parties were unable to agree at the first session on the number and sequence of pleadings and the time limits for their submission. The Respondent stated that it needed additional information from the Claimant, beyond that contained in the Request, in order to consider its position with respect to the jurisdiction of the Tribunal. To this end, the Tribunal ordered that the Respondent submit a document specifying the information it wished to have in order to be able to formulate any possible objections to jurisdiction. The Tribunal further decided on the procedural calendar to be followed in the event that the Respondent decided to raise any such objections.
  
6. In accordance with the Tribunal's directions at the first session, on 15 December 2003 the Respondent filed a submission entitled "Information on the Request for Arbitration: Information Sought by the Respondent in Relation to the Formulation of Potential Objections to Jurisdiction." On 17 December 2003, the Claimant raised a number of objections with respect to the nature and scope of the Respondent's request for information of 15 December 2003. By Procedural Order No. 1 of 22 December 2003, the Tribunal directed that the Claimant submit a Limited Memorial on the merits, articulating the precise legal basis for each of its claims, instead of a response to the Respondent's request for information. The Tribunal further confirmed the timetable for the filing of pleadings as agreed during the first session.

7. In accordance with Procedural Order No. 1, the Claimant filed its Limited Memorial on the Merits on 17 February 2004; the Respondent filed its Memorial on Jurisdiction on 18 March 2004; and the Claimant filed its Counter-Memorial on Jurisdiction on 19 April 2004. A hearing on jurisdiction was held in Paris on 23 and 24 May 2004.

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## II. SUMMARY OF THE PARTIES' SUBMISSIONS

### A. The Claimant's Request

8. *GBC*: According to the Claimant's Request, on 27 April 1995 a joint venture called Ghazi-Barotha Contractors ("GBC" or the "Joint Venture") was formed under the laws of Switzerland, in order to prepare and submit tenders for, and if successful to construct, hydroelectric power facilities in Pakistan known as the Ghazi-Barotha Hydropower Project (the "Project").
9. The Project is located immediately downstream of the Tarbela Dam on the Indus River in Northern Pakistan and, on completion, is expected to increase power generation in Pakistan by 15%.
10. GBC was established pursuant to a "Joint Venture Agreement" ("JVA") concluded between five joint venture participants (comprising both Pakistani and non-Pakistani entities), as follows:
  - (a) Impregilo;
  - (b) Ed. Züblin AG (a German company);
  - (c) Campenon Bernard SGE (a French company);
  - (d) Saadullah Khan & Brothers ("SKB") (a Pakistani company); and
  - (e) Nazir & Company (Private) Limited (a Pakistani company).

11. Impregilo was selected as the Leader of the Joint Venture.
12. Campenon Bernard SGE withdrew from the Joint Venture in 1998.
13. *The Contracts:* On 19 December 1995, two Contracts (the “Contracts”) were concluded between Impregilo (acting on behalf of GBC) and the Pakistan Water and Power Development Authority (“WAPDA” or the “Employer”). Contract C-01 called for the construction of a barrage downstream of the Tarbela Dam that would control the flow of the Indus River. Contract C-02 called for the construction of a 52 km channel that would convey the water from the barrage to a powerhouse, as well as the construction of 47 bridge structures, a railway bridge, and 30 drainage structures. The two Contracts together were initially valued at approximately US\$ 500 million.
14. The performance of the Contracts was to be controlled by an Engineer acting as an agent for the Employer. Pakistan Hydro Consultants (“PHC” or the “Engineer”) was selected by WAPDA to fulfill this task.
15. *Relevant Facts:* Construction under the Contracts began in early 1996 with original completion dates foreseen in March 2000. In the event, the performance of the work was delayed, according to the Claimant, due to obstacles created by the Respondent and to unforeseen conditions discovered over the course of the work. The Engineer and WAPDA denied GBC’s requests for adequate time extensions and reimbursement of costs. The denial of GBC’s claims led to a series of disputes.
16. In particular, the Claimant contends that the timely performance of the preliminary tasks under Contract C-01 was impeded by delay in the Engineer’s issuance of detailed instructions. In addition, the Engineer increased the amount of foundation work to be carried out, and the preliminary work led to the discovery of unforeseen geological conditions. The construction of the main barrage was also delayed by the Engineer’s failure to give timely approvals and issue instructions for the work. Furthermore, the instructions were inadequate in detail and required work more complex than had been



shown in the tender drawings. In addition, WAPDA failed to deliver to GBC items of equipment it had to supply, or delivered them many months later than scheduled.

17. Further, the Claimant contends that the implementation of Contract C-02 was hampered by WAPDA's failure to turn over the land necessary to carry out the work in a proper manner. Moreover, acts and omissions of WAPDA and the Engineer significantly impeded GBC's ability to proceed according to schedule. Sections of the concrete lining for the channel, when completed, were damaged due to the Engineer's design defects. Design details for the construction of bridges and other ancillary structures were issued late. Moreover, GBC was required to build 50 % more concrete structures than required by the tender documents.
18. The Engineer rejected most of GBC's claims for extensions of time, as well as its claims for payment of additional costs. As a result, WAPDA refused to compensate GBC for most of those costs.
19. Beginning in March 2001, GBC attempted an amicable settlement of its disputes with WAPDA. Negotiations continued for some months thereafter, but eventually broke down.
20. The Contracts contain detailed dispute settlement clauses. Under those provisions, disputes have first to be submitted to the Engineer, which is to render its decision within 28 days. If either party is dissatisfied with the Engineer's decision, it may refer the matter to a Disputes Review Board ("DRB" or "Board") within 14 days. This Board is composed of three Members, one selected by GBC, one by the Employer, and the third, who chairs the Board, by the first two Members with the approval of both Parties. If either party is dissatisfied with the Board's recommendation, it may commence arbitration in Lahore within 14 days.
21. Impregilo submits that the Engineer did not act impartially or independently. In this respect, it stresses that the majority partner of PHC is National Engineer Services

Pakistan (“NESPAK”), an enterprise wholly-owned by the Pakistan Ministry of Water and Power, and that NESPAK’s managers were recruited from the ranks of WAPDA officials.

22. Moreover, according to GBC, the DRB’s functioning was frustrated and the review of the Engineer’s decisions was blocked. At every stage of the process, WAPDA blocked the replacement of each member of the Board by delaying, objecting to and frustrating the appointment of replacements. Thus, there was no properly appointed WAPDA representative on the DRB from early 2000 until April 2002. In March 2002, WAPDA objected to the appointment by GBC of a new member of the DRB for unfounded reasons. WAPDA also frustrated the efforts to appoint a new chairman of the DRB in 2001 and 2002. In April 2002, Impregilo and the Respondent agreed to reconstitute the DRB. The reconstituted DRB met in November 2002, and, in early December 2002, it issued one determination which was favourable to GBC. WAPDA immediately challenged the chairman of the DRB and again blocked the proper functioning of the Board. On Impregilo’s case, resort to the DRB was a precondition to arbitration, and hence in the absence of a functioning DRB, arbitration under the Contracts became impossible. Arbitration, in any event, did not provide an adequate substitute to the contemplated DRB process.
23. The events of 11 September 2001 in the United States altered the political, practical and security considerations for all work in the region near the Pakistan-Afghan border. Orders were given by the Italian Authorities to repatriate all Italian personnel of GBC. British, American, Canadian and German personnel also had to leave the site for security reasons. GBC approached WAPDA in order to seek a suspension of the work. The Engineer and the Employer refused. In December 2001, WAPDA required that GBC pay liquidated damages because of its alleged failure to complete the work on schedule.
24. In April 2002, the security situation improved and the Italian Authorities granted authorization for the Italian staff to work in Pakistan. The Italian and German personnel of GBC resumed work on the site.

25. In the meantime, in January 2002, Impregilo had filed a request for arbitration before ICSID (ICSID Case No ARB/02/2). After the registration of the request, Impregilo and the Respondent engaged in discussions in an effort to settle the dispute and, in May 2002, Impregilo withdrew its request. Unfortunately, according to the Claimant, attempts to settle the dispute failed and Impregilo therefore filed a new request for arbitration.
26. *Jurisdiction:* According to Impregilo's Request, jurisdiction over this dispute is established by Article 25 (1) of the ICSID Convention and by Article 9 of the BIT between Italy and Pakistan signed on 19 July 1997, which entered into force on 22 June 2001.
27. With respect to jurisdiction *ratione personae*, Impregilo adds that it is an investor of Italy for the purposes of the BIT. It is also "a national of another Contracting State" for the purposes of the ICSID Convention. As Leader of the Joint Venture, Impregilo is entitled to represent GBC in all matters relating to the Contracts.
28. On Impregilo's case, WAPDA is an instrumentality of the Government of Pakistan and exercises governmental authority. It is therefore part of the Government of Pakistan.
29. The Islamic Republic of Pakistan is both a Contracting Party to the BIT and a Contracting State under Article 25 (1) of the ICSID Convention. It is thus a proper Respondent in this case.
30. With respect to jurisdiction *ratione materiae*, Impregilo submits that the present dispute is "a legal dispute arising directly out of an investment". Impregilo's rights and assets in Pakistan are investments within the meaning of Article 25 (1) of the ICSID Convention and of Article 1 (1) of the BIT. The Respondent has breached and continues to breach both the Contracts and various rights conferred on Impregilo by the BIT with respect to its investment.

31. Concerning jurisdiction *ratione temporis*, the Claimant contends that the breaches occurred after the entry into force of the BIT, and are ongoing. It adds that:

“...while some of the acts and omissions took place before the date of the entry into force of the BIT, the situation that they have created has not ceased to exist as of the date of entry into force. In addition, acts and omissions subsequent to that date have aggravated the situation and, as a whole, constitute a serious breach of the protections granted to Impregilo by the BIT and its rights under the Contracts”.<sup>1</sup>

32. Finally, all procedural conditions precedent to the submission of the dispute to ICSID have been fulfilled. As required by Article 9(1) of the BIT, Impregilo has repeatedly sought a resolution of the dispute through consultation and negotiation. More than six months have elapsed from the time Impregilo submitted a “written application” to reach an amicable settlement as required by Article 9(2) of the BIT.

33. *Breaches of Contract and Treaty:* In conclusion, the Claimant submits, first, that the Respondent failed to honour its commitments under the Contracts:

“...by causing delays in the performance of the Contracts, denying Impregilo’s rights to extensions of time and additional costs, frustrating the dispute settlement mechanism under the Contracts, requiring Impregilo to continue the work in spite of the serious security risks, and threatening to impose liquidated damages.”<sup>2</sup>

34. Second, the Claimant asserts that the alleged acts and omissions of the Respondent also constitute violations of several provisions of the BIT, as follows:

- “1. Respondent is in breach of its obligation under Article 2(2) of the BIT to ‘at all times ensure fair and equitable treatment or the investments of investors of the other Contracting Party.’
2. Respondent is in breach of its obligation under Article 2(2) not to subject investors and investments to unjustified measures.

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<sup>1</sup> Request, para. 53.

<sup>2</sup> *Ibid.*, para. 56.

3. Respondent's acts and omissions constitute 'measure[s] which might limit permanently or temporarily the right of ownership, possession, control or enjoyment' by Impregilo of its investment in Pakistan — measures that are prohibited by Article 5(1) of the BIT.
  4. Respondent's acts and omissions constitute measures that have an effect similar to expropriation under Article 5(2). Respondent's failure to honor the Contracts has destroyed the value of Impregilo's investment. The Contracts are the principal asset of Impregilo. The continuous failure to observe their terms is tantamount to an expropriation of Impregilo's investment under Article 5(2) of the BIT for which compensation is due."<sup>3</sup>
35. As a result of these alleged breaches of the Contracts and the BIT (referred to below as the "Contract Claims" and the "Treaty Claims" respectively), Impregilo submits that the Respondent has caused damages of approximately US\$ 450 million. In its Request, Impregilo seeks the following relief:
- "1. Impregilo seeks compensation for the entirety of the damages, including interest and the costs of the arbitration proceedings. Impregilo is entitled to claim the entirety of the damages suffered by GBC because of its role in the Joint Venture with its partners. Under Swiss law, the law governing the Joint Venture Agreement, and under the Joint Venture Agreement itself, Impregilo's rights, duties and liabilities are such as to entitle, if not oblige, it to assert a claim for the full amount of the damages suffered by GBC.
  2. In any event, if the Tribunal finds that it cannot award Impregilo damages in excess of its proportionate interest in GBC, Impregilo claims, in the alternative, 57.80 % of the total damages."<sup>4</sup>

## **B. The Claimant's Limited Memorial**

36. On 17 February 2004, pursuant to Procedural Order No. 1, Impregilo filed a Limited Memorial on the Merits (the "Memorial"), in which it expanded upon and explained its case as summarized in the Request.

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<sup>3</sup> *Ibid.*, para. 57.

<sup>4</sup> *Ibid.*, para. 58.

37. *Relevant Facts - Contractual Dispute Resolution Provisions:* In this Memorial, the Claimant first presented a statement of facts in which it describes the Project, and each of the entities involved, *i.e.*, Impregilo, GBC, WAPDA and the Engineer. Many of the points set out in its Request (and summarized above) were restated and elaborated upon.
38. According to Impregilo's Memorial, Pakistan has consistently thwarted and undermined the dispute resolution mechanism of the Contracts. It stresses that:
- “[t]hrough its influence over the determinations of the Engineer ... and through its outright obstruction of the Disputes Review Board ... WAPDA has prevented GBC from obtaining a fair hearing and equitable resolution of claims worth US\$550 million.”<sup>5</sup>
39. Impregilo adds that “GBC has submitted to the Engineer a total of over 140 events that gave rise to claims for extensions of time and additional costs”.<sup>6</sup> However, the Engineer “has consistently refused to allow GBC reasonable” claims.<sup>7</sup> Moreover, in the proceedings before the DRB, the Engineer has actively supported WAPDA's interests. It “failed utterly to act in an impartial and independent manner, contrary to his contractual role.”<sup>8</sup>
40. The Claimant also states that the DRB heard 12 disputes between January 1997 and September 2000, but that subsequently WAPDA obstructed the functioning of the Board. It did so after the resignation of WAPDA's member of the Board, Mr. Zahid Hamid, on 13 November 2000; as a consequence, from that date to April 2002, there was no properly appointed WAPDA representative on the DRB. After the resignation of Mr. Harald Peipers (GBC's member of the Board) on 15 January 2001, WAPDA objected in an unjustified manner to the appointment of his successor by GBC, and prevented such an appointment until April 2002. In April 2001, GBC drafted a memorandum of understanding, the purpose of which was to reconstitute

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<sup>5</sup> Memorial, para. 36.

<sup>6</sup> *Ibid.*, para. 41.

<sup>7</sup> *Ibid.*, para. 39.

<sup>8</sup> *Ibid.*

the DRB under a new chairman. WAPDA verbally agreed with this proposal, but communicated it privately to the existing chairman of the DRB, thus exacerbating the situation.

41. From March 2001, GBC began to try to settle disputes related to time extensions and additional costs directly with WAPDA and other Pakistani officials. No agreement was reached.
42. The events of 11 September 2001 caused a precipitous deterioration of the security situation in the area of the Project. On 25 September 2001, the Italian Ministry of Labor and Social Services revoked its authorization for the Italian staff employed under the Contracts to work in Pakistan. At the time, GBC was employing approximately 65 expatriates on the site, including 48 Italians who occupied most of the senior-level positions. They had to be repatriated.
43. Thereafter, GBC approached WAPDA and the Engineer seeking a suspension of the works pursuant to Clause 40 of the Contracts. This was refused and, on 4 December 2001, WAPDA notified GBC that it considered GBC in breach of the Contracts and intended to invoke liquidated damages in the amount of US\$36 million against it.
44. In February 2002, 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. As a result of these negotiations, on 14 April 2002, GBC entered into a supplementary agreement with WAPDA ("Supplementary Agreement"). This agreement established the conditions for the resumption of work on the site and extended the time for the completion of the work to 31 July 2003. It was agreed that this would not prejudice any of GBC's claims for events that occurred prior to 11 September 2001, but GBC relinquished its rights to compensation on a number of other issues covered in the Supplementary Agreement. The DRB was also to be reconstituted.

45. After the reconstitution of the DRB, in September 2002, a program of eight hearings was approved by the Board, to take place between November 2002 and February 2004. Two hearings were organized to examine the claims relating to the unforeseeable geological conditions and the hand over of land. Recommendations were made by the DRB largely in favour of GBC. But, in December 2002, WAPDA unjustifiably challenged the independence of the chairman of the Board and, in April 2003, WAPDA's member of the Board decided not to participate in any future DRB meetings or hearing until this challenge was resolved. WAPDA refused to allow resolution of that challenge as provided in the Supplementary Agreement and the functioning of the DRB was once again halted.
46. Then, in November 2002, WAPDA notified GBC of its intention to commence arbitration in Lahore on the issue of the unforeseen ground conditions covered by DRB Recommendation Number 14. An arbitral tribunal was duly constituted according to the Contracts.
47. *Relevant Facts - Performance of the Works:* Impregilo also contends that Pakistan consistently obstructed and disrupted GBC's performance of the works:
- “The commencement of this project ... coincided with the collapse of WAPDA to a barely functioning, grossly mismanaged, overstaffed organization”.<sup>9</sup>
48. On Impregilo's case, WAPDA failed to make the Advance Payments on the due date, and failed to make payment of approximately US\$75 million until May 1996. It did not pay the interest to which GBC was entitled. Moreover, the Pakistani authorities significantly delayed the importation of the initial shipments of plant and equipment necessary to begin work. It took WAPDA and other relevant Pakistani Government agencies four months to sort out the issue. GBC sought reimbursement for these

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<sup>9</sup> *Ibid.*, para. 85.



additional costs and delays. The DRB agreed, but WAPDA has to date paid only a minor portion of these costs.

49. In the performance of Contract C-01, GBC encountered substantial delays: 77 were memorialised and gave rise to claims. At the barrage site, GBC discovered unforeseen ground conditions. WAPDA and the Engineer did not issue necessary instructions in a timely manner. The Engineer issued instructions increasing the amount of the foundation work. Moreover, WAPDA failed to meet each and every one of the twelve dates set out in the Contracts for delivery of mechanical and electrical equipment to GBC.
50. With respect to Contract C-02, WAPDA was scheduled to hand over the Power Channel site in six sections, each on a different date. WAPDA, however, missed each one of these deadlines. It did not hand over to GBC the land for the last portion of the main channel until July 2002 (28 months delay). Rather than handing over the land as scheduled in the Contract, it made 43 handovers of smaller and non-contiguous strips of land. GBC's schedule of work on the Kamra Aeronautical Complex and Air Force Base site was disrupted as a result of delays in the handing over of the land. Additional delays and costs resulted from the delay in the construction of a railway bridge by the Pakistan Railways Authority; changes in the design of bridges and other superstructures; lack of instruction relating to the method for compaction of a filter layer of soil; and incidents of rioting, commotion and disorder on the site.
51. The Claimant contends further that WAPDA violated the April 2002 Supplementary Agreement in failing to make timely payments as provided for in this Agreement. WAPDA also refused to implement properly the procedures for calculating price adjustments.
52. In spite of all these problems, GBC substantially completed the whole of the works for Contract C-01 by January 2003. However, the Engineer has not yet issued a formal Taking-Over Certificate that covers the entire works under that Contract. A similar

pattern was repeated with Contract C-02. According to Impregilo, these refusals were “simply a pretext to deprive GBC of the early completion bonus” provided for in the Contracts.<sup>10</sup> Moreover, in September 2003, WAPDA began withholding monthly payments due to GBC. It also required GBC to maintain bank guarantees to secure the full amount of the advance payments, even though WAPDA claimed it was using the withheld monthly payments to offset the Advanced Payments.

53. *Jurisdiction:* The Claimant submits that the Tribunal has jurisdiction over the dispute under Article 9 of the BIT and Article 25(1) of the ICSID Convention. In this regard, its Memorial confirms and develops the arguments already presented in the Request, and summarized above.
54. *Breaches of Treaty:* On the merits, Impregilo claims that Pakistan has violated Article 2(2) of the BIT under which it is required to “at all times ensure fair and equitable treatment of the investments of investors of the other Contracting Party” and not to subject investors and investments “to unjustified or discriminatory measures”. It is said that “Pakistan’s conduct was clearly unfair, arbitrary, and capricious”.<sup>11</sup> It was also unjustified. It “failed to make funds, land, equipment and drawings available” and “to compensate Impregilo for any reasonable delays and disruptions incurred for which Pakistan was responsible under the Contracts.”<sup>12</sup> Further, it thwarted the operation of the dispute settlement mechanisms.
55. Impregilo also claims that Pakistan has violated Article 5(1) of the BIT under which Pakistan may not take “measure[s] which might limit permanently or temporarily the right of ownership, possession, control or enjoyment” by Impregilo of its investment in Pakistan, and Article 5(2), under which Pakistan may not either expropriate Impregilo’s

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<sup>10</sup> *Ibid.*, para. 118.

<sup>11</sup> *Ibid.*, para. 142.

<sup>12</sup> *Ibid.*, para. 148.

investment, or take measures that have an effect similar to expropriation on the investment.<sup>13</sup>

56. The Claimant recalls that:

“...the concept of expropriation has been defined in ICSID jurisprudence broadly to include any unjustified interference with an investor’s property that deprives the investor of the use or value of that property.”<sup>14</sup>

It argues that Pakistan’s conduct throughout the duration of the Project as already described constitutes such an expropriation in violation of Article 5(2) and must also be regarded as a violation of Article 5(1) of the BIT.

57. *Breaches of Contract:* Aside from alleged breaches of the Treaty, Impregilo also complains of breaches of the Contracts. It submits that the Tribunal has jurisdiction to consider such claims under Article 9 of the BIT which covers “any disputes” without exception, between the Parties. It states that:

“[m]any of these breaches consist of actions or omissions by WAPDA. Others relate to acts or omissions of the Engineer that have given rise to claims by GBC against WAPDA that remain unresolved to this date. Still others relate to acts of other governmental authorities such as the Customs and military authorities. WAPDA is responsible for these actions and omissions of the Engineer.”<sup>15</sup>

58. In its Memorial, Impregilo lists the specific clauses of the Contracts and of the Supplementary Agreement which, in its opinion, have been breached by Pakistan, *i.e.*, in the Contracts: clauses 1.5; 2.6; 6.4; 12.2; 20.4; 31.2; 40.1 and 40.2; 42.1; 42.2; 44.1 and 44.3; 47.5; 48.1; 51 and 52; 54.3; 60.7; 60.8; 67.1; 67.2 and annex A; 70.1; 70.8; clauses 3.10 and 15 of the Special Conditions (Contract C-01); in the Supplementary Agreement: clauses 2 (d) and 3 (d).

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<sup>13</sup> *Ibid.*, para. 139.

<sup>14</sup> *Ibid.*, para. 156.

59. *Relief Sought:* According to Impregilo, as a result of these alleged breaches of the BIT and the Contracts, the Respondent has caused damages of approximately US\$ 450 million. Impregilo's Memorial articulates the relief sought as follows:

“1. Impregilo seeks compensation for the entirety of the damages, including interest. Impregilo is entitled to claim the entirety of the damages suffered by GBC because of its role in the Joint Venture with its partners. Under Swiss law, the law governing the Joint Venture Agreement, and under the Joint Venture Agreement itself, Impregilo's rights, duties and liabilities are such as to entitle, and indeed oblige, it to assert a claim for the full amount of the damages suffered by GBC.

2. In any event, if the Tribunal finds that it cannot award Impregilo damages in excess of its proportionate interest in GBC, Impregilo claims, in the alternative, 57.80 % of the total damages plus interest.

... Impregilo also respectfully requests an Award of its legal fees and other costs incurred in connection with this proceeding.”<sup>16</sup>

### **C. The Respondent's Objections to Jurisdiction**

60. On 18 March 2004, the Islamic Republic of Pakistan submitted a Memorial containing its objections to jurisdiction (“Memorial on Jurisdiction”).

61. *Initial Observations and Relevant Facts:* In its introductory observations, the Respondent emphasises that this dispute is in substance a contractual dispute - as evidenced by the Supplementary Agreement of 14 April 2002 and the initial Request. It then “addresses some of the incorrect assertions made by the Claimant in its Limited Memorial.”<sup>17</sup> In this respect, and related to its case on the proper characterisation of the dispute, it stresses “the implausible nature of Impregilo's claims of expropriation and denial of fair and equitable treatment.”<sup>18</sup> It contends that Impregilo's claim revolves around a series of contractual complaints relating to extensions of time, additional costs

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<sup>15</sup> *Ibid.*, para. 169.

<sup>16</sup> *Ibid.*, paras. 200 and 201.

<sup>17</sup> Memorial on Jurisdiction, Preface, para. (i)

<sup>18</sup> *Ibid.*, Chapter 2, Section A.

or technical issues. Moreover, these claims are grounded in events and allegations which arose well before the BIT ever came into existence.

62. Pakistan adds that WAPDA is not responsible for any frustration of the contractual dispute resolution mechanisms. It submits that Impregilo's assertions relating to the Engineer's lack of impartiality are wholly unjustified, and emphasises that most of the Engineer's decisions have been confirmed by the DRB. It argues that "PHC [the Engineer] was not WAPDA's agent"<sup>19</sup>; it was not controlled by NESPAK, which did not even have a majority stake in PHC; and moreover NESPAK is not a State owned company, but rather a private one, receiving no budget allocation from the government. In addition, GBC "was fully aware before the Contracts were signed that NESPAK would form part of the Engineer" and did not raise "the slightest concern" in this respect.<sup>20</sup>
63. The Respondent further submits that it is GBC, and not WAPDA, which attempted to undermine the dispute resolution process. It tried to side-step the Engineer and, later, attempted to "impede the Engineer's consideration of claims in submitting unsubstantiated claims."<sup>21</sup> The Respondent adds that GBC formulated unwarranted accusations against the DRB member appointed by WAPDA, Mr. Zahid Hamid who, as a result of those accusations, had to resign. This forced WAPDA to replace him and led to subsequent difficulties in reconstituting the DRB. Then the chairman of the DRB, Mr. Bowcock, was compelled by GBC to step down. A new chairman was appointed in 2002, but he recused himself to avoid any appearance of possible conflict of interest. However, GBC has steadfastly refused to agree to his replacement.
64. *The Contractual Arbitration Agreements:* Pakistan focuses upon the Arbitration Agreements that were concluded by GBC and WAPDA in the Contracts, and the Lahore Arbitration that has been initiated under those agreements. It analyses the continued

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<sup>19</sup> *Ibid.*, para. 2.24.

<sup>20</sup> *Ibid.*, para. 2.34.

<sup>21</sup> *Ibid.*, para. 2.50.

validity and efficacy of these arbitration agreements by reference to their applicable law (the law of Pakistan), which includes the 1923 Geneva Protocol on Arbitration Clauses that remains in effect as between Italy and Pakistan. On Pakistan's case:

- “(a) The Arbitration Agreements were always and remain legally effective and binding on Employer and Contractor, providing to the Contractor a consensual jurisdiction for the final adjudication of contractual disputes with the Employer by an independent and impartial arbitration tribunal under a long-established *lex arbitri*;
- (b) The Contractor was thereby not only entitled but also legally obliged to refer its contractual disputes to arbitration under the Arbitration Agreements as the exclusive jurisdiction for the final settlement of those disputes, in accordance with the terms of the two Contracts;
- (c) The subsequent invalidity (if any) or alleged “frustration” or other alleged misconduct of the Employer in regard to procedures relating to the Engineer and/or DRB is legally irrelevant to the submissions above, by virtue of the separability of the Arbitration Agreements and the express terms of the Contracts;
- (d) The Lahore arbitration tribunal, validly appointed under the Arbitration Agreements, is already seized with part of the dispute between the Employer and the Contractor; the Lahore tribunal's mandate requires each arbitrator to discharge his functions as required by the Arbitration Agreements and the *lex arbitri*; and subject to its own decision on the Contractor's jurisdictional challenge in the Lahore arbitration, the Lahore arbitration tribunal is obliged to proceed to an award on the merits, regardless of all other extraneous factors;
- (e) By virtue of the 1923 Geneva Protocol on Arbitration Clauses, both Italy and Pakistan have assumed obligations under public international law to recognise the validity of the Arbitration Agreements and the arbitral procedure applicable to contractual disputes between Employer and Contractor (including the extensive jurisdiction of an arbitration tribunal validly appointed there under, such as the Lahore arbitration tribunal); and
- (f) This is not a case of a ‘refusal of arbitration as a denial of justice’; nor does Impregilo so specifically allege. Moreover, Impregilo nowhere explains why the Arbitration Agreements cannot be invoked or a counterclaim brought before the Lahore arbitration tribunal. Where a State has itself refused to arbitrate pursuant to a valid arbitration clause in a Contract between that State and an alien, or otherwise frustrated the agreed arbitral procedure, the State may attract responsibility for denial of justice – but that is very, very far from the facts of the present

case where it is the *alien* which seeks willfully both to thwart the consensual obligations to arbitrate and to negate the 1923 Geneva Protocol's legal obligations long assumed by Italy and Pakistan."<sup>22</sup>

65. *Jurisdictional Objections*: Each of Pakistan's jurisdictional objections is considered in detail in Sections III, IV and V of this Decision. The following is a brief outline only.
66. *Objections "Ratione Materiae"*: Pakistan contends that this Tribunal lacks jurisdiction *ratione materiae* and that the claim is inadmissible. In this respect, the Respondent first submits that the Tribunal has no jurisdiction with respect to the Contract Claims. It states that WAPDA, and not Pakistan, is party to the Contracts and that, under the law of Pakistan, WAPDA possesses a legal personality distinct from the State of Pakistan. The Tribunal cannot exercise jurisdiction over Pakistan for breaches of a contract to which it is not a party. Further, it cannot exercise such jurisdiction over WAPDA in the absence of designation under Article 25(1) of the ICSID Convention.
67. Moreover, even if Pakistan had been party to the Contracts, the Tribunal should respect the Arbitration Agreements incorporated in those Contracts. The dispute settlement mechanism selected in the Contracts must have priority over the more general jurisdiction clause incorporated in the BIT, as recognised by the ICSID decisions rendered in *SGS v. Pakistan* and *SGS v. Philippines*. The result is that either the Tribunal lacks jurisdiction over the Contract Claims, or those claims are inadmissible.
68. Finally, the Respondent submits that, in the present case, there are no Treaty Claims that can be separated from Contract Claims. Impregilo's Treaty Claims, based on violation of Article 2(2) and Article 5 of the BIT, "are in fact Contract claims dressed up in other language."<sup>23</sup> On Pakistan's case, "[t]he reason why it is said that the measures of which complaint is made were 'unjustified'" under Article 2(1) of the BIT is in fact "that they were supposedly contrary to the contractual obligations of WAPDA."<sup>24</sup> Furthermore,

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<sup>22</sup> *Ibid.*, para. 3.18.

<sup>23</sup> *Ibid.*, para. 4.44.

<sup>24</sup> *Ibid.*, para. 4.47.

there could be no question of expropriation under Article 5 of the BIT, the contractual rights of the Claimant under a Contract in force remaining what they were. But:

“even if there were a Treaty claim entirely distinct from the Contract claims, ... it would ... be wholly inappropriate, and indeed, impractical for this Tribunal to hear such a claim until the Contract claims had been resolved by the contractual mechanisms.”<sup>25</sup>

69. *Objections “Ratione Personae”*: Pakistan also submits that Impregilo has no *locus standi* before this Tribunal. In this respect, it first contends that Impregilo has no standing to claim on behalf of GBC. It stresses that GBC has no legal personality under Swiss law or Pakistani law. It is not “a juridical person” within the meaning of Article 25(1) of the ICSID Convention. Moreover, even if GBC had such a personality, Impregilo, although Leader of the Joint Venture, would have no authority to act on its behalf. Impregilo is no more entitled to claim on behalf of the other partners in the Joint Venture, those partners of German or Pakistani nationality having no right to benefit from the protection conferred upon Italian investors by the BIT.

70. Any claim by Impregilo is thus limited to the losses it has itself suffered:

“Upholding the claim in its entirety would be ... prejudicial both to Impregilo’s non represented joint venture partners, whose own claims for damages would be compromised and whose recovery from Impregilo could not be guaranteed, and to Pakistan which could face the risk of multiple claims for the same alleged damages.”<sup>26</sup>

71. The Respondent also contends that the Claimant cannot even assert an alternative claim for a 57,8 % share of the losses said to have been incurred by GBC. It submits that the Partners within GBC “have consistently acted collectively in asserting their rights under the contractual mechanism and in proceedings in Pakistan.”<sup>27</sup> It adds that “this approach accords with the prevailing practice in international law”<sup>28</sup> and that, in particular, there

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<sup>25</sup> *Ibid.*, para. 4.56.

<sup>26</sup> *Ibid.*, para. 5.36.

<sup>27</sup> *Ibid.*, para. 5.38.

<sup>28</sup> *Ibid.*, para. 5.43.



are in the present case no special circumstances which could justify Impregilo bringing a separate claim.

72. Finally, Pakistan contends that “Impregilo has not been properly authorized to bring the arbitration and has not complied with Institutional Rule 2(1)(f).”<sup>29</sup> Impregilo has produced Minutes of a meeting of an Executive Committee of 22 January 2002, but these minutes concern the initial request of Impregilo which was withdrawn in May 2002 and not the present Request. Moreover, Impregilo does not provide any document showing that it had obtained the required authorization of the Board of Representatives of the Joint Venture itself.
73. *Objections “Ratione Temporis”*: With respect to jurisdiction *ratione temporis*, Pakistan recalls that the BIT between Italy and Pakistan entered into force on 22 June 2001. It has no retroactive effect. It can have no application in respect of conduct relied upon by Impregilo that took place before that date. Pakistan adds that:

“Impregilo has sought to avoid the basic rule on non-retroactivity of treaties by (i) failing to plead the specific dates of alleged breaches, and (ii) asserting that the breaches it alleges are continuing in character.”<sup>30</sup>

74. On the first point, Pakistan invites the Tribunal:

“...to infer that, save where Impregilo complains of acts that are expressly alleged to have occurred subsequent to the entry into force of the 1997 Treaty, all other specific acts complained of by Impregilo substantially took place before the entry into force of the 1997 Treaty.”<sup>31</sup>

75. On the second point, the Respondent states that to be truly continuing in character a breach must be (i) continuing and (ii) uninterrupted.<sup>32</sup> It argues that this is not the case

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<sup>29</sup> *Ibid.*, para. 5.54.

<sup>30</sup> *Ibid.*, para. 6.5.

<sup>31</sup> *Ibid.*, para. 6.9.

<sup>32</sup> *Ibid.*, para. 6.12.

here. It adds that even where it is established that a breach is of a continuing character, this does not negate the rule on the non retroactivity of treaties.<sup>33</sup>

76. *Relief Sought:* In the light of the foregoing, Pakistan invites the Tribunal to declare that it has no jurisdiction in respect of the totality of Impregilo's claims, and that these claims are accordingly to be dismissed. In the alternative, insofar as the Tribunal considers that the claims are not to be dismissed in their entirety for lack of jurisdiction, Pakistan invites the Tribunal to make alternative declarations to reflect restrictions on its jurisdiction and/or on the admissibility of Impregilo's claims, namely:

- “(a) That it has no jurisdiction in respect of Impregilo's allegations of breach of the Contracts, alternatively that such claims are inadmissible before this Tribunal.
- (b) That, insofar as the Tribunal has jurisdiction to determine Impregilo's claims characterised as breaches of the 1997 Treaty, such claims should not be heard pending resolution of the disputes pursuant to the Arbitration Agreements in the Contracts.
- (c) That it has no jurisdiction save in respect of specific acts that are expressly alleged by Impregilo to have occurred subsequent to the entry into force of the 1997 Treaty, alternatively that the provisions of the 1997 Treaty do not in any event bind Pakistan in relation to any act or fact which took place or any situation which ceased to exist before 22 June 2001, and that the Tribunal's jurisdiction is limited accordingly.
- (d) That Impregilo has no standing to claim on behalf of GBC or other joint venturers, and that its standing is limited, at most, to claiming in respect of a *pro rata* share of the total alleged loss.”<sup>34</sup>

#### **D. The Claimant's Counter-Memorial on Jurisdiction**

77. On 19 April 2004, the Claimant submitted its Counter-Memorial on Jurisdiction.

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<sup>33</sup> *Ibid.*, para. 6.13.

<sup>34</sup> *Ibid.*, para. 7.2.

78. *Initial Observations:* In this Counter-Memorial, Impregilo first notes that the Respondent does not contest that the Claimant is an “investor” of Italy as defined under the BIT and a “national of another Contracting State” for the purposes of the ICSID Convention. It does not dispute either that it is a Contracting Party to the BIT and a Contracting State under Article 25(1) of the ICSID Convention. Finally, it does not contest that Impregilo’s investment in Pakistan falls under the definition of “investment” under the BIT. The Respondent recognises that a “dispute” clearly exists between the Parties within the meaning of Article 9(1) of the BIT. Moreover, according to the Claimant, Pakistan has consented in writing to the submission of the dispute to ICSID arbitration. Finally, all procedural conditions precedent to the submission of the dispute have been fulfilled.
79. Impregilo adds that it has satisfied the burden of proof required at the jurisdictional phase and “has made the *prima facie* showing of Treaty breaches” required by ICSID Tribunals.<sup>35</sup>
80. *Objections “Ratione Materiae”:* The Claimant submits that the Tribunal has jurisdiction *ratione materiae*. In this respect, it first contends that WAPDA is an instrumentality of Pakistan whose actions and omissions are attributable to the Respondent under international law. Pakistan is also responsible for the acts and omissions of the Engineer (PHC) for two reasons. First PHC was effectively controlled by NESPAK, a State owned and State controlled entity. Second, WAPDA, an organ of the State, maintained ultimate control over PHC which acted on behalf of WAPDA with respect to Impregilo and GBC.<sup>36</sup>
81. *Breaches of Treaty:* The Claimant then submits that the Tribunal has jurisdiction over Impregilo’s claims for breaches of the BIT. It recalls that it has asserted such claims in its Request and in its Limited Memorial on the basis both of Article 2(2) and Article 5 of

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<sup>35</sup> Counter-Memorial on Jurisdiction, para. 26.

<sup>36</sup> *Ibid.*, paras 43-62.

the BIT. It adds that the Tribunal has jurisdiction over those claims, even when they arise from breaches of the Contracts:

“The assertion that Impregilo’s Treaty and Contract claims may be ‘inextricably linked’ merely describes the fact that the two sets of claims are based on similar or identical facts.”<sup>37</sup>

On Impregilo’s case, this overlap does not impair the distinct legal bases of those claims. In any event, Impregilo’s claims for breaches of the BIT go beyond breaches that also constitute breaches of Contract:

“These claims are based on conduct by Governmental authorities not directly involved in the Contracts, including Pakistan’s Ministry of Commerce, its Customs authorities, and its military authorities.”<sup>38</sup>

82. *Breaches of the Contracts:* According to Impregilo, the Tribunal also has jurisdiction over Impregilo’s claims for breaches of the Contracts. In this respect, the Claimant relies on Article 9(1) of the BIT which covers “any disputes arising between a Contracting Party and the investors of the other.” The Claimant states that WAPDA is the Government of Pakistan and concludes that there is a contractual dispute between the Government and Impregilo. Consequently, the jurisdiction of the Tribunal is not subordinated to the designation of WAPDA under Article 25(1) of the ICSID Convention.
83. Moreover, contrary to Pakistan’s case, the existence of a forum selection clause in the Contracts does not deprive the Tribunal of its jurisdiction over the Contract Claims. This is all the more so given that “the contractual dispute settlement mechanism has been rendered wholly inoperative by Respondent’s own conduct”.<sup>39</sup>
84. The Claimant adds that the BIT contains a most-favoured nation clause. It observes that several of the other BITs concluded by Pakistan include an “observance of

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<sup>37</sup> *Ibid.*, para. 77.

<sup>38</sup> *Ibid.*, para. 86.

commitments” provision (sometimes termed an “Umbrella Clause”). On Impregilo’s case, by the operation of the MFN clause and, in turn, the application of “observance of commitments” provisions in other BITs, a breach of the Contracts constitutes in any event a breach of the Italian-Pakistan BIT.

85. Impregilo further states that the contractual dispute resolution mechanism provided for by the Contracts is unavailable to Impregilo as a result of the Respondent’s conduct. It contends that the Engineer has failed to act in an impartial manner and that Respondent has thus abused the first tier of the settlement mechanism. It also has frustrated the second tier in blocking the appointment of replacement DRB members, and in having recourse to other delaying tactics. It has also since blocked the functioning of the re-constituted DRB. Contrary to Pakistan’s analysis, the Claimant contends that the contractual dispute settlement mechanism is comprised of a process consisting of three interrelated tiers and not three alternative forums. The so-called “Arbitration Agreements” are not separable from the other terms of the Contracts (such as the DRB provisions) and GBC does not have the right to submit its claims to arbitration when there is no functioning DRB. Neither Clause 67 of the Contracts, nor the doctrine of separability may lead to another solution. On Impregilo’s case, “[b]ecause Respondent has effectively blocked the dispute settlement mechanism, Impregilo has been refused arbitration and denied justice” and a “grievous wrong has ensued”.<sup>40</sup>
86. *Objections “Ratione Personae”*: With respect to jurisdiction *ratione personae*, Impregilo submits that it can assert its claim on behalf of the Joint Venture, in its capacity as project leader and majority stakeholder. The partners of GBC have confirmed the propriety of this approach by bestowing on Impregilo a specific power of attorney to represent GBC. Moreover, the only way for Impregilo to obtain its 57.8 % stake in the Joint Venture is for the Tribunal to permit Impregilo to proceed on behalf of GBC, then to distribute to its partners their part of the monetary judgment awarded to it.

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<sup>39</sup> *Ibid.*, para. 106.

<sup>40</sup> *Ibid.*, paras. 163 and 164.

87. Finally, Impregilo submits that, in the alternative, it is clearly a proper Claimant in its own right, without having to prove “individual damages” or “special circumstances”. In any event, the issue of Impregilo’s capacity only affects the quantum of damages and not the jurisdiction *ratione personae*.
88. *Objections “Ratione Temporis”*: With respect to jurisdiction *ratione temporis*, Impregilo submits that it has asserted a single existing dispute arising from continuing breaches of the BIT and of the Contracts. According to Impregilo, its claims arise directly from the same subject matter, and the dispute:
- “deals with a systematic and continuous pattern of conduct that has resulted, subsequent to the BIT’s entry into force, in the current and continuing breach of the BIT and of the Contracts.”<sup>41</sup>
89. According to Impregilo, the conduct of both WAPDA and the Engineer throughout the course of the Project constitute “composite acts” for which the Respondent is liable.<sup>42</sup> Furthermore, the application of the BIT to the present dispute is consistent with the principle of non-retroactivity in Article 28 of the Vienna Convention as interpreted in the official Commentary.
90. *Relief Sought*: In conclusion, Impregilo “requests that the Tribunal decide that the dispute between the Parties is within its jurisdiction and proceed to decide the dispute on the merits.”<sup>43</sup>

**E. The Hearing on 23 and 24 May 2004**

91. At the oral hearing on 23 and 24 May 2004, both Parties reiterated and developed their submissions on the jurisdiction of the Tribunal in some detail. The following account distills some of the key issues, again by way of brief summary only, rather than presenting a full account of each of the Parties’ respective submissions.

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<sup>41</sup> *Ibid.*, para. 183.

<sup>42</sup> *Ibid.*, para. 189.

<sup>43</sup> *Ibid.*, para. 199.

**(i) The Respondent's Case**

92. *Objections "Ratione Materiae"*: The Respondent again emphasised that this is a dispute concerning a breach of contract on which the Claimant has artificially superimposed the charge of denial of fair and equitable treatment. Further, it cautioned that the Tribunal should not exercise its jurisdiction over a contractual claim when the Parties have already agreed on how such a claim is to be resolved and have done so exclusively. To this end, Pakistan stressed:

“... the existence and continuing efficacy of the parties’ Arbitration Agreements, as a matter of their chosen contractual language, as a matter of the chosen law of Pakistan and as a matter of international law.”<sup>44</sup>

93. *Contract Claims*: Pakistan contended that under clause 67 of the conditions of the Contracts (conditions of particular application), at any time the Engineer and the Chairman of the DRB could be seized of any claim, and if the DRB remained silent during 56 days, the aggrieved party could give notice to commence arbitration. It submitted that under Pakistani law:

“... the pre-arbitral procedures, both the Engineer and the DRB are separable from the substantive Contracts and from the arbitration agreements”<sup>45</sup>.

so that:

“... the invalidity, the frustration, the repudiation of whatever breakdown occurs under clause 67.1 and 2 relating both to the Engineer and the DRB cannot invalidate the Arbitration Agreements in Clause 67.3.”<sup>46</sup>

94. On Pakistan’s case, Impregilo has never been refused arbitration and denied justice under the Contracts.

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<sup>44</sup> Transcript of hearing on May 23, 2004, p. 24, para. 16.

<sup>45</sup> *Ibid.*, p. 55, para. 16.

<sup>46</sup> *Ibid.*, p. 60, para. 12.

95. Pakistan further submits that the dispute arose out of two Contracts concluded not by the Government of Pakistan, but by WAPDA, which under Pakistani law is a separate legal entity. Therefore, the Tribunal has no jurisdiction to consider any contractual claims directed against Pakistan. But, even if Pakistan were a party to the Contracts, the Tribunal could not exercise jurisdiction over the Contract Claims put forward by Impregilo: those claims are to be submitted to the contractual disputes mechanisms agreed between the Parties. It was noted that:

“Of course there remains the possibility that, should that contractual mechanism somehow be deliberately frustrated in a way amounting to a denial of justice, then of course it would be the expertise of the ICSID Tribunal that would be appropriate.”<sup>47</sup>

However this, according to Pakistan, is not the present situation.

96. *Treaty Claims*: Treaty claims must also be rejected. They are in fact dependant upon the existence of a breach of contract. Thus, if the Tribunal has no jurisdiction or is not able to exercise a jurisdiction over contract based claims, it is no more able to do so with respect to treaty claims. Moreover, the Claimant is not entitled to rely upon the “Most Favoured Nation” provision of the Italy-Pakistan BIT, and in turn the “umbrella clause” of the Swiss-Pakistan BIT, since this would be to import into the Italy-Pakistan BIT far more than can reasonably be construed from the language of that Treaty. Even if such a submission was sustainable, the decision in *SGS v. Pakistan* demonstrated the limits of the “umbrella clause” in question.
97. *Objections “Ratione Temporis”*: Furthermore, the Tribunal has no jurisdiction *ratione temporis*. The Italy-Pakistan BIT entered into force on 22 June 2001 and could not have any retroactive effect. The dispute before this Tribunal dates back to 1996. Moreover “facts and situations which have arisen prior to the entering into force of the BIT do not

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<sup>47</sup> *Ibid.*, p. 106, para. 4.



and cannot constitute breaches of that Treaty”<sup>48</sup> ... “whether considered in isolation or as part of a conduct.”<sup>49</sup>

98. *Objections “Ratione Personae”*: Finally, the Tribunal has no jurisdiction *ratione personae*. First, Impregilo cannot represent a joint venture, GBC itself, “which is devoid of any legal personality.” Second, “the joint venturers can only bring a claim jointly.” Third, in the present case, “neither all the joint venturers can bring a claim, nor Impregilo can represent” them “because they are not Italian investors.” Fourth, Impregilo “cannot claim for its own right, which cannot be individualized”. Fifth, in any case, and alternatively, “Impregilo could certainly not claim more damages than its *pro rata* shares with joint ventures”.<sup>50</sup>

#### **(ii) The Claimant’s Case**

99. *Objections “Ratione Materiae”*: In its oral submissions, Impregilo emphasised that:

“... the acts of WAPDA and those under its control went beyond the normal range of behaviour typically encountered in large construction and infrastructure projects.”<sup>51</sup>

Moreover, the Claimant suffered from acts of Pakistan’s military, customs and political authorities. In those circumstances, it was argued, the Tribunal has jurisdiction to consider both Treaty Claims and Contract Claims.

100. *Treaty Claims*: In this respect, the Claimant first contended that WAPDA is an organ of the government of Pakistan as recognized both under international law and Pakistani law. It added that the Engineer is under State control and ownership, and that WAPDA is responsible for the Engineer’s action. As a consequence, the acts of WAPDA and

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<sup>48</sup> *Ibid.*, p. 121, para. 24.

<sup>49</sup> *Ibid.*, p. 128, para. 4.

<sup>50</sup> *Ibid.*, p. 130.

<sup>51</sup> *Ibid.*, p. 141, para. 14.

those of the Engineer are attributable to Pakistan. It follows that the Tribunal has jurisdiction to consider them.

101. The Claimant submitted further that “the task of the Tribunal at this stage is not to determine definitively whether or not there has been a breach of the Treaty.”<sup>52</sup> It is only to satisfy itself “that *prima facie*, the claim ... is within the jurisdictional mandate of ICSID arbitration.”<sup>53</sup> It stressed that, under ICSID case law, “this Tribunal cannot avoid jurisdiction or forego deciding claims on the merits merely because the BIT claims relate to a contract or to allege breaches of that contract.”<sup>54</sup> It added that a number of its Treaty Claims are based on conduct of governmental authorities other than WAPDA.
102. *Contract Claims:* Impregilo also submitted that the Tribunal has jurisdiction over its Contract Claims. In this respect, it invoked Article 9 of the BIT and the fact that, in the present case, “the dispute settlement mechanism provided for in the Contract has been frustrated.”<sup>55</sup> It contended that WAPDA is the Government of Pakistan and that the Respondent cannot escape international responsibility for WAPDA’s actions. It stated that WAPDA is not the named Respondent in this case, and that no designation of WAPDA as an eligible Respondent is needed under Article 25 of the ICSID Convention. It added that it is not obliged to submit contractual disputes to the contractual dispute settlement mechanism rather than to ICSID arbitration. In this respect, it invoked previous ICSID decisions, and stressed that the entire dispute mechanism has been frustrated by the Respondent’s own conduct: the Engineer failed to act in an impartial manner and WAPDA engaged in a series of efforts to block the appointment of DRB members. As a consequence, the DRB could not function and is still not functioning. The integrated dispute settlement mechanism was not and is not available.

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<sup>52</sup> *Ibid.*, p. 154, para. 6.

<sup>53</sup> *Ibid.*, para. 12.

<sup>54</sup> *Ibid.*, p. 161, para. 13.

<sup>55</sup> *Ibid.*, p. 164, para. 25.

103. *Objections “Ratione Temporis”*: The Claimant also submitted that the Tribunal has jurisdiction *ratione temporis*. It stated that “a tribunal’s exercise of jurisdiction over a current dispute that arose before the Treaty’s entry into force is consistent with the non-retroactivity principle”<sup>56</sup>, and asserted that Pakistan is wrong in alleging that Impregilo did not provide relevant dates at issue in the dispute. It recalled that Impregilo had asserted the reality of a single, ongoing dispute arising out of the continuing conduct by the Respondent and constituting “a composite act”.
104. *Objections “Ratione Personae”*: Finally, in the Claimant’s submission, the Tribunal has jurisdiction *ratione personae*. It can assert claims on behalf of the entire Joint Venture as “leader” of this venture. It has been authorized to do so. It can also act on its own behalf.
105. Answering a question put by the Tribunal, both Parties gave further information on the present situation of the DRB and the pending proceedings in the Lahore Arbitration.

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### III. THE BILATERAL INVESTMENT TREATY

#### A. The Basis for This Tribunal’s Jurisdiction

106. This Tribunal’s jurisdiction depends in the first instance upon the requirements of the ICSID Convention. 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.”

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<sup>56</sup> *Ibid.*, p. 198, para. 7.

107. It is to be noted that the Claimant's submissions are only directed against Pakistan as a Contracting State to the ICSID Convention. They are not directed against WAPDA. It follows that the provisions of Article 25 concerning jurisdiction over constituent subdivisions or agencies of a Contracting State have no application in the present case, and need not be addressed in this Decision.
108. In order to meet the requirements of Article 25 of the ICSID Convention, and to establish the jurisdiction of this Tribunal, the Claimant does not invoke any provisions of the Contracts it has concluded with WAPDA. Rather, it relies exclusively upon (1) the consent of Pakistan to arbitration as contained in the BIT between the Government of the Italian Republic and the Government of the Islamic Republic of Pakistan dated 19 July 1997, combined with (2) its own consent as contained in the Request for arbitration. Following what is now a well-established practice<sup>57</sup>, 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. However, this will only be so if the dispute falls within the scope of the BIT. This remains the critical enquiry here.

## **B. Relevant Provisions of the BIT**

109. For ease of reference, the relevant provisions of the BIT are as follows:

ARTICLE 1  
DEFINITIONS

For the purposes of this Agreement:

1. The term "investment", irrespective of the legal form adopted or the legal system having jurisdiction, shall be construed to mean any kind of property invested after 1<sup>st</sup> September 1954 by a natural or legal person being a national of one Contracting Party in the territory of the other, in conformity with the laws and regulations of the latter. ...

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<sup>57</sup> See e.g. Christoph H. Schreuer *The ICSID Convention : A Commentary* (CUP, 2001) (hereafter "Schreuer"), at pages 210-221 ("Consent through BITs has become accepted practice...").

2. The term “investor” shall be construed to mean any natural or legal person being a national of a Contracting Party who effected, is effecting or intending to effect, investments in the territory of the other Contracting Party.

....

4. The term “legal person”, in reference to either Contracting Party, shall be construed to mean any entity established in the territory of one of the Contracting Parties, and recognized as legal person in accordance with the respective national legislation such as public establishments, joint-stock corporations or partnerships, foundations, or associations, regardless of whether their liability is limited or otherwise.

....

## ARTICLE 2

### PROMOTION AND PROTECTION OF INVESTMENTS

1. Both Contracting Parties shall encourage investors of the other Contracting Party to invest in their territory, and shall authorize these investments in accordance with their legislation.

2. Both Contracting Parties shall at all times ensure fair and equitable treatment of the investments or investors of the other Contracting Party. Both Contracting Parties shall ensure that the management, maintenance, enjoyment, transformation, cessation and liquidation of investments effected in their territory by investors of the other Contracting Party, as well as the companies and firms in which these investments have been made, shall in no way be subject to unjustified or discriminatory measures.

## ARTICLE 3

### NATIONAL TREATMENT AND THE MOST FAVOURED NATION CLAUSE

1. Both Contracting Parties, within the bounds of their own territory, shall offer investments effected by, and the income accruing to, investors of the other Contracting Party no less favorable treatment than that accorded to investments effected by, and income accruing to, its own national or investors of third States.

2. The treatment accorded to the activities connected with the investment of investors of either Contracting Party shall not be less favourable than that accorded to similar activities connected with investments made by their own investors or by investors of any Third country.

3. The provisions of paragraphs 1 and 2 of this Article do not apply to any advantages or privileges which one Contracting Party grants or may grant at some future time to Third States by virtue of its membership in Custom or Economic Unions, Common Market associations, Free Trade Areas regional or sub-regional Agreements, international multilateral economic Agreements, or economic Agreements entered into in order to prevent double taxation or to facilitate cross-border trade.

#### ARTICLE 4

##### COMPENSATION FOR DAMAGES OR LOSSES

1. Should investors of one of the two Contracting Parties incur damages or losses in their investments in the territory of the other Contracting Party, due to war or other forms of armed conflict, states of emergency or other similar events, the Contracting Party in which the affected investment has been made shall offer adequate compensation. Compensation payments shall be freely transferable in convertible currency without undue delay.

2. The investors concerned shall receive the same treatment as the nationals of the Contracting Party having liability and, at all events, shall be treated no less favorably than investors of Third States.

#### ARTICLE 5

##### NATIONALIZATION OR EXPROPRIATION

1. The investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily the right of ownership, possession, control or enjoyment, save where specifically provided by law and by judgments or orders issued by Courts or Tribunals having jurisdiction.

2. Investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects in the territory of the other Contracting Party, except for public purposes, or national interest, against immediate full and effective compensation and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures.

....

ARTICLE 9

SETTLEMENT OF DISPUTES BETWEEN INVESTORS AND THE CONTRACTING PARTY

1. Any disputes arising between a Contracting Party and the investors of the other, including disputes relating to compensation for expropriation, nationalization, requisition or similar measures, and disputes relating to the amount of the relevant payments, shall be settled amicably, as far as possible.

2. In the case that such a dispute cannot be settled amicably within six months of the date of a written application, the investor in question may submit the dispute, at his discretion, for settlement to:

(a) the Contracting Party's Court, at all instances, having territorial jurisdiction;

(b) an ad hoc Arbitration Tribunal in accordance with the Arbitration Rules of the "UN Commission on International Trade Law" (UNCITRAL).

(c) the "International Centre for the Settlement of Investment Disputes", for the application of the arbitration procedures provided by the Washington Convention of 18<sup>th</sup> March 1965 on the "settlement of Investment Disputes between States and Nationals of other States", whenever, or as soon as both Contracting Parties have validly acceded to it.

ARTICLE 10

SETTLEMENT OF DISPUTES BETWEEN THE CONTRACTING PARTIES

1. Any disputes which may arise between the Contracting Parties relating to the interpretation and application of this Agreement shall, as far as possible, be settled amicably through diplomatic channels.

2. In the event that the dispute cannot be settled within three months from the date on which one of the Contracting Parties notifies, in writing, the other Contracting Party, the dispute shall, at the request of one of them, be laid before an ad hoc Arbitration Tribunal as provided in this Article."

110. Each of the Respondent's objections to the Tribunal's jurisdiction (*i.e. ratione personae, ratione materiae and ratione temporis*) is addressed in turn below.

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#### IV. JURISDICTION *RATIONE PERSONAE*

##### A. Issues in Dispute

111. As far as Impregilo's *locus standi* is concerned, there is no dispute that:

- (a) Impregilo has made an "investment" in Pakistan within the meaning of Article 1(1)<sup>58</sup> of the BIT, and Article 25(1) of the ICSID Convention;
- (b) Impregilo is an "investor" within the meaning of (*inter alia*) Articles 1(2)<sup>59</sup>, 1(4)<sup>60</sup> and 9<sup>61</sup> of the BIT, being a joint-stock company organised and recognised under Italian law, with its registered office in Milan;
- (c) Impregilo is "a national of [a] Contracting State" for the purposes of Article 25(1) of the ICSID Convention, Italy having become a party to the ICSID Convention on 28 April 1971, and Impregilo being a "juridical person which ha[s] the nationality of a Contracting State other than the State party to the dispute", as required by Article 25(2)(b) of the ICSID Convention.

112. Notwithstanding this common ground, Pakistan has raised three separate objections *ratione personae* to this Tribunal's jurisdiction, as follows:

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<sup>58</sup> Article 1(1), which is set out above, provides a broad definition of "investment". Articles 1(1)(a) to (e) of the BIT (which have not been set out) provide a non-exhaustive list of types of investment within this definition.

<sup>59</sup> Set out above.

<sup>60</sup> Set out above.

<sup>61</sup> Article 9, which is set out above, concerns the settlement of disputes and applies to matters as between "a Contracting Party and the investors of the other ...".



- (a) That Impregilo has no standing to bring a claim on behalf of (i) GBC or (ii) the other partners that comprise the Joint Venture;
- (b) That Impregilo cannot bring a claim for its own share of any losses; and
- (c) That Impregilo has not been properly authorised to bring this arbitration and has not complied with Rule 2(1)(f) of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“Institution Rules”).

113. Each of these objections is addressed in turn.

**B. Impregilo’s Standing to Bring a Claim on Behalf of (i) GBC or (ii) the Other Joint Venture Partners**

114. In analysing each of Pakistan’s objections to Impregilo’s standing, it is necessary to consider first (i) the nature of GBC itself, and (ii) the precise nature of the claims that Impregilo seeks to pursue.

**(i) The Nature of GBC**

115. GBC is designated as the Contractor in Contracts C-01 and C-02. As stated earlier, GBC is an unincorporated Joint Venture formed on 27 April 1995 under the laws of Switzerland. Its genesis was the JVA concluded between the following five joint venture participants:

- i. Impregilo;
- ii. Ed. Züblin AG (a German company);
- iii. Campenon Bernard SGE (a French company);
- iv. Saadullah Khan & Brothers (a Pakistani company); and
- v. Nazir & Company (Private) Limited (a Pakistani company).

116. As matters currently stand, following the withdrawal of Campenon Bernard SGE in 1998, the participation shares or ownership interests in GBC are divided among the partners as follows:

Impregilo:	57.80 %
Ed. Züblin AG:	35.20 %
Saadullah Khan & Brothers:	4.60 %
Nazir & Company (Private) Limited:	2.40 %

117. The JVA sets out detailed arrangements for GBC's structure and internal organisation. Clause 32.1 ("Legal Relationship Amongst the Parties") provides that:

"This Agreement does not constitute a partnership or other form of permanent company or organization between the Parties under any applicable law."

118. Clause 25(1) of the JVA provides that:

"This Agreement and the relationship between the Parties hereunder shall be governed by and construed in accordance with the law of Switzerland."

119. Swiss law does not provide for a specific legal regime for joint ventures. Such joint ventures must therefore follow the rules applicable to corporations ("*sociétés*"). According to Article 530(2) of the Swiss "*Code des Obligations*", GBC is classified as a "*société simple*". As such, it is common ground that GBC has no legal personality under Swiss law. It does not constitute a partnership or other form of permanent or corporate body, and it has no capacity to act in legal proceedings in its own right.

120. Equally, in so far as relevant, GBC is not vested with legal personality by the law of Pakistan (being the law applicable to the Contracts).

121. It follows, as stated by Pakistan, that GBC "is no more than a contractual relationship between the original five, and now four, corporations which entered into the [JVA]."

122. *GBC's Structure under the JVA*: The JVA sets out a detailed structure for this contractual relationship. By Clause 32.1 of the JVA, each of the joint venture partners acts "as an independent business entity in the ordinary course of business". By Clause 5.2 of the JVA, each of the partners shares (*inter alia*) the "rights and obligations, costs and expenses, losses and benefits arising out of or in any way connected with the Contract(s) and the performance of the Works" in proportion to its respective participation.
123. By Clauses 6.1 to 6.2 of the JVA, the entities comprising GBC are jointly and severally liable to the Employer (WAPDA) "for the obligations deriving from and in any way connected with the present Agreement and the Contract(s)", as well as being liable to each other.
124. Since the Joint Venture cannot act on its own behalf, this organisational form requires – and the JVA provides in Clause 10.1 – that one company (Impregilo) act as "Leader". In this capacity, by Clause 10.1 of the JVA Impregilo is responsible for directing and controlling the execution of the Contracts, as well as a wide range of matters as set out in Clauses 10.1 i) to xv) (such as "representing [GBC] in all matters connected to the performance of the Contract(s)"). Impregilo, through its then Vice President, signed the Contracts for and on behalf of GBC. It also signed the Supplementary Agreement for and on behalf of GBC.

**(ii) The Relief Claimed by Impregilo**

125. In paragraph 58.1 of its Request for Arbitration, Impregilo claims in respect of all losses suffered by the Joint Venture as a whole. This is articulated as follows:

"Impregilo seeks compensation for the entirety of the damages, including interest and the costs of the arbitration proceedings. Impregilo is entitled to claim the entirety of the damages suffered by GBC because of its role in the Joint Venture with its partners. Under Swiss law, the law governing the Joint Venture Agreement, and under the Joint Venture Agreement itself, Impregilo's rights, duties and liabilities are such as to entitle, if not oblige, it to assert a claim for the full amount of the damages suffered by GBC."

126. A claim in substantially similar terms appears at paragraph 200.1 of Impregilo's Limited Memorial, the only change being an added emphasis on Impregilo's alleged obligation to claim for the full amount of GBC's damages (see paragraph 59 above).
127. This is a claim, therefore, which is advanced in respect of, and on behalf of, GBC itself, as well as the three other joint venture partners (Ed. Züblin AG, Saadullah Khan & Brothers, and Nazir & Company (Private) Limited).

**(iii) Claims in Respect of GBC**

128. *Pakistan's Objection:* It is Pakistan's case that, as a matter of jurisdiction, Impregilo cannot act on behalf of GBC (*i.e.* the entire Joint Venture), and cannot claim in respect of losses allegedly incurred by GBC as a whole. This is so, given the restrictions in Article 25(1) of the ICSID Convention, and in particular the fact that GBC is neither a party to the BIT nor a "juridical person" within the meaning of the Convention.
129. *Impregilo's Case:* By way of response, Impregilo argues that it is entitled to assert a claim on behalf of the Joint Venture, given its status as "Leader" of GBC. It points to its contractual right and duty to represent GBC in all matters relating to the Contracts. For example, in accordance with provisions of the Contracts and JVA, it is responsible for directing and controlling the execution of the Contracts; it selects and pays the compensation of GBC's Project Manager, recruits GBC's expatriate staff, and supervises GBC's Site Management. It manages GBC's finances and has complete control over GBC's bank account. As noted above, Impregilo was the only signatory to the Contracts on behalf of GBC and is the guarantor of the performance of the other members of the consortium. On Impregilo's case, it is therefore the proper party to bring claims on the Joint Venture's behalf. Further, the propriety of this approach has been confirmed by the conferral of a specific Power of Attorney on Impregilo (dated 31 January 2003) by the other joint venture participants for this purpose.

130. Impregilo also contends that arbitral tribunals have “long recognized” the right of a joint venture partner to bring claims before an international arbitral tribunal on behalf of its partners in the Joint Venture. Impregilo relies on the following decisions in this regard:

- (a) *Preliminary Award in ICC Arbitration Case No. 4983*<sup>62</sup>, in which Impregilo sought to assert claims on behalf of a joint venture. The Tribunal had to decide “[w]hether ... the arbitrators have jurisdiction to continue with the reference to this arbitration [with only Impregilo as the Claimant]” in the event that the other joint venture partner had to withdraw from the proceeding. It concluded that “the arbitrators are of the opinion that the Tribunal has jurisdiction to continue to hear the reference to arbitration with Impregilo S.p.A. [Claimant] as the only Claimant, because in their view, each member of a joint venture has a several right to go to arbitration.” The tribunal reasoned that in an unincorporated joint venture of co-liable partners, each joint venture partner is liable for the entirety, and therefore each partner also has the right to act as a creditor for the entirety.
  
- (b) *Interim Award in ICC Arbitration Case No 5029*<sup>63</sup>, in which the tribunal found “that company A [the leader of a joint venture] could validly submit the Contractor’s claims against defendant in this arbitration in its own behalf and on behalf of the parties forming joint venture X...”. The tribunal relied on the fact that the successive joint venture agreements between the partners gave the Leader the authority to represent the joint venture in all matters pertaining to the Contract. According to the tribunal, “[s]uch an agreement creates an agency relationship and not an undertaking to exercise any rights arising under the Contract against defendant only jointly.”

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<sup>62</sup> ICC Case no. 4983, *Impresit-Girola-Lodigiani (Impregilo) S.p.A. & Impregilo Iran Construction Company v. Tehran Regional Water Board (Iran)*, Preliminary Award of 6 February 1986.

<sup>63</sup> Interim Award of 16 July 1986 in Case No 5029, XII Y.B.Com.Arb.113, 122, at para 35 (1987).

(c) *McHarg, Roberts, Wallace, Todd v. Iran*<sup>64</sup>, in which the Iran-U.S. Claims Tribunal found that some members of a partnership could assert a claim on behalf of the whole partnership, provided that (i) “the ownership interests of such [partners], collectively, were sufficient ... to control the [partnership];” and (ii) the partnership “is not itself entitled to bring a claim under the terms” of the agreement on which the jurisdiction of the tribunal is founded.

131. *Analysis*: The Tribunal agrees with part of Pakistan’s analysis, and considers that Impregilo may not pursue claims in these proceedings on behalf of GBC.

132. By Article 25(1) of the ICSID Convention, the jurisdiction *ratione personae* of the Centre extends to legal disputes between a Contracting State and a national of another Contracting State.<sup>65</sup> By Article 25(2)(b) of the Convention, “national of another Contracting State” is defined as follows:

“any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.”

133. Schreuer<sup>66</sup> notes as follows (by reference to the Convention’s drafting history):

“This indicates that legal personality is a requirement for the application of Art. 25(2)(b) and that a mere association of individuals or of juridical persons would not qualify. In such a case, the individuals might be brought under Art. 25(2)(a) or the juridical persons forming the association would have to be brought separately under Article 25(2)(b).

...

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<sup>64</sup> *McHarg, Roberts, Wallace, Todd v. Iran*, Award 282-10853-1 of 17 December 1986, para 54, 13 Iran-U.S. C.T.R. 286.

<sup>65</sup> Set out above.

<sup>66</sup> *Op.Cit.*, at pp.276-7, ¶¶457-9.

“... for the purposes of the Convention the quality of legal personality is inherent in the concept of ‘juridical person’ and is part of the objective requirement for jurisdiction.”

134. It follows that the consent to arbitration contained in the BIT here does not cover claims by GBC, since GBC is not a “juridical person” for the purposes of the ICSID Convention.
135. The Tribunal considers that the position is no different if Impregilo pursues a claim “on behalf of GBC”<sup>67</sup>. The claim remains that of GBC, albeit advanced by Impregilo in some form of representative capacity. If this were permissible, it would constitute a simple and effective means of evading the limitations in Article 25 of the Convention, and expanding the scope of the BIT. Indeed, on this basis, any party could bring itself within the ambit of the Convention and the BIT by simply appointing a representative. This cannot have been intended by the careful delimitation of both the Convention’s and the BIT’s scope.<sup>68</sup>
136. In the Tribunal’s view, the fact that Impregilo is empowered to represent GBC by virtue of the provisions of the JVA does not change this analysis. This must be so, since it remains a fundamental proposition that the scope of the BIT cannot be expanded by a municipal law contract to which Pakistan is not a party. To this end, none of the arbitral awards relied upon by Impregilo appears to address this situation.
137. In so far as this is a claim in respect of GBC’s alleged losses, it remains a claim by an unincorporated grouping that fails to meet the requirements of the BIT and the ICSID Convention, and lies beyond the scope of Pakistan’s consent to arbitration. Indeed, each

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<sup>67</sup> *i.e.* as distinct from a claim on its own behalf, which is considered below.

<sup>68</sup> The Tribunal notes the slightly different analysis of this issue by C.F. Amerasinghe in *Jurisdiction of International Tribunals*, Kluwer 2003, pp.667-8, where it is suggested that there is no definition of *juridical person* in the ICSID Convention; that it is therefore within the competence of a Tribunal to decide whether or not an entity is a juridical person to which the nationality requirements of Article 25(2)(b) apply; and that special circumstances may exist in which an association or group of entities which does not have the status of a juridical person under the law of either the host state or the other Contracting state, ought nevertheless to be treated as within the scope of the Convention. Even if this analysis were to be applied, the Tribunal considers that no such special circumstances exist here.

of the contractual factors upon which Impregilo relies simply reinforces the representative nature of its position in these proceedings. As “Leader” of GBC, Impregilo is entrusted with a wide range of duties that are to be performed on behalf of the joint venture, including matters of management. However, these are internal GBC management issues. Ultimately, GBC cannot be identified exclusively with Impregilo, nor characterised as “Impregilo’s joint venture” (as Impregilo has at times sought to do).

138. This conclusion is confirmed by a careful review of the JVA, and in particular the fact that the role of “Leader” forms only one element in an intricate internal management structure comprising a Board of Representatives as well as an Executive Committee.
139. The fact that GBC has no separate legal personality may lead to the conclusion that this cannot be “GBC’s claim” in any event, since GBC is nothing more than a contractual relationship between different entities. This, however, does not convert the claim into Impregilo’s own claim. Rather, any claim advanced by Impregilo in respect of GBC’s losses is tantamount to a claim on behalf of the other joint venture partners. This in turn raises other difficulties that are considered next.

**(iv) Claims in Respect of the Other Joint Venture Partners**

140. If not a claim “on behalf of GBC”, then Impregilo’s claim for “the entirety of the damages suffered by GBC” is in reality a claim on behalf of its joint venture partners, *i.e.* Ed. Züblin AG of Germany, Saadullah Khan & Brothers of Pakistan, and Nazir & Company (Private) Limited of Pakistan.
141. *Pakistan’s Objection:* It is Pakistan’s case that Impregilo cannot advance claims in these arbitral proceedings in respect of losses incurred by these three entities. This is so for the simple reason that none of the other three entities is an Italian company, or within the scope of the BIT.



142. *Impregilo's Case:* By way of response, Impregilo relies upon the same points as above: the terms of the JVA and Contracts; Impregilo's contractual position as "Leader" of the Joint Venture, and the cited instances in which previous arbitral tribunals have allowed such claims.
143. Impregilo also argues that it can only be made whole for the losses it alleges it has suffered if it is allowed to proceed on behalf of the Joint Venture as a whole (*i.e.* in respect of each participant's alleged losses). This is so, since Clause 5.2 of the JVA expressly provides that the joint venture partners must "share the rights and obligations, risks, costs and expenses, losses and benefits arising out of or in any way connected with the Contract(s) and the performance of the Works ... in the above proportions ...". Impregilo is therefore under a contractual obligation to distribute any monetary Award. Thus, the only way for Impregilo to obtain its 57.8% stake is for the Tribunal to permit Impregilo to proceed on behalf of all participants.
144. *Analysis:* In the Tribunal's view, Impregilo cannot advance claims in these proceedings on behalf of the other participants in GBC.
145. Of the three joint venture partners:
  - (a) None is a protected "investor", within the ambit of the BIT; and
  - (b) Two of the three are not nationals "of another Contracting State" for the purposes of Article 25(1) of the ICSID Convention.
146. Again the question is raised whether a party who does fall within the ambit of a BIT and the Convention may act in arbitration proceedings in a representative capacity, in order to advance claims on behalf of other entities who do not so qualify. In the Tribunal's view, this issue turns upon the precise scope of the parties' respective consent to the

jurisdiction of ICSID. It is now well-accepted that “consent of the parties is the cornerstone of the jurisdiction of the Centre.”<sup>69</sup>

147. In this case, Pakistan’s consent is delineated by the BIT. In concluding the Treaty with Italy, Pakistan has conferred certain rights on Italian nationals in connection with the protection of investments in Pakistan. It has not conferred any rights on nationals of any other state, nor on nationals of Pakistan itself.
148. It must follow that the scope of Pakistan’s consent to ICSID is correspondingly limited. On a proper construction, Pakistan has consented to the resolution by ICSID of disputes arising out of investments made by Italian nationals in Pakistan. There is nothing in the BIT to extend this to claims of nationals of any other state, even if advanced on their behalf by Italian nationals.<sup>70</sup> Any other interpretation would obviously expose Pakistan to claims by nationals of any state worldwide.
149. To this end, investors of German nationality (Ed. Züblin AG) and Pakistani nationality (Saadullah Khan & Brothers of Pakistan and Nazir & Company (Private) Limited) cannot benefit from the protection conferred upon Italian investors by the 1997 BIT. Indeed, it might be noted as far as Ed. Züblin AG is concerned that there exists a BIT between Germany and Pakistan (Treaty for the Promotion and protection of Investments of 25<sup>th</sup> November 1959). This Treaty, however, does not provide for any dispute resolution mechanism between the States parties and investors. It would be a curious result indeed if investors from Germany could secure additional rights under a different BIT.

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<sup>69</sup> Report of the Executive Directors of the IBRD on the ICSID Convention, *1 ICSID Reports 28*, para 23. We are reminded, in this regard, of the cautionary observation of the arbitral Tribunal in *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/02, Award of 15 March 2002, *6 ICSID Reports 310*, at paras 55-56.

“... the question of jurisdiction of an international instance involving consent of a sovereign State deserves a special attention at the outset of any proceeding against a State Party to an international Convention creating the jurisdiction. As a preliminary matter, the question of the existence of jurisdiction based on consent must be examined *proprio motu*, *i.e.* without objection being raised by the Party. *A fortiori*, since the Respondent has raised preliminary objections to the jurisdiction, the existence of consent to the jurisdiction must be closely examined.”

150. As to Impregilo's reliance on the terms of the JVA, and its own contractual rights and obligations as "Leader", the Tribunal's jurisdiction remains circumscribed by the 1997 BIT and the ICSID Convention. As noted above, that jurisdiction cannot be expanded either by municipal law (*i.e.* Swiss law) or a municipal law contract to which only the Claimant is a party.
151. The fact that Impregilo may be empowered to advance claims on behalf of its partners is an internal contractual matter between the participants of the Joint Venture. It cannot, of itself, impact upon the scope of Pakistan's consent as expressed in the BIT. Equally, the fact that Impregilo may be obliged to account to its partners in respect of any damages obtained in these proceedings is also an internal GBC matter, which has no bearing on Pakistan's agreed exposure under the BIT. If this were not so, any party would be at liberty to conclude a variety of private contracts with third parties, and thereby unilaterally expand the ambit of a BIT.
152. Indeed, there is a further counter to Impregilo's argument that it requires recovery in respect of GBC's total losses in order to be left with compensation in respect of its own 57.8% stake (because its own contractual arrangements with its partners oblige it to share out any proceeds in any event). As pointed out in the decision of the Iran-U.S. Claims Tribunal in *Blount Brothers Corporation v. Iran*<sup>71</sup>, a tribunal has no means of compelling a successful Claimant to pass on the appropriate share of damages to other shareholders or participants:

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<sup>70</sup> It is to be noted that, by Article 34 of the Vienna Convention on the Law of Treaties: "A Treaty does not create either obligations or rights for a third State ... without the consent of that State ...".

<sup>71</sup> Award No.215-52-1, 28 February 1986 *Blount Brothers Corporation v. The Government of the Islamic Republic of Iran, et al*, 10 Iran-U.S. C.T.R., p.64. Similar points have been made in a number of other awards, such as Award No. 232-97-2, 2 May 1986 *Richard D. Harza, et al v. The Islamic Republic of Iran, et al*, 11 Iran-U.S. C.T.R., p.86; Award No 244-68-2, 8 August 1986, *Howard, Needles, Tammen & Bergendorff v. The Government of the Islamic Republic of Iran*, 11 Iran-U.S. C.T.R., p.314; Award No. 282-10853 to6-1, 17 December 1986, *Ian L. McHarg v. The Islamic Republic of Iran*, 13 Iran-U.S. C.T.R., p.302.

“... once the Tribunal has rendered an Award on an indirect claim, including the portion owned by the minority shareholders, those minority shareholders would be left without independent recourse, except insofar as the applicable corporate law might permit them to recover against the majority. The Tribunal has no means of compelling a successful Claimant to distribute the proceeds of its claim, were it to receive 100%.

Furthermore, to grant 100% in such an indirect claim would still not fully exclude the admitted risk that the corporation itself might at some point bring an action based on the same facts against the same Respondent in another forum.”

**(v) Conclusions**

153. It follows that this Tribunal has no jurisdiction in respect of claims on behalf of, or losses incurred by, either GBC itself, or any of Impregilo’s joint venture partners.
154. As Pakistan has pointed out, this conclusion is in line with a number of decisions of ICSID tribunals, as well as other international courts and arbitral tribunals. Indeed, there is an established principle of international law that a shareholder of a company, or one member of a partnership or joint venture, may not claim for the entire loss suffered by the corporate entity or group.
155. By way of example, the Tribunal was referred to *American Manufacturing & Trading Inc. v. Democratic Republic of the Congo*, in which an ICSID tribunal determined that a U.S. Claimant could not claim for the total damages caused to the Zairian company SINZA, in which it had a minority interest.<sup>72</sup> Similarly, awards in the Iran-US Claims Tribunal have frequently limited claims of shareholders and partners to the extent of their respective shares or participation in the entity or partnership that has suffered loss.<sup>73</sup>

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<sup>72</sup> *American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo*, ICSID Case No. ARB/93/1, Award of 21 February 1997, 5 *ICSID Reports*, pp.14-36, as referred to by the Tribunal in the *Mihaly* case, 6 *ICSID Reports* 310, para 25.

<sup>73</sup> Unusually, the Algiers Declarations provide that a controlling shareholder is entitled to claim for damage caused to the company in which it has shares - 1 Iran-U.S. C.T.R., p.9.

As one example, the Chamber in *Housing and Urban Services International v. Iran* held that:

“... international law seems to accept that as a rule a partner may not sue in his own name alone on a cause of action accruing to the partnership.”

and that

“... there is a widespread agreement that, where claims of individual partners for their personal interest are allowed, those claims are limited to the extent of such interest.”<sup>74</sup>

### **C. Impregilo’s Standing to Bring a Claim for its Own Share of any Losses**

156. In paragraph 58.2 of its Request, Impregilo claims (in the alternative) as follows:

“In any event, if the Tribunal finds that it cannot award Impregilo damages in excess of its proportionate interest in GBC, Impregilo claims, in the alternative, 57.80% of the total damages.”

157. A claim in substantially similar terms appears at paragraph 200.2 of Impregilo’s Limited Memorial.

#### **(i) Pakistan’s Objections**

158. Aside from the objections discussed above in respect of GBC and the other joint venture partners, it is Pakistan’s case that Impregilo has no standing to claim its own share of alleged losses. This is put on two bases, as follows:

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<sup>74</sup> Award No. 201-174-1, 22 Nov 1985 *Housing and Urban Services International, Inc v. The Government of the Islamic Republic of Iran et al.*, 9 Iran-U.S. C.T.R., p.330-3. The principle has been recognised for some time. The Tribunal was referred to the Decision of 20 February 1870, in *Ruden & Co* (synopsis in J.B. Moore, *International Arbitration*, Vol. 2 (1898), pp.1654-1655, where an American national and partner of a citizen of New Granada brought a claim for the entire damage caused to the business. The Umpire held that only Ruden’s claims for his *pro rata* share were properly before the Commission, and awarded him his one-half interest only. Other examples were referred to in Scribner K. Fauver, “Partnership Claims Before the Iran-United States Claims Tribunal”, *Virginia Journal of International Law*, 1987, Vol 27, p.328).

- (a) That the partners in GBC have, as a matter of fact, consistently acted collectively in asserting their rights under the contractual mechanism and in court proceedings in Pakistan; and
- (b) That this approach accords with the prevailing practice in international law.

159. As for the practice of GBC's participants, Pakistan argues that Impregilo and its partners in the Joint Venture have constantly and consistently acted jointly in all matters relating to the implementation of the Contracts with WAPDA, and moreover that the Contracts clearly envisage that the joint venture partners will act collectively. Pakistan relies, in this regard, upon the Contracts themselves, as well as a number of clauses in the JVA that refer to joint activity on the part of the members of GBC, including:

- (a) Second recital of the JVA, which recalls that the Parties have been "jointly prequalified" and that they "intend to jointly submit the Tender(s)" and, in case of Award, "jointly execute" the Contracts.
- (b) Clause 2.1 of the JVA, by which the Parties undertook not to have "any separate dealings with any other company, consortium or joint venture in connection with the submission of the Tender(s) or for the carrying out of any work relative to the Contract(s)."
- (c) Clause 3.2 of the JVA, which provides that "Decisions shall be taken unanimously".
- (d) Clauses 7.1, 8.1 and 8.5 of the JVA, which set out the management structure of the Joint Venture, including a Board of Representatives and an Executive Committee comprising representatives of each of the parties. By Clause 8.5(v), the Board of Representatives has responsibility (inter alia) for "recourse to arbitration or to litigation of any claims against the Employer or third parties on the basis of the Contract(s)".
- (e) Clause 17.1 of the JVA, which refers to joint performance of the Contracts.

160. Further, Pakistan relies upon the numerous references in Impregilo's own Limited Memorial to the joint activity of the four members of the Joint Venture. For example, in its "Statement of Facts" (Section III of its Limited Memorial), Impregilo has consistently referred to the rights and obligations of, and the activities of, GBC (rather than any of the individual participants in the Joint Venture). The same may be said of Impregilo's Request. It is Pakistan's conclusion that "according to [Impregilo] itself, the parties in the Joint Venture have exclusively acted jointly in the implementation of the Contracts as well as in relation to any claims arising from the Contracts. On no occasion has Impregilo acted in isolation. ...".
161. Similarly, Pakistan observes that in the extensive litigation in the courts of Pakistan regarding the affairs of the Joint Venture, it has never been the case that one party has claimed on behalf of all. On the contrary, claims have always been made in the name of GBC, used as a term to describe all the partners collectively. All requests for DRB Recommendations have also been made in GBC's name.
162. In terms of legal principle, Pakistan contends that the concept that the partners in a joint venture should act collectively accords with the prevailing practice in international law, as reflected in the jurisprudence of international tribunals. In this regard, Pakistan relies upon:
- (a) The *Klöckner* case, which involved a claim based on different contracts signed, on the one hand, by a number of partners, and on the other hand, by the Government of Cameroon. In that case, the request for arbitration was brought by "Klöckner Industrie-Anlagen GmbH, a German company whose principal office is in Duisburg, acting on its own behalf as well as on the behalf of Klöckner Belge SA, a Belgian company whose principal office is in Brussels, and Klöckner Handelsmaatschappij BV, a Netherlands company whose principal office is in The Hague, (hereafter 'Claimant')." <sup>75</sup>

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<sup>75</sup> *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Award of 21 October 1983, 2 ICSID Reports 9.

- (b) The *Salini* case, which concerned a major highway construction contract which had been awarded jointly to the Italian companies Salini Costruttori S.p.A. and Italstrade S.p.A., who together had “created the *Groupement d’Entreprises Salini-Italstrade* ... for the performance of the contract.” Pakistan notes that the tribunal in that case “underlined” that the “Group is not a legal entity. As a result, the Italian companies take part in the present arbitration as joint Claimants.”<sup>76</sup>
- (c) A number of awards of the Iran-U.S. Claims Tribunal, such as *Housing and Urban Services International*<sup>77</sup>, *Phillips Petroleum*<sup>78</sup>, and *United Painting Company*<sup>79</sup>, which are said to recognise a general rule of international law that a partner may not sue in his own name alone on a cause of action accruing to the partnership.

**(ii) Impregilo’s Case**

163. Impregilo argues that this Tribunal possesses jurisdiction *ratione personae* over Impregilo with respect to claims in its own right, even if Impregilo’s role as the Leader of the GBC Joint Venture, and its express legal authority to file actions for GBC, do not permit it to pursue claims on GBC’s behalf. This is so, since Impregilo is a properly incorporated Italian juridical person with investments in Pakistan within the meaning of the BIT.

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<sup>76</sup> *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, French original in 129 *Journal du droit international* 196 (2002); English translations in 6 *ICSID Reports* 400, para 3.

<sup>77</sup> Award No. 201-174-1, 22 Nov 1985 *Housing and Urban Services International, Inc v. The Government of the Islamic Republic of Iran et al.*, 9 Iran-U.S. C.T.R.

<sup>78</sup> Award No. 425-39-2, 29 June 1989, *Phillips Petroleum Co. Iran v. The Islamic Republic of Iran and NIOC*, 21 Iran-U.S. C.T.R.

<sup>79</sup> Award No. 458-11286-3, 20 December 1989, *United Painting Company, Inc. v. The Islamic Republic of Iran*, 23 Iran-U.S. C.T.R.



164. Further, previous ICSID decisions make clear that an investor who is a stakeholder in an enterprise may bring claims under most BITs for injury to that enterprise and its assets in violation of the investor's Treaty rights. No rule requiring "special circumstances" has been established. Impregilo cites in this regard:

- (a) *Asian Agricultural Products Ltd. v. Sri Lanka*<sup>80</sup>, in which the tribunal awarded damages to a shareholder in a corporation established pursuant to a joint venture agreement for injury suffered by that corporation.
- (b) *American Manufacturing & Trading Inc. v. Democratic Republic of the Congo*<sup>81</sup>, in which the tribunal acknowledged that a 94% shareholder in a company whose properties were harmed by the respondent government "acts in its own name and in its own capacity as an American enterprise having invested in Zaire," and rejected objections to jurisdiction.
- (c) A number of recent cases in which tribunals have confirmed the rights of minority stakeholders to advance such claims, such as *Lanco v. Argentine Republic*<sup>82</sup> (18.3% stakeholder) and *CMS Gas Transmission Co. v. Argentine Republic*<sup>83</sup> (29.42% stakeholder), and the rights of indirect stakeholders, as in *Azurix Corp. v. Argentine Republic*.<sup>84</sup>

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<sup>80</sup> *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award of 27 June 1990, 4 ICSID Reports 246.

<sup>81</sup> *American Manufacturing & Trading, Inc. v. Democratic Republic of the Congo*, ICSID Case No ARB/93/1, Award of 21 February 1997, 5 ICSID Reports 14.

<sup>82</sup> *Lanco International Inc. v. Argentine Republic*, ICSID Case No ARB/97/6, Decision on Jurisdiction of 8 December 1998, 40 ILM 457 (2001).

<sup>83</sup> *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No ARB/01/8, Decision on Jurisdiction of 17 July 2003, 42 ILM 788 (2003).

**(iii) Analysis and Conclusions**

165. The Tribunal is unpersuaded by Pakistan's objections on this issue.
166. The Tribunal accepts Pakistan's description of the way in which the partners in this Joint Venture have conducted themselves to date. The fact that the individual participants have acted jointly in the past, however, does not of itself give rise to any principle of law that they must do so in the future, or that this Tribunal has no jurisdiction to consider the claims of one of the entities pursued on its own behalf.
167. Equally, none of the provisions of the Contracts or the JVA upon which Pakistan relies in this context appears to limit (or indeed could limit) the scope of Pakistan's consent to arbitration as expressed in the BIT. Whether or not Impregilo's action in commencing this ICSID proceeding gives rise, for example, to a claim by the other joint venture participants for breach of the JVA (a municipal law agreement to which Pakistan is not a party) is a different matter, analytically distinct from the question whether or not Impregilo has standing to pursue its claims against Pakistan as a matter of the BIT, the ICSID Convention, and the law applicable to these instruments.<sup>85</sup>
168. As for the legal authorities relied upon by Pakistan:
- (a) The fact that the Claimants in the *Klöckner* case chose to pursue their claims collectively does not reflect any particular legal requirement that this be done. Indeed, as Pakistan itself points out, the question of the identity or standing of the Claimants was not addressed by the tribunal in that case, since Cameroon had accepted its jurisdiction.

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<sup>84</sup> *Azurix Corp. v. Argentine Republic*, ICSID Case No ARB/01/12, Decision on Jurisdiction of 8 December 2003, 43 *ILM* 262 (2004).

<sup>85</sup> Similarly, it is to be noted that a number of decisions of the Iran-U.S. Claims Tribunal support the proposition that the characterisation of a relationship either under municipal law or by the parties to a Contract is not determinative of a "partner's" right to bring a claim before that Tribunal. See e.g. *Phillips Petroleum Company Iran*, 21 Iran-U.S. C.T.R. at 103-4.

- (b) Similarly, the fact that the Claimants in the *Salini v. Morocco* case took part in that arbitration as joint Claimants does not appear to reflect any mandatory principle that both partners pursue their claims jointly, or, put another way, any restriction upon one partner pursuing its own claims separately.
- (c) In so far as the Iran-U.S. Claims Tribunal recognised such a restriction, as Pakistan itself notes, it was not seen as an absolute rule. Rather, as was stated by Chamber One in *Housing and Urban Services International*, in reviewing the decisions of other international tribunals:

“While international law seems to accept that as a rule a partner may not sue in his own name alone on a cause of action accruing to the partnership, where special reasons or circumstances required it, ‘international tribunals have had little difficulty in disaggregating the interests of partners and in permitting’ partners to recover their *pro rata* share of partnership claims. The most relevant ‘special circumstance’ in this sense exists when a partner’s claim is for its own interest, which is independent and readily distinguishable from a claim of the partnership as such.”<sup>86</sup>

169. Here, as follows from the analysis later in this Decision, the relevant causes of action in these proceedings are alleged breaches of Treaty. As will be clear from the following Section, no consideration need be given for present purposes to Impregilo’s allegations of breach of the Contracts. Given the nature of the BIT, the alleged breaches of Treaty could only be causes of action accruing to Impregilo alone, and not to the Joint Venture itself or any of its other participants. It follows that this is not a case in which one member of a partnership is seeking to pursue in its own name a cause of action accruing to the partnership.

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<sup>86</sup> 9 Iran-U.S. C.T.R 313, p.330. It might be noted that this decision has been criticised as misstating the general rule. See Note, *Partnership Claims before the Iran-United States Claims Tribunal*, 27 Va.J.Int’l L. 307, 340 (1987), asserting that *pro rata* recovery is the general rule, not the exception.

170. If particular “circumstances” are required to allow such a claim, which the Tribunal doubts, then in the words of the Iran-U.S. Claims Tribunal in *Housing and Urban Services International*, Impregilo’s claim is properly characterised as one for its own interest, which is readily distinguishable from a claim of the partnership as such. To this end, the Tribunal is satisfied that adequate circumstances exist such as to allow Impregilo to pursue these proceedings on its own, albeit only in respect of its own alleged loss (being proportionate to its *pro rata* share of the Joint Venture).<sup>87</sup>
171. Lastly, Pakistan points out that nowhere has Impregilo specified any damage it might have suffered individually. Rather, any loss could only be that of the Joint Venture overall. To this end, Pakistan contends that Impregilo has not shown any right “independent and readily distinguishable” from a claim of the other parties to the Joint Venture.
172. The Tribunal disagrees. As stated, the relevant causes of action for present purposes (breaches of Treaty) are distinguishable from the claims that may be available to the other joint venture partners (breaches of the Contracts). Whether or not Impregilo can actually establish any actionable loss is a question to be resolved at the substantive hearing of this dispute. It does not, of itself, impact on the question of jurisdiction.
173. The Tribunal therefore concludes that Impregilo is not prevented from pursuing its claims for breach of the BIT on the basis that it is acting alone.
174. This conclusion accords with the previous ICSID decisions which Impregilo has cited, as set out above, and to which may be added further decisions such as *Enron*

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<sup>87</sup> Pakistan further objects to Impregilo acting alone in these proceedings on the basis that “... this would not only frustrate the purpose of having an exclusive Contractual dispute settlement mechanism, but it would also mean that the same issue was being pursued in two separate sets of proceedings simultaneously. In effect, to allow Impregilo to bring ICSID proceedings even for a *pro rata* share would enable it to steal a march on its partners in the joint venture.” This ignores the fundamental distinction between claims for breach of the Contracts, and claims for breach of the BIT – a distinction that is addressed later in this Decision. The circumstance here that warrants Impregilo pursuing these proceedings alone is precisely the fact that the cause of action in question is exclusive to this participant, and is fundamentally different from the causes of action that might be referred to the Contractual dispute settlement mechanism.

*Corporation and Ponderosa Assets, L.P. v. Argentine Republic.*<sup>88</sup> The Tribunal in that case again confirmed the analogous right of minority and non-controlling shareholders to claim independently of a separate corporate entity for the measures that affect their investment. As stated there: “[t]his right has been upheld both under international law and the ICSID Convention.”

**D. Impregilo’s Authority to Bring the Arbitration, and its Compliance with Institutional Rule 2(1)(f)**

175. The third of Pakistan’s objections *ratione personae* concerns the question of Impregilo’s authority to commence this arbitration, and its compliance with the ICSID Institution Rules. Rule 2 of the Institution Rules sets out requirements for the contents of a request for arbitration. Rule 2(1)(f) provides as follows:

“The request shall:

...

(f) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request.”

Rule 2(2) provides as follows:

“The information required by subparagraphs (1)(c), (1)(d)(iii) and (1)(f) shall be supported by documentation.”

**(i) Pakistan’s Objections**

176. It is Pakistan’s case that Impregilo has provided no document showing that such authorisation has been given, and that such documentation as has been provided is inadequate for these purposes. In particular, Pakistan points to Exhibit 5 to Impregilo’s Request of 17 January 2003, which comprises “Minutes of the Meetings of the

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<sup>88</sup> *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No ARB/01/3, Decision on Jurisdiction of 14 January 2004, an electronic text is provided by *International Law in Brief* at <http://www.asil.org/ilib/Enron.pdf>.

Executive Committee [of Impregilo] of January 22, 2002”, held in Milan. In the English translation provided by Impregilo, this provides in relevant part as follows:

“After due discussion, the Executive Committee unanimously resolved that Impregilo institute and maintain appropriate legal proceedings before the International Centre for Settlement of Investment Disputes under the Bilateral Investment Treaty in force between Italy and Pakistan.

The Committee resolved further that Impregilo, as leader and majority shareholder of the Ghazi-Barotha Joint Venture, sole signatory of the two Contracts and principal interlocutor with WAPDA and other authorities of the Government of Pakistan, institute and maintain such legal proceedings on behalf of the Joint Venture in order to recover costs, damages and losses suffered by the Joint Venture as a whole.”

177. According to Pakistan, this authorisation is inadequate for the purposes of the Institution Rules, for two reasons:

- (a) The authorisation was made with respect to the initial Request (of 28 January 2002) to which the same document was attached. That Request was formally withdrawn in May 2002 in conformity with Clause 5 of the Supplementary Agreement. Rule 2(1)(f) of the Institution Rules, on Pakistan’s case, requires that “*the* request”, not “*any* request” be duly authorised.
- (b) The authorisation appears to be that of a purely internal organ of Impregilo, which has authorised Impregilo to bring the dispute before an ICSID tribunal under the BIT, on behalf of the Joint Venture. This runs counter to Clause 8.5 of the JVA, by which recourse to arbitration falls exclusively within the competence of the Board of Representatives of the Joint Venture. Clause 8.5(v) provides as follows:

“The Board of Representatives shall decide and be responsible for the general policy of the Joint Venture, and in particular shall deal with matters of primary importance, such as:

...

v) The general policy of submission of claims to the Engineer and/or the Employer and the recourse to arbitration or

to litigation of any claims against the Employer or third parties on the basis of the Contract(s)”

178. As for the two subsequent documents filed by Impregilo, dated 31 January 2003, Pakistan maintains that these are “general in nature”, “do not formally authorise the Request for Arbitration lodged with the ICSID Secretariat on 13 January 2003”, and are subsequent to the date of the Request in any event.

179. Pakistan therefore concludes that Impregilo lacks proper authorisation to bring this claim, and the Tribunal accordingly lacks jurisdiction *ratione personae*.

**(ii) Impregilo’s Case**

180. It is Impregilo’s case that it is properly authorised to bring these proceedings, on the following basis:

- (a) That it is axiomatic that Impregilo requires no authorisation from any third party to bring a claim on its own behalf; and
- (b) That at most, a corporate Claimant might include with its Request for Arbitration “some indication of internal authorization, consistent with its corporate structure, for the decision to proceed with an ICSID claim”, and that the Minutes of 22 January 2002 referred to by Pakistan adequately serve this purpose; and
- (c) That GBC’s Board of Representatives and Executive Committee jointly authorised Impregilo to “represent GBC and all GBC Partners and appoint law firms in any arbitration, judicial and extra-judicial proceedings” as evidenced by Combined Minutes of Board of Representatives Meeting No 12 and Executive Committee Meeting No 15, para 5, dated 31 January 2003. A Power of Attorney of the same date (31 January 2003) signed by the other members of

GBC in that capacity authorises Impregilo to “file any claim or legal action” and “to represent the Joint Venture in any arbitration ... directly or indirectly related to the Joint Venture.” Further, on 18 August 2003, GBC’s Board of Representatives reaffirmed its decision to have Impregilo “continue with ICSID arbitration”, as evidenced by Minutes of Board of Representatives Meeting No 13, at Section 2.

**(iii) Analysis and Conclusions**

181. In the Tribunal’s view, Impregilo is properly authorised to commence and pursue these arbitration proceedings, and has satisfied the requirements of Rule 2(1) and (2) of the Institution Rules.
182. This is a claim by Impregilo which, properly analysed, is limited to alleged breaches of the BIT<sup>89</sup>, and Impregilo’s own alleged loss. As such, it is Impregilo, and neither GBC nor the other joint venture participants, that constitutes the “juridical person” for the purposes of Rule 2(1)(f) of the Institution Rules. Contrary to Pakistan’s case, it follows that the “internal actions” referred to in Rule 2 are those internal to Impregilo. As far as the requirements of the ICSID Convention and Rules and the BIT are concerned, there is no need for authorisation by GBC or any other joint venture partners for arbitration to be commenced pursuant to Article 9 of the BIT.
183. On this basis, the Tribunal considers that the authorisation granted in the Minutes of the Meeting of the Executive Committee of Impregilo on 22 January 2002 is sufficient for these proceedings.

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<sup>89</sup> As follows from the analysis in Section V of this Decision.



**E. Conclusions on Objections *Ratione Personae***

184. It follows that this Tribunal has jurisdiction *ratione personae* over Impregilo's claims, only in so far as such claims concern Impregilo's own alleged loss, being (at most) proportionate to its *pro rata* participation in the Joint Venture.

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**V. JURISDICTION *RATIONE MATERIAE***

185. As set out above, Impregilo advances claims before this Tribunal in respect of alleged breaches by Pakistan of the Contracts, as well as of the BIT. Impregilo contends that the Tribunal has jurisdiction under the terms of the BIT with respect to both types of claim. Each is addressed in turn.

**A. Contract Claims**

**(i) Impregilo's Case**

186. In its Limited Memorial, Impregilo articulated a number of specific allegations of breach of the two Contracts. These have been summarised earlier in this Decision, and have been referred to as the "Contract Claims."

187. Unlike other BITs to which Pakistan is a party, the BIT between Italy and Pakistan does not contain an "observance of commitments" or "umbrella clause". The focus of Impregilo's case as to the jurisdiction of this Tribunal over the Contract Claims was therefore Articles 9 and 3 of the BIT.

188. *Article 9:* Article 9 of the BIT contains Pakistan’s consent to ICSID arbitration.

Article 9(1) is cast in broad terms, as follows:

“... any disputes arising between a Contracting Party and the investors of the other, including disputes relating to compensation for expropriation, nationalization, requisition or similar measures, and disputes relating to the amount of the relevant payment shall be settled amicably, as far as possible.”

Article 9(2) provides as follows:

“... in the case that such a dispute cannot be settled amicably within six months of the date of a written application, the investor in question may submit the dispute at his discretion for settlement to [various fora, including ICSID].”

189. Impregilo contends that Article 9(1) is drafted in such general terms (e.g. “*any disputes*”) that it covers not only disputes relating to alleged violations of a provision of the BIT, but any dispute which may arise between a State Party and an investor of the other Party, including disputes concerning alleged violations of contracts.

190. *The Contracting Party:* Impregilo’s complaints concern alleged acts and omissions by WAPDA itself, as well as by the Engineer and other governmental authorities (such as the Customs and military authorities) that have given rise to complaints against WAPDA under the Contracts. These complaints are brought against the State of Pakistan in these proceedings, on the basis that:

“WAPDA is an instrumentality or organ of the Government of Pakistan ... whose actions and omissions are attributable to Respondent in international law.”

Therefore, on Impregilo’s case, it is irrelevant that WAPDA, and not the State of Pakistan, is Party to the Contracts, and it follows that the Tribunal has jurisdiction to entertain its Contract Claims directed against Pakistan.

191. *The Arbitration Agreements:* Impregilo further submits that the forum selection clauses contained in the Contracts do not deprive the Tribunal of its jurisdiction over the Contract Claims. As set out earlier, it emphasises that (on its case) these contractual dispute resolution mechanisms are unavailable to it in any event, having been frustrated as a result of the Respondent's conduct. Again as set out above, Impregilo takes issue with the Respondent's analysis of Pakistan law as to the continued viability of the two arbitration agreements, and the relevance of the 1923 Geneva Protocol.
192. *Article 3:* As a further ground, Impregilo contends that this Tribunal also has jurisdiction over Impregilo's Contract Claims by operation of the Most Favoured Nation clause in Article 3 of the BIT, and in turn by operation of the "umbrella clauses" contained in other BITs that exist as between Pakistan and other countries (e.g. the Swiss-Pakistan BIT).

**(ii) Pakistan's Objections**

193. As recorded in Section II of this Decision, Pakistan has advanced a number of detailed arguments on this issue. For the reasons set out below, the Tribunal considers that many of these arguments need not be addressed in this Decision.
194. *The Contracting Party:* It is the Respondent's principal case that this Tribunal lacks jurisdiction over the Contract Claims because it is WAPDA - and not Pakistan - which is a Party to the Contracts. It stresses that WAPDA is a corporate body distinct from the State of Pakistan and that Pakistan cannot be held responsible for breaches of the Contracts concluded by WAPDA.
195. *The Arbitration Agreements:* Pakistan adds that even if it had been a Party to the Contracts, the Tribunal should respect the exclusive forum selection clauses contained therein. In accordance with ICSID jurisprudence, the Tribunal should conclude either that it lacks jurisdiction over the Contract Claims (following the approach, for example, that was taken in *SGS v. Pakistan*) or that those claims are inadmissible, and that these

proceedings should be stayed (following the approach that was taken in *SGS v. Philippines*).

**(iii) Issues in Dispute**

196. In the Tribunal's view, whether or not the Contract Claims advanced by Impregilo fall within this Tribunal's jurisdiction depends upon three distinct issues, as follows:

- (a) Whether Article 9 of the BIT covers disputes between Impregilo and Pakistan arising out of the implementation of Contracts concluded between GBC and WAPDA.
- (b) If Article 9 does not extend to such disputes, whether the Tribunal nevertheless has jurisdiction by virtue of the Most Favoured Nation clause in Article 3 of the BIT.
- (c) If the Tribunal has jurisdiction over Impregilo's Contract Claims by virtue of Article 9 or Article 3 of the BIT, whether the existence of dispute resolution provisions in the Contracts deprives the Tribunal of such jurisdiction, or renders the Contract Claims inadmissible.

197. To the extent necessary, each issue is addressed in turn below.

**(iv) The Scope of Article 9 of the BIT**

198. Both Contracts were concluded with WAPDA and not with the State of Pakistan. Whether or not Article 9 of the BIT extends to disputes between Impregilo and Pakistan arising out of contracts concluded with WAPDA therefore turns upon the precise status of this authority, and the legal consequences to be drawn from this status.

199. *The Status of WAPDA:* The status of WAPDA as a party to the Contracts is a matter for the law of Pakistan, being both the law by which WAPDA was established and exists, and also the law governing the Contracts.
200. WAPDA was established by the Pakistan Water and Power Development Authority Act of 1958<sup>90</sup> (“the 1958 Act”). Under Section 3(2) of the 1958 Act, WAPDA (referred to as the “Authority”) is a corporate body that is:
- “entitled to acquire, hold property, shall have perpetual succession and a common seal and shall by the said name sue and be sued”.
201. WAPDA consists of a Chairman, and not more than three Members appointed by the Government (Section 4). They “receive such salary and allowances” and are “subject to such conditions of service as may be prescribed by the Government” (Section 5). Under Section 6 of the 1958 Act, the Government may remove the Chairman and any Member of the Board for various reasons, in particular if they become, in the opinion of the Government, incapable of discharging their responsibilities under the 1958 Act or if they have been declared to be disqualified for employment in, or have been dismissed from, the service of Pakistan.
202. The 1958 Act contains detailed provisions relating to the employees of WAPDA. It states in particular that “the Authority shall prescribe the procedure for appointment and terms and conditions of service of its officers and servants, and shall be competent to take disciplinary action against the officers and servants” (Section 18).
203. “Service under the Authority” is considered “to be service of Pakistan and every person holding a post under the Authority, not being a person who is on deputation to the authority from any Province, shall be deemed to be a civil servant for the purposes of the Service Tribunals Act, 1973” (Section 17 (1-D)) and within the meaning of Section 21 of the Pakistan Penal Code (Section 19(1)).

204. The power and duties of the Authority are defined in Sections 8 to 16 of the Act. Under Section 8, the Authority “shall prepare, for the approval of the Government a comprehensive plan for the development and utilization of the Water and Power resources of Pakistan ...”. It also may frame schemes for a province or any part thereof, subject here again to approval by the Government.
205. Once a scheme is sanctioned by the Government, the authority may take action for its implementation, as specified in Section 8(5), and in particular “enter into any contract or agreement with any company or companies” having the required object. Moreover, in order to carry out the purposes of the Act, WAPDA may “undertake any works, incur any expenditure, procure plant, machinery and materials required for its use and enter into and perform all such contracts as it may consider necessary or expedient”. It may also “acquire by purchase, lease, exchange or otherwise and dispose of by sale, lease, exchange or otherwise any land or interest in land”. More generally, it “may take such measures and exercise such power as it considers necessary or expedient for carrying out of the purposes of this Act” (Section 13).
206. By Section 26 of the 1958 Act, “The liability of the Government to the creditors of the Authority shall be limited to the extent of grant made by the Government and the loans passed by the Authority with the sanction of the Government”.
207. The accounts of the Authority are audited by the Auditor General of Pakistan. The Auditor Report with the comments of the Authority are sent to the Government and the Authority “shall carry out any directive issued by the Government for rectification of an audit objection”. Each year, the Authority submits to the Government for approval a statement of the estimated receipts and expenditures in respect of the next financial year (Section 27).
208. The Authority may, with the approval of the Government, frame regulations for the implementation of the 1958 Act (Section 29).

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<sup>90</sup> Pakistan Act No. XXX1 of 1958, as subsequently amended.

209. Although the Government of Pakistan exercises a strict control on WAPDA, in light of the terms of the 1958 Act that established it, the Tribunal considers that WAPDA is properly characterised as an autonomous corporate body, legally and financially distinct from Pakistan.
210. Much of Impregilo's argument on this issue rested upon international law principles of state responsibility and attribution. However, a clear distinction exists between the responsibility of a State for the conduct of an entity that violates international law (e.g. a breach of Treaty), and the responsibility of a State for the conduct of an entity that breaches a municipal law contract (i.e. Impregilo's Contract Claims). As noted by the *ad hoc* Committee in its decision on annulment in *Compañia de Aguas del Aconquija and Vivendi Universal v. Argentine Republic*, the international law rules on State responsibility and attribution apply to the former, but not the latter:

“... 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 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 ... For example, in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the State ... is internationally responsible for the acts of its provincial authorities. By contrast, the State ... is not liable for the performance of contracts entered into by [a provincial authority], which possesses a separate legal personality under its own law and is responsible for the performance of its own contracts.”<sup>91</sup>

211. *Separate Entities and Article 9:* Article 9 of the BIT covers only “disputes arising between a Contracting Party and the investors of the other”. As is clear from its own terms, the scope of application of this provision is limited to disputes between the entities or persons concerned.

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<sup>91</sup> *Compañia de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment of 3 July 2002, 6 ICSID Reports 340, para.96.

212. As was stated in *Salini Costruttori SpA v. Kingdom of Morocco*, where a State has organised a sector of activity through a distinct legal entity, whether or not a State entity, it does not follow *a priori* that the State has extended its jurisdiction offer in a BIT to contractual breaches committed by such other entity or its agents.

213. *Salini Costruttori SpA v. Kingdom of Morocco*<sup>92</sup> concerned claims for the alleged breach of a contract between Salini (an Italian corporation) and Société Nationale des Autoroutes du Maroc (“ADM”). The tribunal held that ADM was “*une entité contrôlée et dirigée par l’Etat marocain, à travers le Ministre de l’Equipement et divers organismes publics*”<sup>93</sup>, whose main object was “*la réalisation de tâches de nature étatique (construction, gestion et exploitation de biens relevant du service public répondant aux besoins structurels du Royaume du Maroc en matière d’infrastructures et de réseaux de communications).*”<sup>94</sup> The tribunal nonetheless concluded that it did not have jurisdiction over mere breaches of the contract concluded between Salini and ADM, in so far as such breaches did not simultaneously constitute breaches of treaty:

“*Dans l’hypothèse où l’Etat a organisé un secteur d’activité par l’intermédiaire d’une personne morale distincte, fût-elle une émanation de celui-ci, il n’en découle pas pour autant qu’il a accepté a priori que l’offre de compétence de l’article 8 [de l’accord bilatéral d’investissement entre l’Italie et le Maroc] le lie à raison des manquements contractuels de cette entité.*”<sup>95</sup>

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<sup>92</sup> *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, *op. cit.*, paras. 59 to 61.

<sup>93</sup> “an entity controlled and managed by the Moroccan State through the medium of the Minister of Infrastructure and various public organs”.

<sup>94</sup> “to accomplish tasks that are under State control (building, managing and operating of assets falling under the province of the public utilities responding to the structural needs of the Kingdom of Morocco with regard to infrastructure and communication networks).”



*“En d’autres termes, l’article 8 oblige l’Etat à respecter l’offre de compétence à raisons des violations de l’Accord bilatéral et de tout manquement à un contrat qui le lierait directement. L’offre de compétence de l’article 8 ne s’étend pas par contre aux violations d’un contrat auquel une entité autre que l’Etat est nommément partie.”*<sup>96</sup>

214. This analysis applies in terms to Article 9 of the BIT between Italy and Pakistan. In the Tribunal’s view, the jurisdiction offer in this BIT does not extend to breaches of a contract to which an entity other than the State is a named Party. Indeed, had the intention been to extend each Contracting Party’s jurisdiction offer in this way, the language of Article 9 would have been so crafted.
215. The Tribunal notes that this conclusion is also consistent with a number of other decisions of ICSID tribunals in comparable cases<sup>97</sup>.
216. *Conclusions:* Given that the Contracts at issue were concluded between the Claimant and WAPDA, and not between the Claimant and Pakistan; that under the law of Pakistan, which governs both the Contracts and the status and capacity of WAPDA for the purposes of the Contracts, WAPDA is a legal entity distinct from the State of Pakistan; and given that Article 9 of the BIT does not cover breaches of contracts concluded by such an entity, it must follow that this Tribunal has no jurisdiction under the BIT to entertain Impregilo’s claims based on alleged breaches of the Contracts.

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<sup>95</sup> “ In the case where the State has organised a sector of activity through a distinct legal entity, be it a State entity, it does not necessarily follow that the State has accepted *a priori* that the jurisdiction offer contained in Article 8 [of the Italy-Morocco BIT] should bind it with respect to contractual breaches committed by this entity.” (para.61).

<sup>96</sup> “ In other words, Article 8 compels the State to respect the jurisdiction offer in relation to violations of the Bilateral Treaty and any breach of a contract that binds the State directly. The jurisdiction offer contained in Article 8 does not, however, extend to breaches of a contract to which an entity other than the State is a named party.” (para. 61).

<sup>97</sup> E.g. *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision on Jurisdiction of 16 July 2001, para. 68, French original available at <http://www.worldbank.org/icsid/cases.htm>; see also *Cable Television of Nevis. v. Federation of St. Kitts and Nevis*, ICSID Case No. ARB/95/2, Award of 13 January 1997, 5 *ICSID Reports* 106, para. 2.22.

217. This is a short but, in the Tribunal's view, complete answer to the question of contractual jurisdiction in this case, which renders most of the many other arguments under this heading unnecessary to decide.

218. *Interrelationship with Treaty Claims:* However, as stated by the *ad hoc* Committee in its decision on annulment in *Compañia de Aguas del Aconquija and Vivendi Universal v. Argentine Republic*:

“... 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 such as that reflected in ... the BIT”<sup>98</sup>.

219. 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. This question is examined later under the heading “Treaty Claims”.

**(v) The ‘MFN’ Provision in Article 3 of the BIT**

220. Aside from Article 9, Impregilo also relies upon Article 3(2) of the BIT, which contains a most-favoured nation (“MFN”) clause. Impregilo observes that several of the BITs concluded by Pakistan include an “observance of commitments” or “umbrella clause”. More specifically, under Article 11 of the Swiss-Pakistani BIT, each Party is required to “constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party”.

221. According to Impregilo, by operation of the MFN clause inserted in the Italian-Pakistani BIT, Pakistan is obliged to extend this same Treaty protection of contractual commitments to Italian investors. To this end, so the argument goes, the Tribunal would

have jurisdiction to pronounce itself on the commitments thereby incorporated in the BIT.

222. Pakistan stresses that this new claim has been introduced at a late stage, in Impregilo's Counter-Memorial, and is therefore inadmissible. It adds that "if there is no breach of the Contracts, there cannot be a violation of the umbrella clause" thus invoked.<sup>99</sup>
223. In the Tribunal's view, given that the Contracts were concluded by Impregilo with WAPDA, and not with Pakistan. Impregilo's reliance upon Article 3 of the BIT takes the matter no further. Even assuming *arguendo* that Pakistan, through the MFN clause and the Swiss-Pakistan BIT, has guaranteed the observance of the contractual commitments into which it has entered together with Italian investors<sup>100</sup>, such a guarantee would not cover the present Contracts – since these are agreements into which it has not entered. On the contrary, the Contracts were concluded by a separate and distinct entity.

**(vi) The Effect of the Contractual Dispute Resolution Clauses**

224. Much of the focus of each side's argument has been the impact on this Tribunal's jurisdiction of the dispute resolution provisions that are contained in the Contracts, particularly in light of the different approaches that have been taken in recent ICSID decisions.
225. However, since the Tribunal has determined that it has no jurisdiction over the Contract Claims, the impact (if any) of competing arbitration agreements, including all questions as to the viability of such provisions, does not arise.

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<sup>98</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal* (formerly *Compagnie Générale des Eaux*) v. *Argentine Republic*, *op.cit.*, para. 105.

<sup>99</sup> Hearings, vol. I, p. 72 and 73.

<sup>100</sup> *i.e.* putting aside, for the sake of argument, the restrictive analysis of the umbrella clause in the Swiss-Pakistan BIT that was adopted by the tribunal in *SGS v. Pakistan*.

**B. Treaty Claims**

**(i) Impregilo's Case**

226. Aside from the Contract Claims, Impregilo also advances a number of allegations of breach of the Treaty, which have been summarised earlier in this decision, and which have been referred to as the “Treaty Claims”.

227. *Separate Treaty Claims:* Some of the Treaty Claims are quite distinct from, and do not coincide with, any of the Contract Claims. Such claims are “based on conduct by Governmental authorities not directly involved in the Contracts, including Pakistan’s Ministry of Commerce, its Customs Authorities and its military authorities”<sup>101</sup>, as well as the Ministry of Finance and the Ministry of Water and Power. Impregilo contends that the Tribunal self-evidently has jurisdiction over such Treaty Claims.

228. *Interrelationship with Contract Claims:* Some of the Treaty Claims, Impregilo admits, do coincide with the Contract Claims. However, on its case the Tribunal also has jurisdiction over these Treaty Claims, and the “overlap” with Contract Claims is of no relevance thereto.

229. According to Impregilo, “frustration or repudiation of an investor’s contractual rights can amount to a violation of Treaty”. Thus, “the Tribunal is bound to exercise jurisdiction over Impregilo’s Treaty based claims notwithstanding the fact that it may be required to construe the Contracts or analyse Respondent’s behaviour under the Contracts to determine whether there has been a breach of the Treaty”.

**(ii) Pakistan’s Objections**

230. *Qualification as a Treaty Claim:* By reference to the jurisprudence of the International Court of Justice as well as a number of decisions taken by other ICSID tribunals,

Pakistan argues that the fact that the Claimant raises an issue under one or more provisions of the BIT is insufficient, of itself, to establish the jurisdiction of the Tribunal. The Tribunal must ascertain whether the alleged violations of the BIT fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Tribunal has jurisdiction *ratione materiae* to entertain.

231. *Interrelationship with Contract Claims:* Again as summarised earlier, Pakistan submits that the Treaty Claims here cannot 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.
232. As for the allegations of unfair and inequitable treatment and unjustified measures, contrary to Article 2(2) of the BIT, it is observed that the treatment and measures complained of consist only of breaches of the contractual obligations of WAPDA. It concludes that the Tribunal has no jurisdiction to consider them.
233. Moreover, Pakistan stresses that “the only other Treaty claim is for expropriation”, or “measures having similar effects” under Article 5 of the BIT. Here again, this would be “a contract claim clothed as a claim for breach of treaty”. Moreover, a refusal to pay is not an expropriation when there is an unresolved dispute as to the performance of a contract.
234. *Impact of the Contractual Dispute Resolution Provisions:* Finally, Pakistan maintains that “even if there were a Treaty claim entirely distinct from the Contract claims in the present case (which is denied), it would be wholly inappropriate and indeed impractical, for this Tribunal to hear such a claim until the Contract claims had been resolved by the contractual mechanism”. To this end, drawing upon the approach that was adopted in *SGS v. Philippines*, Pakistan submits that this Tribunal should stay these proceedings, in order to allow the contractual dispute resolution mechanisms to take their course.

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<sup>101</sup> Counter-Memorial, p. 34.

**(iii) Issues in Dispute**

235. In the Tribunal's view, whether or not the Treaty Claims advanced by Impregilo fall within this Tribunal's jurisdiction depends upon the following issues:

- (a) The initial threshold that Impregilo's claims must meet at this stage of the proceedings in order to qualify as Treaty Claims.
- (b) Whether or not the Treaty Claims, if established, fall within the scope of the BIT, and in particular the interrelationship between Contract and Treaty Claims.
- (c) The impact (if any) of the dispute resolution provisions that are contained in the Contracts, and the risk of multiple fora.

236. To the extent necessary, each issue is addressed in turn below.

**(iv) Qualification as a Treaty Claim**

237. When considering its jurisdiction to entertain the Treaty Claims, the Tribunal considers 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. This has been recognised both by the ICJ and by arbitral tribunals in many cases.

238. The ICJ, in the *Ambatielos* Case in 1953, stated:

“In order to decide, in these proceedings, that the Hellenic Government's claim on behalf of Mr. Ambatielos is ‘based on’ the Treaty of 1886 within the meaning of the Declaration of 1926, it is not necessary for the Court to find and indeed the Court is without jurisdiction to do so – that the Hellenic Government's interpretation of the Treaty is the correct one. The Court

must determine, however, whether the arguments advanced by the Hellenic Government in respect of the treaty provisions on which the *Ambatielos* claim is said to be based, are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty. It is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty of 1886.”<sup>102</sup>

239. More recently, in comparable cases, the ICJ has used more objective criteria. Rather than referring to the “plausibility” of the claims, in the *Oil Platforms (Islamic Republic of Iran v. United States of America)*, the Court stated that:

“the Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute ‘as to the interpretation or application of the Treaty of 1955’. In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2.

17. The objection to jurisdiction raised by the United States comprises two facets. One concerns the applicability of the Treaty of 1955 in the event of the use of force; the other relates to the scope of various Articles of that Treaty.”<sup>103</sup>

240. In the cases concerning the *Legality of Use of Force in Yugoslavia*, the ICJ adopted a similar approach. It stated that:

“in order to determine, even *prima facie*, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; ... [It] must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling

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<sup>102</sup> *Ambatielos*, Merits Judgment, I.C.J. Reports 1953, p. 18.

<sup>103</sup> I.C.J. Reports 1996, II, p. 810, para. 16-17. In her separate Opinion, Judge Higgins proposed the following approach: “The only way in which, in the present case, it can be determined whether the claims of [Claimant] are sufficiently plausibly based upon the 1955 Treaty is to accept pro tem the facts as alleged by [Claimant] to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes, that is to say, to see if on the basis of Iran’s claims of fact there could occur a violation of one or more of them” (para 32 of the separate Opinion).

within the provisions of the instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX.”<sup>104</sup>

241. Arbitral tribunals have adopted a similar approach. Thus, in *SGS v. Philippines*<sup>105</sup>, the ICSID tribunal stated that:

“The Tribunal’s jurisdiction, if it exists, must arise by virtue of the ICSID Convention associated with the BIT... It is not enough that the Claimant raises an issue under one or more provisions of the BIT which Respondent disputes. To adopt the words of the International Court in the *Oil Platforms Case*, the Tribunal ‘must ascertain whether the violations of the [BIT] pleaded by [SGS] do or do not fall within the’ provisions of the Treaty and whether, as a consequence, the dispute is one which the [Tribunal] has jurisdiction *ratione materiae* to entertain” (para. 26).

242. In another passage of this decision, the arbitral tribunal stated that:

“In accordance with the basic principle formulated in the *Oil Platforms Case* (above, para. 26), it is not enough for the Claimant to assert the existence of a dispute as to fair treatment and expropriation” (para. 157).

243. The test for jurisdiction is an objective one, and its resolution may require the definitive interpretation of the treaty provision which is relied on. On the other hand, as the tribunal in *SGS v. Pakistan* stressed:

“... it is for the Claimant to formulate its case. Provided that the facts alleged by the Claimant and as appearing from the initial pleadings fairly raise questions of breach of one or more provisions of the BIT, the Tribunal has jurisdiction to determine the claim” (para 157).<sup>106</sup>

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<sup>104</sup> *Legality of Use of Force* (Yugoslavia v. Italy), I.C.J. Reports 1999 – I, p. 490, para. 25.

<sup>105</sup> *Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 January 2004, available at <http://www.worldbank.org/icsid/cases/pending.htm>.

<sup>106</sup> *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/1, Decision on Objections to Jurisdiction of 6 August 2003, 18 *ICSID Rev.—FILJ* 301 (2003). See similarly *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Award of 29 November 2004, available at <http://www.worldbank.org/icsid/cases/pending.htm>.



244. On this approach, the ICJ and individual arbitral tribunals have arrived at decisions on jurisdiction that vary from one case to another.
245. In the *Ambatielos* Case, the ICJ, after having considered the possible interpretations of the Anglo-Greek commercial treaty of 1886 concluded that “the difference between the Parties is the kind of difference which, according to the Declaration of 1926, should be submitted to arbitration” (p. 22).
246. In the *Oil Platforms Case*, the ICJ determined the scope of various Articles of the 1955 Treaty of Friendship and Commerce between Iran and the United States of America and decided that it had jurisdiction to entertain the Iranian claims only on the basis of Article XXI, paragraph 2, of the Treaty relating to freedom of commerce and navigation and not on the basis of the other provisions invoked by Iran.
247. In the cases concerning the *Legality of Use of Force* in Yugoslavia, the ICJ stated that “it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application ‘indeed entail the element of intent’ ” which is necessary to characterise conduct as genocide. As a consequence, the Court was “therefore not in a position to find, at [that] stage of the proceedings, that the acts imputed by Yugoslavia to the Respondent [were] capable of coming within the provisions of the Genocide Convention.” Accordingly, it decided that it had no jurisdiction *prima facie*.<sup>107</sup>
248. In *SGS v. Pakistan*, the arbitral tribunal concluded that: “if the facts asserted by the Claimants are capable of being regarded as alleged breaches of the BIT consistently with the practice of ICSID tribunals, the Claimant should be able to have them considered on their merits...”. “We do not exclude the possibility that there may arise a situation where the Tribunal may find it necessary at the very beginning to look to the Claimant’s factual claims but this is not such a case” (para 144).<sup>108</sup>

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<sup>107</sup> *Legality of Use of Force* (Yugoslavia v. Italy), I.C.J. Reports 1999-I, p. 491, paras. 27 and 28.

<sup>108</sup> *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/1, Decision on Objections to Jurisdiction of 6 August 2003, *op. cit.*

249. Similarly, in *Wena Hotels Ltd v. Arab Republic of Egypt*, the arbitral tribunal stated that:

“Wena raised allegations against Egypt ... which if proven, clearly satisfy the requirements of a legal dispute under Article 25(1) of the ICSID Convention. In addition, Wena has presented at least some evidence that suggests Egypt’s possible culpability.”<sup>109</sup>

250. The tribunal concluded that it had jurisdiction and reserved its decision on the merits.

251. The arbitral tribunal, in *SGS v. Philippines* arrived at a different conclusion in respect of part of the claim in that case. It stated that:

“... the present dispute is on its face a dispute about the amount of money owed under a contract. SGS accepts that the provision of services under the CISS Agreement came to an end by the effluxion of time. No question of a breach of the BIT independent of breach of contract is raised (as, arguably, in *SGS v. Pakistan*); there is no allegation of a conspiracy by local officials to frustrate the investment (as in *Vivendi*). As presented to the Tribunal by the Claimant, the unresolved issues between the Parties concern the determination of the amount still payable” (para. 159).<sup>110</sup>

252. The tribunal then recalled that, in its request for arbitration, SGS had invoked Articles IV, VI and X(2) of the BIT. The tribunal commented that:

“... an unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues under Article IV” (fair and equitable treatment) (para. 162).<sup>111</sup>

However, it added that “on the material presented by the Claimant, no case of expropriation has been raised... A refusal to pay is not an expropriation when there is an unresolved dispute as to the amount payable” (para. 161). As a consequence, the tribunal dismissed the claim “so far as it is based on Article VI of the BIT” (expropriation).

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<sup>109</sup> *Wena Hotels Ltd. V. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction of 29 June 1999, 6 *ICSID Reports* 74, page 86.

<sup>110</sup> *Op. cit.*

<sup>111</sup> *Op. cit.*

253. Similarly, in *UPS v. Canada*, the arbitral tribunal established under the NAFTA decided in its decision on jurisdiction that the customary rule of international law, on which the applicant based part of its claims, did not exist and, consequently, that the claim based on such a rule was not within the jurisdiction of the tribunal.
254. 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. In conformity with this jurisprudence, the 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 (see paragraph 263 below).

**(v) Analysis of Treaty Claims and the Interrelationship Between Contract and Treaty Claims**

255. *Treaty Claims which coincide with Contract Claims:* As noted above, the principal jurisdiction objection to the Treaty Claims raised by Pakistan concerns their coincidence with the Contract Claims.
256. In the decision of the *ad hoc* Committee in *Compañia de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*, a number of pertinent observations were made as to the interrelationship between treaty claims and contract claims. In particular, it was noted that:

“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.”<sup>112</sup>

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<sup>112</sup> *Compañia de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic*, Decision of Annulment, 3 July 2002, *op. cit.*, para. 60.

“A State may breach a treaty without breaching a contract, and vice-versa.”<sup>113</sup>

“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.”<sup>114</sup>

257. Applying these criteria, the *ad hoc* Committee in the *Vivendi* Case, went on to state that the *Vivendi* claim:

“... was not simply reducible to so many civil or administrative claims concerning so many individual acts alleged to violate the concession Contract or the administrative law of Argentina. It was open to Claimants to claim, as they did, that these acts taken together, or some of them, amounted to a breach of ... the BIT.”<sup>115</sup>

The Committee added that:

“A Treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standards”. Thus, in choosing to commence an ICSID arbitration, the Claimant takes “the risk of a Tribunal holding that the acts complained of neither individually nor collectively rose to the level of a breach of the BIT.”<sup>116</sup>

258. Hence, contrary 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. Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries.

259. Thus, not every breach of an investment contract can be regarded as a breach of a BIT. In the words of the arbitral tribunal in *Consortium RFCC v. Kingdom of Morocco*:

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<sup>113</sup> *Ibid.*, para. 95.

<sup>114</sup> *Ibid.*, para. 96.

<sup>115</sup> *Ibid.*, para. 112.

<sup>116</sup> *Ibid.*, para. 113.

*“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, comme le Tribunal l’a rappelé ci-dessus.”*<sup>117</sup>

260. In fact, the State or its emanation, may have behaved as an ordinary contracting party having a difference of approach, in fact or in law, with the investor. In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt.<sup>118</sup> Only 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.

261. Similarly, in the case of *Joy Machinery Limited v. Arab Republic of Egypt*,<sup>119</sup> an ICSID tribunal stated that:

“A basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some forms of State interference with the operation of the contract involved”.

The tribunal concluded in that case that:

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<sup>117</sup> “A breach of the substantive provisions of a bilateral investment treaty can certainly result from a breach of Contract, without a possible breach of the Contract constituting, *ipso jure* and by itself, a breach of the Treaty” - *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award of 22 December 2003, para. 48, French original available at <http://www.worldbank.org/icsid/cases.htm>.

<sup>118</sup> See e.g. the review of jurisprudence in Stephen M. Schwebel “*Justice in International Law*” (Grotius / CUP), Chapter 26 : “*On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law*” : “... there is more than doctrinal authority in support of the conclusion that, while mere breach by a State of a contract with an alien (whose proper law is not international law) is not a violation of international law, a ‘non-commercial’ act of a State contrary to such a contract may be. That is to say, the breach of such a contract by a State in ordinary commercial intercourse is not, in the predominant view, a violation of international law, but the use of the sovereign authority of a State, contrary to the expectations of the parties, to abrogate or violate a contract with an alien, is a violation of international law. ... when the State employs its legislative or administrative or executive authority as only a State can employ governmental authority to undo the fundamental expectation on the basis of which parties characteristically contract – performance, not non-performance – then it engages its international responsibility.”

“... the absence of a Treaty-based claim, and the evidence that, on the contrary, all claims are contractual, justifies the finding that the Tribunal lacks jurisdiction. Neither has it been credibly alleged that there was Egyptian State interference with the Company’s contract rights.”<sup>120</sup>

262. This approach to the issue of overlapping Treaty and Contract Claims – *i.e.* to recognise that even if the two coincide, they remain analytically distinct - is all the more apposite because of the different rules of attribution that govern responsibility for the performance of BIT obligations, as opposed to responsibility for breaches of municipal law contracts. In this respect, the Tribunal has noted in Section IV.A above that the legal personality of WAPDA is distinct from that of the State of Pakistan, and that the Contracts were concluded by that authority rather than the State itself. As a consequence, the Tribunal has declined to exercise jurisdiction over the Contract Claims presented by Impregilo. In contrast, under public international law (*i.e.* as will apply to an alleged breach of treaty), a State may be held responsible for the acts of local public authorities or public institutions under its authority. The different rules evidence the fact that the overlap or coincidence of treaty and contract claims does not mean that the exercise of determining each will also be the same.

263. *Analysis of the Treaty Claims here:* Having decided that the fact that some Treaty Claims here may coincide with Contract Claims does not deprive this Tribunal of jurisdiction, the question remains whether, applying the approach set out above, Impregilo’s Treaty Claims fall within the scope of the BIT, assuming *pro tem* that they may be sustained on the facts.

264. *Article 2(2):* Impregilo first asserts that Pakistan failed to comply with the provisions of Article 2(2) of the BIT, which provides that it “shall at all times ensure fair and equitable treatment of the investment or investors of the other Contracting Party” and protect them

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<sup>119</sup> *Joy Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction of 6 August 2004, an electronic text is provided by *International Law in Brief* at [http://www.asil.org/ilib/JoyMining\\_Egypt.pdf](http://www.asil.org/ilib/JoyMining_Egypt.pdf).

<sup>120</sup> *Ibid.*, at paras. 72 and 82.

against “unjustified or discriminatory measures.” It is alleged that Pakistan failed to make funds, land, equipments and drawings available over the entire duration of the project. Pakistan persistently failed to compensate Impregilo for any reasonable delays and disruption incurred for which Pakistan was responsible under the Contracts. Moreover, Pakistan thwarted the operation of the mechanism to resolve disputes contained in the Contracts. As a result of these alleged failures, it is said that Impregilo has been forced to commit extensive - and very expensive - resources over a seven-year period (whereas the project was intended to be completed in just over four years) .<sup>121</sup> More specifically, Impregilo refers to “Pakistan’s failure (through both Custom officials and WAPDA) to facilitate importation of equipment through the port of Karachi”; to unforeseen geological conditions; to the failure to procure the design drawings for the E and M equipment and the equipment itself; to the breach of its obligation to transfer land required for the power channel; and to the failure by the Pakistani military authorities and WAPDA to ensure access to the Kamra Military base.

265. The Tribunal observes that Impregilo bases its Treaty Claims both on (1) the way the Contract was implemented, and the frustration of the dispute resolution provisions, by the Engineer and by WAPDA, and (2) the attitude and conduct of Pakistan itself. According to Impregilo, in both cases, Article 2(2) of the BIT has been violated by Pakistan.
266. In the Tribunal’s view, if it is assumed *pro tem* that Impregilo can establish the facts upon which it relies, it is possible, at least in theory, that Impregilo might establish breaches of the BIT in this regard. Whether or not this is so will depend upon:
- (a) Whether Impregilo is able to establish “attribution” to Pakistan in so far as the acts of other entities are concerned, and
  - (b) Whether Impregilo is able to meet the threshold for treaty claims outlined above, *i.e.* activity beyond that of an ordinary contracting party (“*puissance publique*”).

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<sup>121</sup> Claimant’s Limited Memorial on the merits, para. 148.

267. The threshold to establish that a breach of the Contracts constitutes a breach of the Treaty is a high one. This may be illustrated by the Tribunal's conclusion, set out below, that certain matters that are the subject of a current reference to the Lahore arbitration do not so qualify – even assuming, *pro tem*, that Impregilo is able to establish the facts upon which it relies.
268. *Claims in Respect of Unforeseen Geological Conditions:* Applying the approach outlined above, the Tribunal considers that Impregilo's claims in respect of unforeseen geological conditions, which were the subject of DRB Recommendation 14, and which have since been referred to the Lahore arbitration pursuant to the dispute resolution provisions of the Contracts, are not capable of constituting "unfair or inequitable treatment" or "unjustified or discriminatory measures" for the purposes of Article 2 of the BIT. These are matters that concern the implementation of the Contracts, and do not involve any issue beyond the application of a contract, and the conduct of contracting parties. In particular, the matter does not concern any exercise of "*puissance publique*" by the State.
269. Accordingly, these claims do not enter within the purview of Article 2(2) of the BIT, and the Tribunal has no jurisdiction to consider them in this regard.
270. *Other Treaty Claims under Article 2(2):* With respect to the other alleged breaches of the Contracts, in the absence of detailed factual information, the Tribunal is not presently in a position to decide whether or not these could be considered as breaches of Article 2(2) of the BIT. 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, and constituted "unfair and inequitable treatment" or "unjustified or discriminatory measures" as contemplated in the BIT.



271. The Tribunal therefore has no choice but to decide upon its jurisdiction with respect to these alleged breaches when considering the merits, as contemplated by Rule 41(4) of the ICSID Arbitration Rules.
272. *Article 5*: Impregilo also submits that the “Respondent’s conduct is tantamount to an expropriation under Article 5(2) of the BIT.”<sup>122</sup> In support of this submission, it invokes decisions rendered both within ICSID and by the Iran-United States Claim Tribunal.<sup>123</sup>
273. The Respondent, here again, stresses that “this is a contractual claim clothed as a claim for breach of Treaty”. It adds that the authorities cited by Impregilo are far removed from the facts of the present case and it also invokes a number of ICSID decisions in support of its position.<sup>124</sup>
274. The Tribunal recognises that the taking of contractual rights could, potentially, constitute an expropriation or a measure having an equivalent effect.<sup>125</sup> It notes that the present case does not concern a situation of nationalisation or expropriation in the traditional sense of those terms, but behaviour that could, at least in theory, constitute an indirect expropriation or a measure having an effect equivalent to expropriation.
275. Usually, expropriation or nationalisation are effected:

*“... par le biais d’actes législatifs ou réglementaires, qu’ils soient individuels ou de portée générale”.*<sup>126</sup>

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<sup>122</sup> Counter-Memorial on jurisdiction, para. 72.

<sup>123</sup> Limited Memorial on the merits, para. 158 and following paragraphs.

<sup>124</sup> Objections to jurisdiction, para. 4.49.

<sup>125</sup> *Norwegian shipowner’s claims* (Norway v. USA), R. International Arbitral Awards 307 (1922); *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award of 20 May 1992, 3 ICSID Reports 189, paras. 42-46; *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award of 22 December 2003; *Philips Petroleum Company v. Islamic Republic*, Iran-United States Claims Tribunal, Award 425-39-2, 29 June 1989, para. 76; *SEACO v. Islamic Republic of Iran*, Award 531-260-2, 25 June 1992, para. 45.

<sup>126</sup> “through legislative acts or regulations, whether specific or general”, *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, *op. cit.*, para. 65.

276. “Measures of an equivalent effect” could for their part consist of State intervention even in the absence of such acts. Thus, in *Ethyl Corp. v. the Government of Canada*, in a NAFTA dispute, an arbitral tribunal considered whether the announcement made by the Canadian government stating that it would soon pass a law limiting the import of a chemical substance of which the Claimant, a US company, had engaged in importation and distribution, could constitute a “measure” having an effect equivalent to expropriation. In the course of its enquiry, it concluded that for the purposes of NAFTA, “[c]learly something other than a ‘law’, even something in the nature of a ‘practice,’ which may not even amount to a legal stricture, may qualify” as such a “measure”.<sup>127</sup>
277. An ICSID tribunal has taken a similar decision in a case of a refusal without justification of a construction permit, where such refusal deprived an investor of part or whole of its investment.<sup>128</sup>
278. The Tribunal observes that in those two cases, the measures in question had a unilateral character and were taken by a State or a Province acting in the exercise of its sovereign authority (“*puissance publique*”) and not as a contracting party. Indeed, all the key decisions relating to indirect expropriation mention the “interference” of the Host State in the normal exercise, by the investor, of its economic rights. However, a Host State acting as a contracting party does not “interfere” with a contract; it “performs” it. If it performs the contract badly, this will not result in a breach of the provisions of the Treaty relating to expropriation or nationalisation, unless it be proved that the State or its emanation has gone beyond its role as a mere party to the contract, and has exercised the specific functions of a sovereign authority.<sup>129</sup>

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<sup>127</sup> Arbitration NAFTA/UNCITRAL, *Ethyl Corp. v. The Government of Canada*, Award on Jurisdiction, 24 June 1998, 38 *ILM* 708 (1999), para. 66.

<sup>128</sup> *Metalclad Corporation v. Mexico*, ICSID Case No. ARB (AF) 97/1.

<sup>129</sup> *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award of 22 December 2003, para. 65, *op. cit.*

279. Moreover, the effect of the measures taken must be of such importance that those measures can be considered as having an effect equivalent to expropriation.<sup>130</sup>
280. In the present case, Impregilo complains that Pakistan's conduct throughout the duration of the Project constituted an effective expropriation of its investment, including its rights under the Contracts. It alleges that the actions of Pakistan and WAPDA frustrated its ability to carry out and complete the work in a timely fashion, thereby preventing the realisation of the benefit of the investment. Further, it alleges that WAPDA and Pakistan frustrated the contractual dispute resolution mechanism and Impregilo's right to an impartial hearing and settlement of its claims, thereby again preventing the realisation of the value of the investment. According to Impregilo, Article 5 of the BIT has therefore been violated by Pakistan.
281. Following the analysis above, it is the Tribunal's view 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. Therefore, the Tribunal has jurisdiction only to consider the former, and not the latter, for the purposes of Article 5 of the BIT.
282. *Claims in Respect of Unforeseen Geological Conditions:* As to Impregilo's claims in respect of unforeseen geological conditions, which were the subject of DRB Recommendation 14, and which have since been referred to the Lahore arbitration, the Tribunal is of the same view for the purposes of Article 5 of the BIT as set out above in the context of Article 2(2) of the BIT. Even assuming, *pro tem*, that Impregilo will be able to establish the facts upon which it relies, such claims are not capable of constituting a breach of Article 5 of the BIT.

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<sup>130</sup> *Compañía del desarrollo de Santa Ana SA (CDSE) v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000, 5 *ICSID Reports* 157; *Starrett Housing v. Islamic Republic of Iran*, Iran/USA Claims Tribunal 4 Iran US CTR 122; *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, *op. cit.*, paras. 67 - 68.

283. Accordingly, these claims do not enter within the purview of Article 5 of the BIT, and the Tribunal has no jurisdiction to consider them in this regard.
284. *Other Treaty Claims under Article 5:* With respect to the other alleged breaches of the Contracts, in the absence of detailed factual information, the Tribunal is again not presently in a position to decide whether or not these could be considered as breaches of Article 5 of the BIT. As stated above, 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.
285. The Tribunal therefore has no choice, once again, but to decide upon its jurisdiction with respect to these alleged breaches when considering the merits, as contemplated by Rule 41(4) of the ICSID Arbitration Rules.

**(vi) The Effect of the Contractual Dispute Resolution Clauses**

286. The above approach to treaty claims and contract claims has the consequence that a treaty claim may be the subject of consideration alongside – and in a different forum from – the consideration of an overlapping contract claim. This gives rise to an issue that has been the subject of much debate, and much argument in this case: how might the integrity of the contractual dispute resolution clauses be protected?
287. In the Tribunal’s view, this issue, of itself, does not deprive this Tribunal of jurisdiction over the Treaty Claims, where such jurisdiction otherwise exists.
288. A variety of approaches have been taken by other ICSID tribunals, and were advanced by Pakistan here, including the use of the doctrine of “admissibility” and the ordering of a stay as in *SGS v. Philippines*.
289. The Tribunal considers that, whilst 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).

290. 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.

### **C. Conclusions on Objections *Ratione Materiae***

291. It follows that:

- (a) This Tribunal has no jurisdiction *ratione materiae* over Impregilo's Contract Claims;
- (b) The alleged breaches of the Contracts may constitute breaches of Articles 2(2) and 5 of the BIT if they meet the criteria defined in the present section; but
- (c) This Tribunal has no jurisdiction *ratione materiae* to entertain the claims relating to the unforeseen geological conditions encountered during the implementation of the Contracts, which were the subject of DRB Recommendation 14; and
- (d) With respect to the other Treaty Claims, including the Treaty Claims relating to the frustration of the dispute resolution mechanism, the Tribunal will determine its jurisdiction when considering the merits.

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## VI. JURISDICTION *RATIONE TEMPORIS*

### A. Pakistan's Objections

292. The BIT entered into force on 22 June 2001. Pakistan recalls the basic rule of non-retroactivity of treaties incorporated into Article 28 of the 1969 Vienna Convention, and contends that the BIT:

“... can have no application in respect of conduct relied upon by Impregilo taking place before 22 June 2001, and similarly that the Tribunal can have no jurisdiction in respect of alleged breaches concerning acts and omissions occurring prior to that date.”<sup>131</sup>

293. According to Pakistan:

“Impregilo has sought to avoid the basic rule on non-retroactivity of treaties by (I) failing to plead the specific dates of alleged breaches and (II) asserting that the breaches it alleges are continuing in character.”<sup>132</sup>

294. On the first point, the Tribunal is invited to infer that, save where Impregilo complains of acts that are expressly alleged to have occurred subsequent to 22 June 2001, all other specific acts complained of by Impregilo took place before that date.

295. On the second point, Pakistan stresses that “to be truly continuing in character the breach must be (I) continuing and (II) uninterrupted” - which it states is not the case. Moreover, “even where it is established that a breach is of a continuing character... a Treaty breach can only be found from the date from which the State is bound by the obligation in question and the jurisdiction of the Tribunal concerned is limited accordingly”. Thus, the Tribunal has no jurisdiction save with respect to specific acts that are expressly alleged by Impregilo to have occurred subsequent to the entry into force of the BIT.

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<sup>131</sup> Objections to jurisdiction, para. 6.3.

<sup>132</sup> Objections to jurisdiction, para. 6.5.

296. In the alternative, Pakistan seeks:

“... a declaration in general terms ... that the provisions of [this] Treaty do not bind Pakistan in relation to any act or fact which took place or any situation which ceased to exist before 22 June 2001, and the Tribunal’s jurisdiction is limited accordingly.”<sup>133</sup>

## **B. Impregilo’s Case**

297. Impregilo contends that all of its claims directly arise out of the same subject matter, and therefore constitute a single continuing dispute. It submits that this dispute:

“deals with a systematic and continuous pattern of conduct that has resulted subsequent to the BIT’s entry into force, in the current and continuing breach of the BIT.”

298. The Tribunal has jurisdiction over such a dispute. Moreover, according to Impregilo, the application of the BIT to the dispute is consistent with the principle of non-retroactivity of treaties.<sup>134</sup>

## **C. Relevant Principles**

299. *The Terms of the BIT*: The BIT, which entered into force on 22 June 2001, applies to:

“... any dispute arising between a contracting Party and the investors of the other” (Article 9, para. 1, English version)

or to

“... le controversie che dovessero insorgere tra una delle Parti contra enti et gli investitori dell’altra parte contraente” (Article 9, para. 1, Italian version).

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<sup>133</sup> Objections to jurisdiction, para. 6.17.

<sup>134</sup> Counter-Memorial, paras. 180 to 198.

300. Such language – and the absence of specific provision for retroactivity – infers that disputes that may have arisen before the entry into force of the BIT are not covered (*i.e.* disputes arising before 22 June 2001).

301. *Jurisprudence*: There is an abundant jurisprudence on the definition of “disputes” in international law, and on the date on which such disputes are considered to arise.

302. The Permanent Court of International Justice and the ICJ have taken a position on these questions on numerous occasions. They have defined a dispute as:

“... a disagreement on a point of law or fact, a conflict of legal views or interests between the Parties.”<sup>135</sup>

303. In order to establish the existence of a dispute, “It must be shown that the Claim of one party is positively opposed by the other.”<sup>136</sup> Further, “Whether there exists an international dispute is a matter for objective determination.”<sup>137</sup>

304. ICSID arbitral tribunals have also considered the matter on a number of occasions.<sup>138</sup>

As was observed, for example, in *Maffezini v. Kingdom of Spain*:

“... there tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time, those events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even through the

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<sup>135</sup> See *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.J.I. Series A, No. 2*, p. 11 ; *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 27 ; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 27, para. 35.

<sup>136</sup> *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

<sup>137</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74)” (Case concerning *East Timor (Portugal v. Australia)*, *Judgment, 30 June 1995, I.C.J. Reports 1995*, p. 99, para. 22.

<sup>138</sup> See e.g. *AGIP. Congo*, ICSID Case No. ARB/77/1, Award of 30 November 1979, *1 ICSID Reports 306*; *AALP v. Sri Lanka*, ICSID Case No. ARB/87/3, Award of 27 June 1990, *4 ICSID Reports 25*.



underlying facts predate them ... this sequence of event has to be taken into account in establishing the critical date.”<sup>139</sup>

#### **D. Analysis of the Disputes**

305. *Contract Claims:* In the present case, Impregilo pursues a number of Contract Claims that were initially advanced between 1997 and 2003 (see Annexes 15 and 18 to the Limited Memorial). However, as stated in Section III above, the Tribunal has no jurisdiction *ratione personae* to consider these claims, and therefore the issue of jurisdiction *ratione temporis* need not be addressed.

306. *Treaty Claims:* As for Impregilo’s Treaty Claims, the Tribunal notes that in a letter dated 27 July 2001 to the Secretary of the Ministry of Water and Power, Impregilo requested an “intervention” by Pakistan:

“... in order to seat and agree on an amicable settlement of the disputes that, in the light of WAPDA’s inactions and omissions, have been seriously aggravated during the most recent period of time.”<sup>140</sup>

307. In the months that followed, negotiations between GBC and WAPDA took place without success. Then, on 28 January 2002, Impregilo filed a Request for Arbitration against Pakistan before ICSID. After the registration of that Request, Impregilo and WAPDA engaged in discussions in an effort to settle the dispute. As a result of those discussions, and with the assistance of the Pakistani authorities, a supplementary Arrangement to the Contract was signed on 14 April 2002 and Impregilo withdrew this First Request. However, this attempt ultimately did not succeed, and on 17 January 2003, Impregilo filed the Request presently under consideration.

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<sup>139</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction of 25 January 2000, para. 96, 5 *ICSID Reports* 396.

<sup>140</sup> Annex 6 to the Request.

308. At first sight, therefore, it appears that Impregilo presented its Treaty Claims to Pakistan after 22 June 2001, such that the Tribunal has jurisdiction to consider the corresponding dispute.
309. However, in the Tribunal's view, care must be taken to distinguish between (1) the jurisdiction *ratione temporis* of an ICSID tribunal and (2) the applicability *ratione temporis* of the substantive obligations contained in a BIT.
310. In this respect, it is to be noted that Article 1(1) of the BIT does not give the substantive provisions of the Treaty any retrospective effect. Thus, the normal principle stated in Article 28 of the Vienna Convention on the Law of Treaties applies, and the provisions of the BIT:

“... do not bind the Party in relation to any act of facts which took place or any situation which ceased to exist before the date of entry into force of the Treaty.”<sup>141</sup>

311. Impregilo complains of a number of acts for which Pakistan is said to be responsible. The legality of such acts must be determined, in each case, according to the law applicable at the time of their performance. The BIT entered into force on 22 June 2001. Accordingly, only the acts effected after that date had to conform to its provisions.
312. *Article 14 of the Articles of the ILC on State Responsibility:* However, Impregilo contends otherwise, by reference to Article 14 of the Articles of the International Law Commission on State Responsibility (“Extension in time of the breach of an international obligation”), which, in its opinion, reflects customary international law. Whether or not this Article does in fact reflect customary international law need not be addressed for present purposes. It suffices to observe that, in the Tribunal's view, the present case is not covered by Article 14. Acts attributed to Pakistan and perpetrated before 22 June 2001 could without any doubt have consequences after that date.

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<sup>141</sup> See *Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction of 29 January 2004, *op. cit.*, paras. 165 and 166; see also *Mondev International Ltd. V. United States of America*, ICSID Case No. ARB(AF)/99/2, 6 *ICSID Reports* 192, p. 208-9, paras. 68-70.

However, the acts in question had no “continuing character” within the meaning of Article 14; they occurred at a certain moment and their legality must be determined at that moment, and not by reference to a Treaty which entered into force at a later date.

313. In this respect, the present case is completely different from that described in the *SGS v. Philippines* award, which was relied upon by Impregilo. In that case, the Respondent recognised its obligation to pay sums due under a contract, and disputed only the quantum of the indemnity. In contrast, the current dispute is to be compared with cases of expropriation as mentioned by the Rapporteur of the draft Articles in the International Law Commission (see Report, Article 14, para. 6), in which the effects may be prolonged, whereas the act itself occurred at a specific point in time, and must be assessed by reference to the law applicable at that time:

“The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.”<sup>142</sup>

#### **E. Conclusions on Objections *Ratione Temporis***

314. It follows that the provisions of the BIT do not bind Pakistan in relation to any act that took place, or any situation that ceased to exist, before 22 June 2001 and the jurisdiction of the Tribunal *ratione temporis* is limited accordingly.
315. Having articulated the relevant principles, the Tribunal is unable at this stage to make any final determinations as to which (if any) of Impregilo’s Treaty Claims are thereby excluded. This will have to await a full analysis of each of the claims, at the merits stage of these proceedings.

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<sup>142</sup> Crawford, Commentary on *The International Law Commission’s Articles on State Responsibility*, (CUP, 2002), Art 14, para 6.

## VII. THE TRIBUNAL'S DECISION

316. For the foregoing reasons, the Tribunal unanimously decides:

- (a) That it has jurisdiction *ratione personae* over Impregilo's claims only in so far as such claims concern Impregilo's own alleged loss, being (at most) proportionate to its *pro rata* participation in the Joint Venture.
- (b) That it has no jurisdiction *ratione materiae* over Impregilo's claims based on the alleged breaches of the Contracts.
- (c) That alleged breaches of the Contracts may however constitute breaches of Articles 2(2) and/or 5 of the BIT if they meet the criteria defined in Section V.B (v) above.
- (d) That it has no jurisdiction *ratione materiae* to entertain the claims relating to the unforeseen geological conditions encountered during the implementation of the Contracts, which were the subject of DRB Recommendation 14.
- (e) That with respect to the other Treaty Claims, including the Treaty Claims relating to the frustration of the dispute resolution mechanism, the Tribunal will determine its jurisdiction when considering the merits.

- (f) That the provisions of the BIT do not bind Pakistan in relation to any act that took place, or any situation that ceased to exist, before 22 June 2001 and the jurisdiction of the Tribunal *ratione temporis* is limited accordingly.
- (g) To make the necessary Order for the continuation of the procedure pursuant to Arbitration Rule 41(4).
- (h) To reserve all questions concerning the costs and expenses of the Tribunal and the costs of the Parties for subsequent determination.

Date: April 22, 2005

*signed*

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**Mr. Bernardo M. Cremades**

*signed*

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**Mr. Toby T. Landau**

*signed*

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**Judge Gilbert Guillaume**