ICSID (INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES)

ICSID Case No. ARB/00/1

ZHINVALI DEVELOPMENT LTD. V. REPUBLIC OF GEORGIA

AWARD

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24 January 2003

Tribunal:
Seymour J. Rubin (Appointed by the State)
Andreas J. Jacovides (Appointed by the investor)
Davis R. Robinson (President)

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Award

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

1. This dispute revolves around expenditures incurred in connection with the proposed rehabilitation of a hydroelectric power plant (the "Plant") and its tailrace tunnel (the "Tailrace Tunnel") (together, the "Project"), located near Tbilisi, Republic of Georgia (the "Respondent" or "Georgia"). The Project is known in Georgia as "Zhinvali". The Tailrace Tunnel, built for water outflow downstream from the Plant's turbine generators, has served for many years as the main source of water for this capital city and major population center of Georgia.

2. Al the time that the sponsors of Zhinvali Development Limited (the "Claimant", or "ZDL") became interested in the Project in 1997, the Tailrace Tunnel was in precarious condition. Negotiations between ZDL and Georgia to conclude a definitive set of agreements to finance and implement the rehabilitation spread over a three year period but never came to fruition. The Claimant blames this failure upon the Respondent as a result of what the Claimant sees as the Respondent's culpable actions, and thus the Claimant seeks recovery of development costs, lost profits and moral damages. The Claimant asserts Respondent's liability on the alternative bases of breach of contract, promissory estoppel and unjust enrichment. Georgia, for its part, denies any responsibility and argues that there is no express or implied agreement or other conduct by the Respondent that supports the Claimant's position.

3. Belatedly in the written procedure, the Respondent in its Rejoinder challenged the jurisdiction of ICSID. Following a description of the Parties, a recitation of the procedural history of this case, a statement of findings of fact and history of the Project, and a description of the submissions, claims and responses of the two Parties, the Award turns in Part VI to this threshold issue of ICSID jurisdiction.

4. For the reasons set forth in Part VI of this Award, the Tribunal has concluded by a vote of two to one that, while we unanimously find that Georgia did "consent in writing" to the dispute resolution process of ICSID, Georgia never admitted or received the alleged "development costs" claimed in this case as an investment and thus did *not* assume State responsibility for the expenditures devoted to this failed enterprise. Consequently, the Tribunal holds by a majority vole that these "development costs" do *not* qualify as an "investment" under either the 1996 Georgia Investment Law or Article 25(1) of the ICSID Convention. As a result, ICSID is without jurisdiction over the merits of this case.

5. However, because of the Respondent's dilatory behavior, the arbitral process, as envisaged by the ICSID Convention and the ICSID Arbitration Rules, was disrupted, thereby substantially increasing the attorneys' fees and other arbitration costs of the Claimant. In keeping with Article 61(2) of the ICSID Convention, the Tribunal has, therefore, unanimously decided to award the Claimant an amount equal to two-thirds of such costs incurred after July 31,2001 (this amount being US

$597,125.09), on which amount interest shall run from the date hereof at the rate of 5% per annum until such time as the Claimant receives payment from the Respondent.

II. THE PARTIES

A. *The Claimant*

6. The Claimant in this matter is Zhinvali Development Limited, a corporation incorporated in the Republic of Ireland ("Ireland"), that has its principal place of business in Nicosia, Cyprus (Request for Arbitration, para. 6 at 3 (December 3, 1999) (the "Claimant's Request for Arbitration")).

7. The Claimant's Request for Arbitration described ZDL as a "consortium" of three companies: Profidev Ltd, an Irish corporation headquartered in Cyprus and an international project development company ("Profidev", of which Mr Ramzi Fares is President and Chief Executive Officer ("Mr Fares")); Infrastructure Capital Group, a United States corporation headquartered in Washington, DC and a developer of infrastructure projects ("ICG", of which Mr Ibrahim Elwan is Chairman and Chief Executive ("Mr Elwan")); and Harza Engineering Company, a United States corporation headquartered in Chicago, Illinois and a hydropower development and engineering firm ("Harza") (Claimant's Request for Arbitration, para 7 at 3)). It appears from the Claimant's audited financial statements that ZDL was incorporated on or about March 6, 1998 and that its shares are owned one third each by Profidev, ICG and Harza.

8. The Claimant's Request for Arbitration stated that ZDL was filing not only on behalf of itself but also on behalf of its three shareholders. (Claimant's Request for Arbitration, para. 7 at 3.) Because of its importance, the Tribunal addresses the propriety of this stance in Part VI.I.6. hereof.

B. *The Respondent*

9. The Respondent is the Government of the Republic of Georgia.

10. Presidential Ordinance No. 157 of April 21, 2000 authorized the City of Tbilisi Government to represent Georgia in "the relations with foreign investors in respect of Tbiltskalkanali, Ltd and... [the Project]". (ZDL Submissions at 105-6.) Tbiltskalkanali, Ltd, the Tbilisi water works utility, is the Georgian special purpose, corporate entity to which assets of the Project were transferred pursuant to Resolution No. 111 of the President of Georgia dated February 15, 1999 and Presidential Ordinance No. 157. All of the shares of Tbiltskalkanali, Ltd are owned by the Tbilisi Municipal Government (Transcript, February 12, at 465, Mr Maiashvili).

III. PROCEDURAL HISTORY

A. *Request for Arbitration*

11. On December 3, 1999, ZDL filed the Claimant's Request for Arbitration with the International Centre for the Settlement of Investment Disputes ("ICSID") in Washington, DC. The Respondent named in the Claimant's Request for Arbitration was the "Government of Georgia". ZDL submitted the Claimant's Request for Arbitration pursuant to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (575 UNTS 159) (the "ICSID Convention"). Both the Republic of Ireland and the Republic of Georgia are Contracting States to the ICSID Convention.

B. *Registration of Request for Arbitration*

12. On January 7, 2000, the Acting Secretary-General of ICSID, under Article 36(3) of the ICSID Convention, registered the Claimant's Request for Arbitration and, by letter of the same date, notified the Claimant and the Respondent (together, the "Parties") of such registration. Rule 6 of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) (the "ICSID Institution Rules") requires the Secretary-General of ICSID, subject to the payment of the necessary fee, either to register the request for arbitration or, "if he finds, on the basis of the information contained in the request, that the dispute is *manifestly outside* the jurisdiction of the Centre [to] notify the parties of his refusal to register the request and of the reasons therefor". (Emphasis added.)

13. As noted in the recent 2002 decision in *Mihaly International Corporation* v. *Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/00/2) (the *"Mihaly Case"):* "Such registration is naturally without prejudice to the further examination of arguments or evidence presented by the parties on issues of jurisdiction." *(Mihaly Case,* para. 57 at 18.) Thus, registration by the Secretary-General merely creates a rebuttable presumption of jurisdiction and does *not* restrict any later argumentation or evidence that jurisdiction is in fact lacking under the terms of Article 25(1) of the ICSID Convention. Issues of ICSID jurisdiction are analyzed in detail and decided in Part VI below.

C. *Appointment of Arbitrators*

14. Following earlier steps towards constituting the Tribunal, the Claimant, on March 7, 2000, pursuant to Rule 3(1)(a) of the 1984 Rules of Procedure for Arbitration Proceedings of ICSID (the "ICSID Arbitration Rules"), appointed Ambassador Andrew J. Jacovides, a national of the Republic of Cyprus, as arbitrator ("Ambassador Jacovides"). On March 9, 2000, the Acting Secretary-General of ICSID informed the Respondent by letter that the arbitral tribunal (the "Tribunal") was to be constituted in accordance with Article 37(2)(b) of the ICSID Convention. On May 9, 2000, the Respondent accordingly appointed Professor Seymour J. Rubin, a national of the United States of America, as the second arbitrator ("Professor Rubin"). Ambassador Jacovides and Professor Rubin, with the agreement of the Parties, appointed, on May 23, 2000, the Honorable Davis R. Robinson ("Mr Robinson"), a national of the United States of America, as the President of the Tribunal.

15. On June 9, 2000, in a letter to the Parties, the Deputy Secretary-General of ICSID confirmed the acceptance by Ambassador Jacovides, Professor Rubin and Mr Robinson of their respective appointments (together, the "Three Arbitrators") and deemed the Tribunal constituted as of that date. The Deputy Secretary-General chose Ms Margrete Stevens, Senior Counsel of ICSID, to serve as Secretary of the Tribunal (the "Secretary"). Subsequent written communications between the Parties and the Tribunal were directed through the Secretary.

D. *First Session of the Tribunal*

16. Pursuant to Rule 13(1) of the ICSID Arbitration Rules, the Tribunal, in accordance with the agreement of the Parties, held its first session in Washington, DC on December 19, 2000 (the "First Session"). The holding of the First Session was delayed by suspension in the proceedings to allow settlement negotiations between the Parties, which in the event failed to succeed. In attendance at the First Session were the Three Arbitrators, the Secretary of the Tribunal, Mr Fares on behalf of ZDL, Messrs Scott Morton and Kim Landsman as Claimant's foreign Counsel, Messrs Kakha Aslanishvili and Alexander Sekhnishvili as Respondent's Georgian Counsel, and John W. Polk as Respondent's foreign counsel. As required under Rule 6 of the ICSID Arbitration Rules, each of the Three Arbitrators executed the necessary declaration and the Secretary of the Tribunal presented copies to the Parties and their Counsel in Washington, DC before the convening of the First Session.

17. Al the First Session, the Parties acknowledged the due constitution of the Tribunal in accordance with the relevant provisions of the ICSID Convention and the ICSID Arbitration Rules.

18. During the First Session, the Respondent raised questions concerning the declaration of Ambassador Jacovides. The declaration recited in Rule 6 of the ICSID Arbitration Rules calls, among others, for a "statement" by each arbitrator of "past and present professional, business and other relationships (if any) with the parties". In response, Ambassador Jacovides added the following hand-written sentence at the end of his declaration: "No professional or business relationship but I have a casual, social acquaintance with Mr Ramzi Fares."

E. *Respondent's Proposal to Disqualify an Arbitrator and its Dismissal and Denial*

19. On December 22, 2000, after the conclusion of the First Session, the Respondent, under the first sentence of Article 57 of the ICSID Convention and under Rule 9 of the ICSID Arbitration Rules, submitted to the Secretary-General of ICSID the Respondent's proposal to disqualify Ambassador Jacovides from serving as an arbitrator in this case (the "Respondent's Disqualification Proposal"). In the Respondent's Disqualification Proposal, the Respondent stated: "It is quite clear that Mr Fares is the central player in this dispute, and that his credibility will be extremely important to ZDL's case and the outcome of this arbitration." The Respondent cited an oral elaboration of the hand-written note that Ambassador Jacovides provided at the First Session and that the Respondent's Disqualification Proposal described as follows: "At the [First Session], Ambassador Jacovides said that he attended a dinner party with Mr Fares and occasionally sees Mr Fares at informal meetings.

He commented that 'Cyprus is a small place.'" The Respondent went on to argue that there was a "substantial risk" that Ambassador Jacovides' "contacts with Mi-Fares... will affect Ambassador Jacovides' independent judgment in this case".

20. In pursuing this argument, the Respondent's Disqualification Proposal referred to the standard for ICSID arbitrators set forth in Article 14(1) of the ICSID Convention which stipulates in pertinent part:

> Persons designated to serve on the Panels shall be persons of high moral character... *who may be relied upon to exercise independent judgment...* (Emphasis added.)

21. In a December 27, 2000 letter, Ambassador Jacovides commented upon the Respondent's Disqualification Proposal, as contemplated under Rule 9(3) of the ICSID Arbitration Rules. In that letter, he confirmed his earlier statements and added:

> My only additional comment is that it is my impression that Mr Fares is not from Cyprus... Also that in the past few years I have not resided in Cyprus during the bulk of the time.

22. On December 29, 2000, the Claimant submitted its opposition (the "Claimant's Opposition") to the Respondent's Disqualification Proposal. The Claimant's Opposition adopted the following position: "A casual social acquaintanceship is not a sufficient basis for casting aspersions on Ambassador Jacovides' ability to exercise independent judgment and therefore is not a sufficient basis for disqualification."

23. Following these submissions, in keeping with Rule 9(4) of the ICSID Arbitration Rules, Mr Robinson and Professor Rubin (the "Two Arbitrators"), without any participation from Ambassador Jacovides, thoroughly considered the Respondent's Disqualification Proposal and the Claimant's Opposition. In their decision dated January 19, 2001, the Two Arbitrators referred to Article 57 of the ICSID Convention which supports a proposal of disqualification only in the instance of "any fact indicating a *manifest lack of the qualities* required by paragraph (1) of Article 14". (Emphasis added.) The Two Arbitrators concluded that the facts surrounding the Respondent's Disqualification Proposal failed to meet the test established by Article 57.

24. In reaching this conclusion, the Two Arbitrators regarded the use of the word "manifest" in Article 57 of the ICSID Convention as of particular significance and took note of certain dictionary definitions - *e.g., Webster's New Collegiate Dictionary* at 286 (1949): "manifest" is a word that "implies a display so evident that seemingly no inference is involved"; and *Black's Law Dictionary* at 1115 (4th Ed. 1951): "manifest" is "that which is clear and requires no proof; that which is notorious". The Two Arbitrators found that the Respondent had provided no argumentation or citation to precedent as to why a "casual, social acquaintance" should be held to constitute a "manifest" lack of reliability as to "independent judgment". Further, they viewed the Respondent's position, on the facts before them, as pure speculation necessitating the creation of the very inferences that the common definition of the word "manifest" does not in its ordinary meaning permit. The Two Arbitrators held that the Respondent failed to meet its burden of proof, and that

the reported ruling in the 1982 ICSID case *of Amco Asia Corporation and Others* v. *Republic of Indonesia* (ICSID Case No. ARB/81/1) (the *"Amco Case"),* while of no binding effect, by comparison made their decision to deny and to dismiss the Respondent's Disqualification Proposal an *a fortiori* result.

F. *The Written Procedure*

25. The written procedure phase of the case followed the pattern established by Rule 31 of the ICSID Arbitration Rules. Also, under Rule 26, the time limits for the submission of each pleading were set by the Tribunal after consultation with the Parties.

26. The Claimant filed its memorial, and accompanying documentary evidence, on June 1, 2001 (the "Claimant's Memorial"). On July 31, 2001, the Respondent submitted its counter-memorial (the "Respondent's Counter-Memorial"). A second round ensued, with the Claimant tiling a reply brief on August 31, 2001 (the "Claimant's Reply"), and with the Respondent (following a requested and granted delay) tiling a rejoinder and accompanying documents on January 15, 2002 (the "Respondent's Rejoinder"). The Respondent's Rejoinder, submitted after the Respondent chose new foreign legal counsel, the firm of Norton Rose of London, England, contested ICSID's jurisdiction over this case.

G. *Claimant's Request for Confidential Treatment*

27. On August 31, 2001, in a cover letter accompanying the Claimant's Reply, Claimant's Counsel requested that the Tribunal withhold from the Respondent a "confidential" volume of supporting documents submitted with the Reply. Claimant's Counsel alleged in that cover letter:

> The second volume is of highly confidential material. As stated in our Reply Memorial, we have attempted to negotiate a confidentiality agreement with Georgia, but have received no response from the other side. We have put the confidential volume in an envelope to be kept under seal since... it contains proprietary information of great value.

Pending clarification of this issue, the Secretary did not distribute the "confidential" volume to the members of the Tribunal or to the Respondent or its Counsel.

28. After further negotiations between the Parties, Respondent's Counsel responded on October 26, 2001 to the Claimant's August 31, 2001 request. In announcing its objection, Respondent's Counsel argued that, in order to present its case, both in relation to the merits of the dispute and in relation to damage issues, Counsel needed "to review with our clients all material relating to the dispute". Respondent's Counsel added that "experts of the Respondent also had to review all the materia] in order for them to be able to fulfill their role". Thus, Respondent's Counsel concluded that Georgia would be prejudiced in making its case if denied access to the material concerned.

29.

Counsel for Claimant replied on October 29, 2001 and argued:

> Respondent should not be allowed to gain valuable information through the arbitration process that it would not otherwise get without appropriate compensation... This arbitration arose because Respondent breached its obligation to award to ZDL the work of rehabilitating and operating the Tbilisi hydroelectric plant...

Counsel for Respondent in a letter dated November 1, 2001 called for a ruling by the Tribunal in order to assist the Parties in negotiating and concluding a proper confidentiality agreement.

H. *Respondent's Request for Extensions in Time in Filing Rejoinder and in Oral Procedure*

30. In a separate letter of the same date, Counsel for the Respondent cited the need to retain experts with regard to any calculation of damages, who would necessarily have to undertake a comprehensive review of the confidential material in order to prepare their reports for the Respondent. Thus, Counsel argued, the Respondent would not be in a position to finalize its Rejoinder until these expert reports were prepared as they would inevitably form the basis of the Respondent's submissions on quantum. As a result of these concerns, Counsel for the Respondent, pursuant to Rule 42(2)(a) of the ICSID Arbitration Rules, asked in this second November 1, 2001 letter for an extension of time for the preparation of its Rejoinder until 21 days after the release of the Claimant's confidential material to the Respondent and its Counsel and further requested that oral argument be delayed from a then scheduled December 2001 commencement date until March 2002.

31. On November 5, 2001, Counsel for the Claimant sought a denial from the Tribunal of any such delay because the circumstances cited by Georgia's Counsel were, according to Claimant, entirely of Georgia's own making. Cancellation or postponement of the December hearing date would, Claimant's attorneys claimed, cause ZDL to incur serious additional expense and inconvenience and averred that Respondent's request was part of a consistent pattern of dilatory conduct by Georgia since the commencement of this arbitration. Counsel noted that the time for Georgia to submit a Rejoinder had expired over a month before Norton Rose even appeared as Counsel for Georgia (Georgia informed the Tribunal of Norton Rose's appointment on October 10, 2001). Counsel for Claimant argued that where, as in the case of Georgia's Rejoinder, the time limit had already expired, any extension could only come under Rule 26(3), which provides:

> Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, *in special circumstances* and after giving the other party an opportunity of staling its views, decides otherwise. (Emphasis added.)

The November 5 letter took the position that a party should not be permitted to invoke difficulties of its own making as "special circumstances" in seeking to justify "extensions which the rule would otherwise reject".

32. In a response dated November 7, 2001, Counsel to the Respondent postulated that "natural justice" required that the Respondent have the opportunity to submit in Rejoinder as there were, according to Georgia's new foreign lawyers, a large number of points raised in previous pleadings demanding a response. Counsel also noted: "Our clients have not been involved in an ICSID arbitration before and so are clearly unfamiliar with the procedures to be followed."

33. On November 9, 2001, Counsel for the Respondent informed the Secretary that on November 1, 2001:

> [A]ll Ministers of the Georgian Parliament, including the Minister of Justice, were dismissed by the President of Georgia... Consequently, any decision-making on matters such as this dispute are incredibly difficult and time consuming to obtain.

34. Counsel for the Claimant responded in a letter dated November 13, 2001 to the Norton Rose letters of November 7 and November 9. In that November 13 letter, Counsel for the Claimant rejected the arguments set forth by Counsel to the Respondent and saw no reason for any further delay.

I. The *Tribunal's Decision on Confidentiality and on Extensions in Time*

35. Following upon this round upon round of correspondence related to the Claimant's request for confidential treatment, and the Respondent's request for extensions in time, the Tribunal concluded as follows in a decision dated November 15, 2001:

> i. The Tribunal denied the Claimant's request for the confidential treatment that it proposed on the grounds that fundamental fairness required that the Respondent have access to any evidence that the Claimant decided to produce for consideration by the Tribunal in the rendering of the Tribunal's award. The Tribunal noted its preference that the Claimant and the Respondent achieve a mutually acceptable confidentiality agreement, but, if not possible, then the Claimant must decide what documents, if any, from those for which it previously proposed confidential treatment, it would produce as evidence.
>
> ii. The Tribunal granted the Respondent's request for extensions in lime (a) in the filing of a Rejoinder and (b) in the scheduling of the oral procedure. The Tribunal, while reducing the amount of time requested by the Respondent for its extensions, emphasized the fundamental requirement that a party have a fair and reasonable opportunity to present its case. In granting these extensions, the Tribunal found the presence of "special circumstances" within the meaning of ICSID Arbitration Rule 26(3).

J. *Conclusion of Confidentiality Agreement Between the Parties*

36. Following this decision, correspondence continued between the Parties as to the terms of a confidentiality agreement. Finally, on December 4, 2001, the attorneys for the Claimant and the Respondent concluded such an agreement that applied to all information, documents and things submitted by ZDL and its affiliated entities (the "ZDL Materials"). The Confidentiality Agreement restricted access to the ZDL Materials to a limited described group and solely for the purpose of the arbitration. The Parties agreed that ICSID had jurisdiction to interpret and enforce the Confidentiality Agreement but that nothing in the Confidentiality Agreement was to prejudice any remedy to which a Party might be entitled in the ultimate Award.

37. Following the conclusion of the Confidentiality Agreement, Counsel for the Claimant on December 7, 2001 forwarded to the Secretary a further three volumes of confidential documentary evidence which were distributed to the Tribunal, the Respondent and Respondent's Counsel along with the confidential volume submitted on August 31, 2001.

K. *Claimant's Provisional Measures Motion*

38. On December 17, 2001, the Claimant filed a motion for a recommendation of provisional measures under Articles 26 and 47 of the ICSID Convention and under Rule 39 of the ICSID Arbitration Rules (the "Provisional Measures Motion"). The Claimant took this step, it said, "to preserve its rights against a recent attempt by Respondent Government of Georgia to usurp this Tribunal's exclusive jurisdiction". 'flic Claimant asserted that it had learned that "a litigation was commenced in the Georgian Courts... by Tbilisi Waler Utilities Ltd. against the City of Tbilisi Government to declare cancelled" an agreement into which the Claimant and the Respondent had entered on May 26, 2000 (the "May 26, 2000 Agreement"). The Claimant noted that the defendant in the Georgia court action represented the Respondent in this ICSID proceeding under a delegation of authority from the President of Georgia. The Claimant alleged that the stock of Tbilisi Water Utilities Ltd, the plaintiff in the Georgia lawsuit and otherwise known as Tbiltskalkanali, was itself 100% owned by the Respondent and that the Georgia action was "essentially a governmental entity suing itself-intended to take the decision concerning the validity and effect of the contract (the May 26, 2000 Agreement] away from ICSID". Furthermore, according to the Claimant, it was named as a "third person" in the Georgia lawsuit, "presumably because it has an interest in that contract and in an attempt to bind ZDL to the judgment".

39. Following the Respondent's request and within time limits set by the Tribunal, the Respondent, on January 4, 2002, submitted its observations on the Claimant's Provisional Measures Motion. In those observations, the Respondent look the position that the Plaintiff in the Georgia action was a "completely separate legal entity from the Respondent" and that "under Georgian law, the shareholders of a company cannot represent or control the company in question".

40. In response, on January 10, 2002, the Claimant submitted a declaration of Lasha Gogiberidze, Counsel to ZDL in the case before the Georgia court. The declarant stated:

> In Georgia, as may be true elsewhere, the sole shareholder may not necessarily "directly" control the actions of the company it owns, but there are ample practical and legal safeguards

to ensure that the owner's interests are protected and the owner's instructions are followed.

The declaration reported that the City of Tbilisi Government had not "vigorously defended" the litigation in the Georgia courts and that, at a hearing on motions submitted by the Claimant to dismiss the litigation on the grounds of this pending arbitration and ICSID's exclusive jurisdiction: "The judge asked for Georgia's position on the motions, and its counsel replied that it 'abstained'."

41. On January 17, 2002, as ordered by the Tribunal on January 15, 2002, the Respondent submitted further observations, noting that the plaintiff in the Georgia action had granted a valid lease over the Project:

> [t]he validity of which lease has been confirmed by the Georgian Courts up to, at the earliest. May 2004... [and] they are now subject to a claim from the Claimant to the effect that pursuant to the terms of an agreement to which [the plaintiff in the Georgia action was] not even a party, [the plaintiff] must grant a lease over the same property (Zhinvali) and over the same period of lime, to the Claimant. Indeed, it would be strange to say the least in these circumstances if the directors of [the plaintiff] had not commenced legal proceedings to have the [May 26, 2000] agreement annulled.

42. On January 22, 2002, Claimant's Counsel reported to the Secretary of the Tribunal that Counsel had been informed that the judge in Georgia had decided in favor of the plaintiff and that a written decision was due within 14 days, following which ZDL as a "third person" in the Georgia lawsuit, would have 30 days to file an appeal

43. On January 23, 2002, Respondent's Counsel confirmed that the Regional Court of Tbilisi in Georgia had:

> ruled that the May agreement dated 26 May 2000 was null and void... The action filed before the Regional Court has been the subject of determination and the action has therefore now been concluded. There is, therefore, no pending action which can be withdrawn or suspended.

44. In keeping with Rule 39(2) of the ICSID Arbitration Rules, the Tribunal gave priority consideration to the Provisional Measures Motion. In issuing its recommendation and order on January 24, 2002, the Tribunal noted that the status and interpretation of the May 26, 2000 Agreement might play a significant role in the resolution of this dispute. The Tribunal expressed concern at the possible adverse effect that any final judgment in the Georgia lawsuit might have upon the Claimant's rights and interests, especially in light of its position as a "third person" in that action. The Tribunal emphasized the significance of Article 26 of the ICSID Convention. This Article provides in pertinent part: "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration *to the exclusion of any other remedy."* (Emphasis added.) Furthermore, Article 47 of the ICSID Convention stipulates: "Except as the Parties otherwise agree, the Tribunal may, *if it considers the circumstances so require,* recommend any provisional measures which should be taken *to preserve the respective interests of either party"* (Emphasis

added.)

45. In its ruling, the Tribunal found the necessary "circumstances" under Article 47. As a result, the Tribunal recommended (1) that the Georgia court stay and suspend its proceedings insofar as any issues pending before the Tribunal were concerned and (2) that the Respondent immediately bring the Tribunal's recommendation to the attention of the Georgia court so that it might take into account what appeared to the Tribunal as the "exclusive" jurisdiction of ICSID over issues that any final judgment in the Georgia lawsuit might otherwise implicate in a manner that was prejudicial to the Claimant. The Tribunal took cognizance of the fact that the January 18, 2002 oral decision by the Georgian Court was not final and was subject to appeal.

46. Claimant's Counsel, in a letter dated September 23, 2002, informed the Tribunal that the Tbilisi Regional Court had vacated the lower court's January 2002 ruling.

L. *Dispute over Production of an Electronic Version of a Financial Model of the Claimant*

47. On December 20, 2001, Counsel for the Respondent wrote to the Secretary, noting that the confidential material received from the Claimant on December 7, 2001 contained a "financial model" for the proposed rehabilitation of the Project (the "Financial Model"), and reporting that the Financial Model clearly showed that it was prepared electronically. Counsel pointed out that Respondent's experts could only analyze the Financial Model in depth if they were provided with it in electronic hum, as only then could they review the various assumptions on which the Financial Model's preparation was based. In light of the fact, according to the December 20 letter, that it was standard practice to allow access to the electronic version of such material and bearing in mind that the contents of this Financial Model were covered by the December 4, 2001 Confidentiality Agreement between the Parties, Counsel for the Respondent failed to understand the Claimant's refusal to supply the electronic version. Consequently, the Respondent asked the Tribunal "for an order requiring the Claimant to disclose this electronic version to us without delay, to allow the necessary assessment of its contents to be started".

48. On December 21, 2001 the Tribunal invited the Claimant to submit its observations on the Respondent's December 20 request no later than January 4, 2002. In a letter on that date, Counsel for the Claimant described the Financial Model as:

> ... an analytical tool that provides a complete analysis of projects... It has been developed by ICG at considerable expense, which is to be recovered from several projects... Such models are at the core of the competitive position of development firms and standard practice is to treat them as strictly proprietary... ICG has never divulged the electronic form of the Financial Model to third parties past and cannot do so now.

49. Following a reply from Respondent, Counsel to the Claimant on January 11, 2002, filed further

observations noting:

> The principal use of the Financial Model is not to calculate ZDL's lost profits. The Financial Model was constructed to determine whether the project was viable to ZDL and to present to the lenders so that they can be comfortable in providing the loan.

In this January 11 letter, the Claimant provided a calculation of lost profits which it said was prepared without reference to the Financial Model.

50. In a January 17, 2002 response to Claimant's January 11 letter, attorneys for Respondent referred to the following statements in the Claimant's Memorial:

> ZDL estimates the present value of its lost profits to be at least US $23 million. That number was calculated by constructing a detailed financial model... The assumptions and inputs for the model... provide guidance for calculating ZDL's lost profits...Claimant's Memorial at 37-8.)

It was thus clear, according to the Respondent, that "the financial model is the basis for evidencing the Claimant's loss of profit claims".

51. After reviewing these extensive points and counterpoints, the Tribunal, on January 24, 2002, issued its "Order on Respondent's Request for the Electronic Version of the Financial Model". The Tribunal wrote:

> Either the Financial Model is relevant to the Claimant's calculation of lost profits or It is not. It is the Claimant that has submitted the financial model into evidence in support of its claim, not the Respondent. If the financial model does have relevance to the Claimant's calculation of lost protits, then fundamental fairness requires that the Respondent have access to the financial model *and* to those constituent elements on which it is based. Otherwise, the Respondent will *not* have the necessary opportunity to test the assumptions of the financial model and the calculations thereunder:

52. Consequently, in its Order, the Tribunal decided:

> To the extent that the financial model has any effect on the Claimant's calculation of lost profits, the Claimant is ordered to provide the electronic version to the Respondent no later than... January 28. If, on the other hand, the Claimant concludes that the financial model does *not* impact this calculation and, therefore, does not provide the electronic version to the Respondent by that time, then the Tribunal will *not* take into account the financial model in ascertaining the quantum of damages, if any. owing to the Claimant by way of lost profits...

53. On January 29, 2002, the lawyers for the Respondent informed the Secretary of the Tribunal that the Claimant had *not* provided the electronic version of the Financial Model.

M. *Correspondence After the Filing of the Respondent's Rejoinder and Before the Commencement of the Oral Procedure*

54. Following the filing of the Respondent's Rejoinder on January 15, 2002, there ensued extensive correspondence not only with respect to issues emanating from the contents of that pleading but also with respect to the structuring and managing of the Oral Procedure.

55. On January 18, 2002, Counsel for the Respondent requested the production of "a number of documents for inspection and copying", pursuant to Rule 34(2) of the ICSID Arbitration Rules. The list of documents requested was extensive. As events developed, the Claimant did not produce the requested documents.

56. On January 23, 2002, Counsel for the Respondent wrote to the Secretary of the Tribunal outlining areas of disagreement between the Parties "on matters relating to evidence and procedure...".

57. On January 23, 2002, Counsel for the Claimant wrote to the Secretary of the Tribunal with respect to four evidentiary issues which it believed required decision by the Tribunal:

> 1. Whether Respondent should be allowed to introduce expert testimony without having submitted expert witness reports by, at the latest, the lime the Respondent's Rejoinder was due;
>
> 2. Whether Respondent should be allowed to introduce fact testimony solely by written statement without making the witness available for cross-examination;
>
> 3. Whether Claimant should be permitted to introduce some of its direct evidence by oral testimony supplementary to the written witness statements; and
>
> 4. Whether the Claimant should have the opportunity to introduce evidence in rebuttal to that of the Respondent.

58. In another letter of the same date, Counsel for the Respondent addressed the issue of burden of proof and certain other evidentiary matters.

59. On January 25, 2002, the Secretary, at the instruction of the President, called, among others, for the submission of a list of witnesses and for written statements of all witnesses and experts by given dates, with which the Parties later complied.

60. On January 25, 2002, Counsel for the Respondent advised the Secretary of the names of the experts who would provide oral testimony at the hearing.

61. On the same date, Counsel for the Respondent wrote further with regard to the admissibility of factual witness evidence. In explaining why a number of factual witnesses would not be available

for cross-examination at the Oral Procedure, Respondent's Counsel explained:

> It is clearly impractical (and frankly too expensive) for the Respondent to put forward a large number of witnesses, all of whom are resident in Georgia, for a hearing in Washington... Further, some of these witnesses have either never worked with the Respondent or no longer work for the Respondent and the Respondent is therefore unable to compel their attendance.

62. On January 25, 2002, the Secretary of the Tribunal wrote to the Parties on behalf of the Tribunal regarding the structure of the forthcoming hearing.

63. On January 28, 2002, Counsel for the Claimant objected by letter to the contents of the Respondent's Rejoinder and requested that the "Tribunal strike or disregard those portions of Respondent's Rejoinder that far exceed the permissible scope of such a pleading by inappropriate introduction of new factual issues and legal theories...". The Claimant asserted that this injection of new factual issues and new documentary submissions, served less than a month before the scheduled Oral Procedure, was prejudicial to ZDL's ability to respond and to rebut. In citing Rule 31(3) on the scope of a Rejoinder, the Claimant argued: "... the purpose of responsive pleadings is to narrow the issues in dispute, not to expand them...", The Claimant charged that the Respondent had taken unfair advantage of the extensions in time granted by the Tribunal.

64. With regard to the Respondent's challenge to ICSID's jurisdiction on the basis of a purported lack of consent by Georgia, the Claimant, in this January 28, 2002 letter, cited Rule 41 of the ICSID Arbitration Rules as governing the timing of objections to the Tribunal's jurisdiction, subsection (1) of which requires the filing of an objection "no later than... the filing of the Counter-Memorial". The Claimant, therefore, requested that the Tribunal disregard this "untimely objection to its jurisdiction". The Tribunal reports its handling of this issue in Part VI.F.

65. On January 29, 2002, the President of the Tribunal asked the Respondent to reply to the Claimant's January 28 letter no later than February 4, 2002.

66. On January 31, 2002, Counsel for the Respondent replied:

> Article 41 of the Rules envisages the Tribunal hearing challenges to jurisdiction during the hearing on the merits and given that, in our view, the issues require little debate (either the [Georgian] Concession Law, Article 19, applies such that the Tribunal has no jurisdiction or it does not), we repeat our submission that no prejudice will be incurred by the Claimant in the event this issue is raised during the oral hearing.

67. On January 29, 2002, Counsel for the Claimant submitted a letter outlining in detail the evidence that the Claimant intended to produce at the oral argument. On the same date, Counsel for the Respondent similarly outlined the evidence that it intended to produce.

68.

On February 1, 2002, the Secretary informed the Parties and their Counsel:

> The President of the Tribunal, after consultation with its other members, has asked me to convey the President's concerns as to the feasibility and advisability of proceeding with the oral hearing during the week of February 11, 2002 under circumstances where there are apparently many substantive and evidentiary issues either unresolved between the parties or not fully digested or developed at this time.

The Parties thereafter conveyed their desire to proceed with the hearing as scheduled.

69.

On February 4, 2002, Respondent's Counsel submitted a letter, noting that the Parties had, as requested, "exchanged lists of issues which remained to be determined by the Tribunal" and that "neither Georgian law expert is to appear at the hearing...". The issues which, according to Respondent's Counsel, remained outstanding were:

> (1) the admissibility of witness statements in the event witnesses are not available to be cross-examined;
>
> (2) whether the Respondent's Rejoinder stands in full;
>
> (3) the position with regard to jurisdiction;
>
> (4) the position with regard to expert testimony;
>
> (5) the status of the Financial Model;
>
> (6) the position with regard to further witness evidence being adduced which is not contained in the written statements;
>
> (7) the conduct of the hearing and the purpose of the first round of submissions and of the second round of submissions;
>
> (8) discovery from the Claimant which to date the Respondent had not received; and
>
> (9) confirmation from the Tribunal that the Respondent's pleadings are "in evidence".

70.

On February 4, 2002, Counsel for the Claimant provided its list of issues requiring a Tribunal decision:

> (1) whether to admit witness statements without the presence of those witnesses at the oral hearing;
>
> (2) whether to strike portions of the Respondent's Rejoinder, "especially Norton Rose's effort to sneak in 'expert' testimony (regarding project finance practices] through legal argument";
>
> (3) whether Respondent's objection to jurisdiction may be considered; and

(4) whether Respondent should be allowed to introduce expert testimony without having submitted expert witness reports by the time the Rejoinder was due.

71. On February 4,2(X)2, the Claimant provided witness statements from the following individuals: Ramzi Fares, President and Chief Executive Officer of Profidev and Chairman of ZDL, and Ibrahim I. Elwan, Chairman and Chief Executive of the ICG; and the expert opinion of Shalva Chikvashvili, a Professor of Law at Tbilisi State University in Tbilisi, Georgia.

72. On the same date, the Respondent submitted witness statements from: Mikheli Ukleba, former Minister of State Property Management of Georgia; luri Maisashvili, head of the Tbilisi State Properly Management Oilice; George Sheradze, Premier of Tbilisi and Chairman of the Tbilisi Municipal Government; Paata Tsintzadze, Commissioner of the Georgia National Energy Regulatory Commission ("GNERC"); Alexander Kobaidze, Deputy Chairman of the Supervisory Board of Zhineri Ltd, the lessee of the Project; Temur Chichinadze, Chairman of the Supervisory Board of Zhineri Ltd; and Irma Kavtaradze, former Deputy Minister of State Property Management of Georgia. The Respondent also submitted an expert opinion from Professor Makvala Kakhadze, Dean of the Faculty of Law at Grigol Robakidze University in the Republic of Georgia; a technical expert report by GEO Engineering; and an expert report from the accounting firm of KPMG of London. England.

73. On February 5, 2002, Counsel for the Claimant wrote to the Secretary complaining about the lack of any summary from the Respondent of its experts' evidence.

74. On February 5, 2(X)2, Respondent's attorneys informed the Tribunal of the names of the individuals who were to attend the hearing in Washington on behalf of the Respondent.

75. In a February 5, 2002 letter to the Parties and their Counsel, the Secretary reported the Tribunal's decision, in keeping with the Parties' wishes, to proceed as scheduled with the February 11, 2002 hearing. The Secretary also reported the Tribunal's decision that, pursuant to Rule 41(2) of the ICSID Arbitration Rules, the Tribunal would consider during the Oral Procedure whether the dispute before It was within the jurisdiction of the Centre and that, at the conclusion of the Oral Procedure, because of the lateness with which the Respondent had raised the issue, the Tribunal would set an expedited schedule for post-hearing written pleadings. The Tribunal's analysis and decision on ICSID jurisdiction are found in Part VI hereof.

76. On February 6, 2002, the Secretary of the Tribunal informed the Parties in furtherance of the letter of February 5, 2002, that "... the Tribunal will decide all evidentiary and procedural questions as they may arise, upon objection of one party or the other, during the course of the oral procedure". This reflected the judgment of the Tribunal as to how best to deal with the many such issues raised by the two Parties in the correspondence previously described.

77. On February 6,2002, Counsel for the Claimant asked for the "worksheets and my other back-up materials used to create the tables" attached to the documentation supplied by KPMG. On the same date, Counsel for the Respondent inquired whether "factual witnesses will not be allowed to be present at the hearing until after they have completed giving all their evidence".

N. *The Oral Procedure*

78. On November 30, 2001, the Secretary informed the Parties of the President's fixing of Monday, February 11, 2002 as the date for the commencement of the oral hearing, which took place at the seat of the Centre at the World Bank's headquarters in Washington, DC from February 11, 2002 through February 15, 2002.

79. Appearing on behalf of the Claimant at the Oral Procedure were Scott Horton, Kim J. Landsman and Clare Saperstein of the law firm of Patterson, Belknap, Webb & Tyler LLP of New York, New York; and Lasha Gogiberidze and Constantine Rizhinashvili of the Georgian Consulting Group law office of Tbilisi, Georgia. And appearing on behalf of the Respondent at the Oral Procedure were Juliet Blanch, Bruce MacCauley and Charlotte Martin of the law firm of Norton Rose of London, England; and Victor Kipiani and Irakli Mgaloblishvili of the law firm of Mgaloblishvili, Kipiani, Dzidziguri of Tbilisi, Georgia.

80. Witnesses presented by the Claimant at the Oral Procedure were Ibrahim Elwan, Ramzi Fares, Dr Achilles Adamantiades, Director of Engineering for ICG, and Constantine Rizhinashvili. Witnesses for the Respondent at the Oral Procedure were Iuri Maisashvili, Paata Tsintzadze and Omar Kutsnashvili of GEO Engineering. Expert testimony was provided for the Respondent by Jim McCredie, technical construction expert from KPMG of London, England, and Philip Haberman of the forensic accounting unit of KPMG of London, England.

81. At the first day of the Oral Procedure on February 11, 2002, the Tribunal orally issued procedural rulings in response to some questions which the Parties had raised in their earlier correspondence and for which they sought a Tribunal ruling at the start of the hearing. The Tribunal:

- allowed the introduction of a witness statement even though the witness was not available for cross-examination at the hearing;

- with the concurrence of both Parties, allowed witnesses and experts scheduled to testify at the Oral Procedure to be present for the entire Oral Procedure because of the special circumstances of this case;

- decided at a future time to rule (a) as to whether to strike portions of the Respondent's Rejoinder for lateness and (b) as to whether to consider expert testimony whose summary reports were not attached to the Rejoinder;

- decided that if the Claimant used the Financial Model for any purpose, the Claimant must deliver the electronic version to the Respondent or the Tribunal would decide what, if any, evidentiary weight to give to the Financial Model;

- allowed brief introductory remarks by a witness that might be repetitive of his or her witness statement;

- allowed witnesses for rebuttal purposes so long as no prejudicial surprise occurred.

82. During the hearings, the Tribunal posed questions to the Parties which were either answered at the Oral Procedure or were later addressed in their post-hearing briefs.

83. Full verbatim transcripts were made of the Oral Procedure and were promptly distributed to the Tribunal, to the Parties and to their Counsel.

84. A Russian language translator participated in the oral hearing, which was conducted in English.

85. On March 4, 2002, the Secretary of the Tribunal forwarded to the Parties and their Counsel summary minutes of the Oral Procedure held from February 11 through 15, 2002, which minutes the Tribunal had previously approved.

O. *Post-Hearing Written Pleadings*

86. With the agreement of the Parties, the Tribunal, before the conclusion of the Oral Procedure, set a date for the simultaneous filing of post hearing written pleadings which ultimately took place on March 26, 2002. The Parties thereafter agreed upon the submission of post-hearing reply briefs.

87. In the meantime, the March 15, 2002 decision in the *Mihaly Case* was brought to the attention of the Tribunal and, thereafter, at the direction of the President, to the attention of the Parties and their Counsel. The post-hearing reply written pleadings were thereafter filed by both Parties on May 24, 2002.

IV. TRIBUNAL'S FINDINGS OF FACT AND HISTORY OF THE PROJECT

88. Before turning to the issues presented for decision by the Tribunal, the Tribunal hereinafter sets forth its understanding of the pertinent facts in this case. This is in keeping with Rule 47 of the ICSID Arbitration Rules which, among others, requires that ICSID tribunal awards contain "(g) a statement of the facts as found by the Tribunal...". The Tribunal sets forth these findings of fact in chronological order. The Tribunal's recitation presents uncontested facts except as otherwise indicated.

89. In August of 1997, Mr Ramzi Fares, President and Chief Executive Officer of Profidev, visited Tbilisi with a view to becoming involved in the privatization and rehabilitation of power plants. Profidev, ICG and Harza thereafter, on or about March 6, 1998, formed an Irish corporation, ZDL, in order to accomplish this goal. ZDL was the first significant foreign entity to show interest in the power sector of Georgia. (Claimant's Request for Arbitration, para. 2 at 2.) As former World Hank officials, Mr Fares and his colleague, Mr Ibrahim Elwan, Chairman and Chief Executive of ICG, had extensive experience in international project finance in developing nations such as the Respondent.

90. During Mr Fares' visit, Government officials of Georgia identified the Zhinvali Plant and Tailrace Tunnel, located about 40 kilometers from Tbilisi, "as being the highest on the list of its priorities". (Claimant's Request for Arbitration, para. 17 at 6.) The Tailrace Tunnel had seriously deteriorated over the years since completion in 1986 (Claimant's Request for Arbitration, para. 2 at 2) and the

Plant was operating at only about one-half of its installed capacity of 130 megawatts. (Claimant's Request for Arbitration, para. 18 at 6.) The Plant was constructed through a geological fault line and suffered frequent breakdowns. (Claimant's Memorial at 1.) Because of its vital importance, the main purpose of Zhinvali was to provide water to Tbilisi and its power generation capabilities were "ancillary", (Respondent's Rejoinder at 1.)

91. Zhineri Ltd, a limited liability Georgian company ("Zhineri"), has operated the Plant and Tailrace Tunnel since 1994, most recently under a lease from Tbiltskalkanali, Ltd (the Tbilisi water utilities company), another limited liability Georgian company, all of whose voting shares are, as previously noted, owned by the Tbilisi Municipal Government. Georgian court proceedings, begun by Zhineri in late 1999, confirmed the validity of Zhineri's lease until May 1, 2004. (Respondent's Rejoinder at 8.)

92. The sponsors of ZDL began to negotiate with Zhineri shortly after Mr Fares' first arrival in Tbilisi In October of 1997, representatives of the sponsors of ZDL. Zhineri and the Georgian Government met again in Tbilisi, at which time the sponsors of ZDL proposed to rehabilitate the Zhinvali Plant and Tailrace Tunnel through a privatization and project finance scheme which was a first-time experience for the Respondent. (Respondent's Rejoinder at 2.) Because Zhineri held the lease for the Zhinvali Project, Zhineri was a necessary party to any financing arrangements.

93. In these discussions, Mr Fares suggested that the sponsors of ZDL and Zhineri form a joint venture company, to which Zhineri would transfer its leasing rights. This special-purpose corporate entity was to serve as the "vehicle for carrying out (ZDL's) proposed investment in Georgia". (Respondent's Post-Hearing Brief, para. 9 at 3.) Mr Fares proposed that the joint venture company be called "Zhinvali Hydropower Limited" ("ZHL") and that ZDL initially should own 80% of the voting shares of ZHL and Zhineri 20%. (Respondent's Rejoinder at 8.) This joint venture company, ZHL, however, was never formed for reasons never made entirely clear to the Tribunal.

94. On October 15, 1997, a "Memorandum of Understanding Between Zhineri Ltd and Profidev Ltd & Infrastructure Capital Group & Harza for Improvement and Operation of Zhinvali Power Station and Development, Implementation, Operation and Exploitation of Power Stations in Georgia" (the "MOU") was executed. (ZDL Submissions at 1-3.) This occurred before the March, 1998 incorporation of ZDL. The MOU referred to an October 13, 1997 meeting in which the Claimant, with a "team of technical and financial experts", conducted "an initial sounding for joint development and investment opportunities for power generation projects in Georgia". In the MOU, Zhineri undertook to provide the Claimant "on an exclusive basis" with all pertinent background information and the Claimant in turn agreed to:

> submit... a proposal for a Joint Venture Company outlining the framework for the new company covering: corporate restructuring,... concession agreement, power purchase agreement, guarantees, tariff levels..., financing plan... and the structure of the security package needed to raise both debt and equity in the international capital markets and the timetable for moving forward. (ZDL Submissions at 1-3.)

95. On January 15, 1998, ZDL, as a follow-up to the MOU, sent a proposal to Georgia for either the purchase or long-term lease of the Project. (Claimant's Request for Arbitration, para. 21 at 7.) This

proposal was not submitted as an evidentiary document by either Party.[1]

96. In February 1998, representatives of the Claimant visited Tbilisi to negotiate with Georgia officials a plan to implement the January 15, 1998 proposal. (Claimant's Request for Arbitration, para. 22 at 7.) At these February meetings, the Claimant and the Respondent discussed the need for technical documentation and for a feasibility study that would support the Claimant's proposal.

97. On February 11, 1998, Zhineri entered into a second agreement with ICG, Profidev and Harza, collectively referred to as Zhinvali Development Group ("ZDG"). This was the so-called "Heads of Agreement" (the "HOA") (ZDL Submissions at 297-304). This agreement detailed the "modalities" of co-operation between Zhineri and ZDG. (Claimant's Memorial at 27.) Attached to the HOA was an updated "Proposal for the Privatization of the Zhinvali Hydro-Power Station" but, for reasons never explained, neither Party introduced the attachment as documentary evidence in this arbitration.

98. In the HOA, the parties agreed:

> - to cooperate in the collection of all pertinent information;
>
> - not to enter into any agreement or negotiate with anyone else regarding the Project without the other's consent during an "exclusivity period";
>
> - to prepare a detailed "project report" and the agreements comprising the "Security Package";
>
> - to arrange for the financing of the Project.

Under the HOA, the parties were to negotiate a joint venture agreement "prior to February 28, 1999" after ZDG had conducted its "due diligence" and had made a decision to proceed with the Project. The HOA contemplated that: "Additional shareholders may be brought in by ZDG to provide a portion of the equity financing necessary to construct the Project." Also, ZDG agreed to "defer fees until final closing and will be compensated by the joint venture for services performed on a commercially reasonable basis". (ZDL Submissions at 297-303.)

99. On the same February 11, 1998, Mr Fares wrote to Mr Nicholas Lekishvili, a State Minister of the Republic of Georgia:

> [W]e are keen to demonstrate our commitment to this project... [ZDL] is thus willing to begin expending the large sums of money required as soon as we have received an expression of the Government's firm commitment to the Project, without waiting for all the agreements to be finalized. (ZDL Submissions at 4-5.)

Mr Fares recalled:

> I sent that letter because I appreciated that our consortium would not be able to implement the project without first expending a tremendous amount of time, money and resources.

[1] The Respondent made the point in its Rejoinder that "It seems unusual that the Claimant has chosen not to attach this document to its pleadings, it. as it states, it contains such detailed proposals in relation to Zhinvali." (Respondent's Rejoinder at 10.)

> Because many of those expenditures would have to be incurred before the parties formalized any concession agreement, I felt compelled to inform Mr Lekishvili that our consortium would need a "Letter of Support" in which Georgia would express its acceptance of our consortium's role in the project and its commitment and support to it. (Witness Statement, Ramzi Fares, para. 34 at 9.)

100. On March 30, 1998, in keeping with his letter of February 11, 1998, Mr Fares wrote to Mr Lekishvili for the purpose of presenting a further updated "Proposal for the Privatization of the Zhinvali Hydropower Station". (ZDL Submissions at 7.) For reasons never articulated, neither of the Parties submitted this revised proposal into evidence either.

101. On April 7, 1998, State Minister Lekishvili expressed the Georgian Government's written support for the Claimant's proposal in terms drafted by Mr Fares:

> Given the high priority of the Zhinvali Hydropower Project, the Government is ready to begin negotiations of these agreements and looks for the completion of the negotiations as soon as possible. (ZDL's Submissions at 8 9)

In this letter (ZDL Submissions at 8-9), the Respondent stated: "... you can expect support from the Government in the following areas", which included: the transfer of the Project facilities to a joint venture company of ZDL and Zhineri by sale or lease; the issuance of a license by the Georgian National Energy Regulatory Commission; and the establishment of a tariff structure that would "allow full recovery of the investment and operational costs". (Claimant's Request for Arbitration, para. 27 at 9.)

102. On May 4, 1998, Mr Fares acknowledged Mr Lekishvili's letter as providing "our group with the basis to continue our future work on this project with the utmost speed" (Claimant's Request for Arbitration, para. 29 at 9) and proposed another ZDL team visit to Tbilisi. Mr Fares expressed the hope that, during the proposed next visit, the joint venture with Zhineri could be finalized and a Concession Agreement "concluded". (ZDL Submissions at 11-12.)

103. From May 11-17, 1998, representatives of ZDL visited Tbilisi and met with Mr Lekishvili and other Georgian leaders. According to the Claimant, "there was no mention of any competitive bidding for the project, or discussions with any other party...", (Witness Statement of Ramzi Fares, para. 48 at 12.)

104. On June 1, 1998, Mr Fares submitted to Minister Lekishvili a "Revised Proposal for the design, financing, rehabilitation and operation of the Zhinvali Hydropower Plant". The Claimant introduced this version into documentary evidence with its Memorial (the "Revised Proposal"). (ZDL's Submissions at 13-40.) This Revised Proposal called for a "long-term lease concession... as opposed to outright sale" in order to increase "the probability of securing" financing for the Project. The Revised Proposal estimated a "proposed investment of US $55-75 million", and emphasized the "strong interest" of the European Bank for Reconstruction and Development ("EBRD") in the Project. The June 1, 1998 Revised Proposal included sections devoted to such issues as the proposed

joint venture, the legal framework, the security package, long-term rights to the Plant and rehabilitation and upgrade plans. The Revised Proposal indicated that if ZDL were granted "a one-year exclusivity", ZDL would during that lime "complete all the necessary technical, legal and financial work and raise the total financing requirements for the implementation of the Project".

105. With regard to the security package, the June 1, 1998 Revised Proposal referred to 11 agreements in all. It provided two alternative solutions for the Tailrace Tunnel, one, the building of "a bypass tunnel to provide additional flow capacity" and, the other, the "shutting down" for one year of the existing facility to allow its upgrade to full capacity. (ZDL Submissions at 30.) The Revised Proposal foresaw three phases of the Project: "Development Phase, Tendering and Financial Closure Phase and Rehabilitation and Commissioning Phase". (ZDL Submissions at 31.) The Revised Proposal promised a more detailed study of Project feasibility "once exclusivity was granted". The June 1, 1998 Revised Proposal also stated: "Under limited recourse financing, the lenders and equity investors would look to the revenues of... [the joint venture company] for security in terms of servicing the debt... and providing a return on equity." (ZDL Submission at 35.) The Revised Proposal assumed "an Internal Financial Rate of Return" of "not less than 20%". (ZDL Submission at 17.)

106. In July of 1998, an official of the World Bank affiliate, the International Finance Corporation (the "IFC"), visited Georgia and inspected the plant with Mr Fares. (Claimant's Memorial at 25.)

107. On July 31, 1998, the Georgian State Minister for Fuel and Energy, Mr T. Giorgadze, wrote to the President of Georgia, Edward Shevardnadze, requesting that the President grant his consent to an exclusivity period of 9 months within which ZDL would develop and finalize its proposals. In seeking the President's approval, the Minister noted:

> "Company" Harzas (sic) is ready to start the construction work... Zhinvali Development Group has undertaken the obligation to attract investments and has accepted the offer of such prestigious organizations as EBRD and IFC on partnership in this project... Taking all the aforesaid into consideration, please give your consent on granting the priority right to the said group for 9 months. (ZDL Submissions at 41-2.)

108. On August 6, 1998, President Shevardnadze responded to Minister Giorgadze stating: "Due to the importance of the matter, grant your consent and provide every assistance in implementing the said project." (ZDL Submissions at 38.)

109. On August 10, 1998, in keeping with this instruction. Minister Giorgadze wrote to Mr Fares, communicating approval of a nine-month "exclusivity period" during which Georgia committed that "we will not enter into contract with third Party about the above-mentioned project". (ZDL Submissions at 44-5.) *This August 10, 1998 letter expressly addressed the issue of costs incurred by the Claimant during the exclusivity period:*

> We understand that on the first stage of project your consortium needs to carry out technical, legal and financial work. You have mentioned that this process may last 9 months during

> which *your group lakes commitment on its sole risk and cost to obtain required resources and financial means.* (Emphasis added.)

The Minister stressed the high priority to the Georgian Government of the Project and emphasized that "we are ready to begin negotiations about these [Project] agreements and we are looking forward to prompt completion of negotiations...".

110. On August 14, 1998, Mr Fares replied to Minister Giorgadze that ZDL was "urgently proceeding with its work...". (ZDL Submissions at 46.)

111. On September 21, 1998, Mr Fares wrote to Minister Giorgadze proposing an October visit in which EBRD representatives would accompany the ZDL team. Mr Fares reported that he expected to discuss with Georgia officials "the terms of the Concession Agreement" and "to continue with our technical work for the preparation of the feasibility report, on the basis of which we expect to secure the financing of the Project". (ZDL Submissions at 47.)

112. On October 2, 1998, ZDL sent a "Draft Concession Agreement Term Sheet" to Mr Giorgadze. The Draft Concession Agreement Term Sheet was a 22 page document containing 26 articles. (ZDL Submissions at 49 72.) Article 25.3, for example, confitmed the non recourse nature of the financing:

> ... there shall be no recourse against the initial shareholders or any investor or any of their stockholders... for any liability to the GOG [the Government of Georgia]..., it being acknowledged and agreed that the GOG shall only have recourse to the assets of the Company. (ZDL Submissions at 70.)

113. From October 4-17, 1998, representatives of ZDL and EBRD visited Tbilisi. (Claimant's Memorial at 25.)

114. On November 9, 1998, Mr Fares sent Minister Giorgadze a revised "Termsheet for the Concession Agreement" in both the English and Georgian languages. Mr Fares proposed a meeting in Tbilisi on November 16 to "hopefully finalize" the document. He also wrote that "we expect to finalize the feasibility study for the project very soon". (ZDL Submissions at 73.) For reasons never made entirely clear, the Parties never executed the termsheet, possibly as a result of ongoing difficulties between Zhineri and the Georgian Government as hereinafter described.

115. On Friday, November 20, 1998, ZDL and Georgia representatives continued negotiations in Tbilisi and Mr Elwan was, according to ZDL, invited to the Ministry of Fuel and Energy to execute the Concession Agreement the next day. (Claimant's Post-Hearing Brid at 15.)

116. On November 21, 1998, Mr Elwan and the ZDL team appeared at the Ministry of Fuel and Energy as invited but were directed to call first on Mr Mikhail Ukleba, Minister of the Ministry of State Property Management of Georgia ("MSPM"). Mr Ukleba informed the ZDL team that his Ministry was henceforth responsible for the Project. Until that time, the Claimant was under the impression

that the Ministry of Fuel and Energy was in charge. (Witness Statement of Ramzi Fares, paras. 72 and 73 at 19.) Minister Ukleba informed ZDL at this November 21, 1998 meeting that, in his view, the Project should be put out to competitive tender. According to the Claimant, this was the "first occasion on which ZDL was informed that GOG might not conclude the Concession Agreement by direct negotiation". (Claimant's Request for Arbitration, para. 44 at 12.) As a result of these developments, no Concession Agreement was executed at this November 21, 1998 Meeting.

117. On November 25, 1998, Mr Fares wrote to Minister Ukleba regarding the November 21 meeting and noted that MSPM would set the lease rental:

> at a level that would maximize the stream of revenues to the Government of Georgia over the concession period. This level would take into account the tariff set by the Government, and the need to cover debt service and operating costs, meet the financial performance indicators set by the lenders and provide an adequate compensation to investors. (ZDL Submissions at 77.)

Mr Fares also provided a status report on ZDL's work to date:

> The legal and financial frameworks for the agreements required to mobilise the financing required have been completed and are ready for negotiation with the Government. You will appreciate that our Consortium has borne the lull cost of all this work, which to date stands at over US $1 million. (Respondent's Rejoinder at 13.)

118. During late 1998, Harza performed a "Civil Engineering Inspection of the Tailrace Tunnel' (Claimant's Reply ay 8.) Harza documented the inspection

119. On December 3, 1998, the Premier of the City of Tbilisi, Mr Sheradze, submitted a report to President Shevardnadze outlining the critical importance of the Plant and the Tailrace Tunnel to Tbilisi and referred to the ZDL proposal as a cure for their dilapidated condition.

120. On December 4, 1998, the President responded to Premier Sheradze by ordering: "Present the Agreed Proposal." (ZDL Submissions at 79-80.)

121. On January 17, 1999, President Shevardnadze issued Presidential Decree No. 29 (ZDL Submissions at 81). The Decree declared: "Timely implementation of the reconstruction-rehabilitation works on the damaged part of the Zhinvali waler tunnel is of crucial importance for consistent water supply of Tbilisi..." Presidential Decree No. 29 referred to the work already carried out by ZDL and then issued the following specific instructions:

> 1. The rehabilitation works carried out by the "Zhinvali Development Group" on the Water Tunnel shall be approved.
>
> 2. The Ministry of Fuel and Energy of Georgia (T. Giorgadze), the Ministry of State Property Management (M. Ukleba) and the owners of the balance of the Basic Funds of Zhinvali Plant shall guarantee the execution of the Concession Agreement by the "Zhinvali Development

Group" within one month.

3.. The Ministry of State Properly Management of Georgia (the legal successor of the State in implementation of the earlier Lease Agreement) shall have the authority and shall carry out the functions of the Lessor..., shall accept [Zhinvali Development Group] as a new Lessee, and shall before March 20, 1999 extend the aforementioned Lease Agreement for the period of no less than 25 years..., with the precondition of implementation of the Rehabilitation Project of the Zhinvali Water Tunnel and projected industrial usage of the leased properly.

4. The State Property Management of Georgia and the Mayor of Tbilisi shall work out and carry out the measures for the Implementation of the Rehabilitation Project of the Zhinvali Water Tunnel. (ZDL Submissions at 81.)

122. Al this time, according to Mr Fares: "... I understood that the reason for the lack of progress [in advancing ZDL's proposal] was the political infighting over which ministry... had authority over the Zhinvali complex." (Witness Statement of Ramzi Fares, para. 84 at 22.) This understanding was later borne out by the issuance of Presidential Resolution No. 111 on February 15, 1999 (please see below).

123. On January 21, 1999, Ms Judy O'Connor, Country Director for Georgia of the International Bank for Reconstruction and Development (the "World Bank"), sent a letter to President Shevardnadze regarding a proposed "Energy Sector Adjustment Credit" (ESAC) for Georgia She expressed concern that Georgia:

> had not decided whether to award ownership/concession of the [Project] through an open competitive process as the Bank is recommending. We understand from Mr Giorgadze that there is no contractual obstacle to a competitive process.... However. I have subsequently been informed (perhaps incorrectly) that the Ministry of State Properly Management has been instructed to award a 25-year concession without competition. I respectfully seek clarification that the original decision to apply a competitive process does in fact stand.... This clarification will allow preparation of the proposed credit to proceed. (ZDL Submissions at 82.)

124. On January 25, 1999, Minister Ukleba wrote to the Minister of Economy and the Minister of Finance seeking "decisions" on a draft Concession Agreement (Georgia's Submissions at 2307 and 2309), which, according to the Respondent, was provided by the Claimant "at the end of January, 1999". (Respondent's Rejoinder at 20.)

125. On February 1, 1999, the Ministry of State Property Management wrote to the State Attorney to the President of Georgia, Mr Koba Buchukuri, asking for the "charter and relevant documentation" of the proposed joint venture company and for the "missing schedules" to the draft Concession Agreement. (Georgia's Submissions at 2292.)

126. On February 8, 1999, MSPM sent copies of the draft Concession Agreement to the Anti-Monopoly Service and to GNERC seeking their comments. (Georgia's Submissions at 2294 and 2296.)

127. On February 12, 1999. the Deputy Minister of Economy advised Zhineri that "before they could review the draft (of the Concession Agreement], it would be necessary for the Ministry of Fuel and Energy... to prepare the necessary implementing legislation and to provide detai led comments on the draft". (Georgia's Submissions at 2298.)

128. On February 15, 1999, the "Division of Legal Procurement" of MSPM provided an internal memorandum detailing a "significant number of issues in relation to which the Concession Agreement required amendment". (Georgia's Submissions at 2390-2.)

129. In an undated letter at about this time, the Minister of Justice listed in detail 47 items in relation to which the draft Concession Agreement required amendment. (ZDL Submissions at 2311-20.)

130. On February 15, 1999, President Shevardnadze issued Resolution No. 111 "On Immediate Measures for Water Supply of Tbilisi" in which he noted:

> In order to rehabilitate "Tbiltskalkanali" Ltd [the Tbilisi water utilities company], the cooperation has been started with the World Bank... Notwithstanding..., there are still many problems related to the unimpeded water supply of the capital of Georgia... *The fact that the complex is subject to different authorities does not enable the resolution of the problem.* (Emphasis added.)

With these considerations in mind, the President decided, among others:

> 1. The Ministry of State Property Management was to transfer the "Basic Funds" of the Project to "Tbiltskalkanali" Ltd within one week
>
> 2. Thereafter, the Department of the State Properly Management of the City of Tbilisi shall be granted authority... to carry out the functions. of the Lessee...
>
> 3. The Mayor of the City of Tbilisi shall take necessary measures for commencement of rehabilitation works on Zhinvali water tunnel. (ZDL Submissions at 84-5.)

Paragraph 2 of the Resolution had the intended effect of ousting Zhineri as lessee of the Project. Zhineri later challenged this Presidential Resolution No. 111 and the Georgia Supreme Court subsequently confirmed the validity of Zhineri's lease (please see below).

131. On February 16, 1999, Mr Temur Basilia, Assistant to President Shevardnadze, wrote to Ms O'Connor of the World Bank in response to her January 21, 1999 letter. Mr Basilia's letter explained the state of affairs as between Georgia and ZDL. Mr Basilia went on to indicate that Georgia did "not share" the World Bank's "opinion" that the exclusivity arrangement with Zhinvali constituted "a breach" of Georgia's "commitments" under the World Bank's ESAC programs. Mr Basilia noted:

> *[I]n 1997 the Government initiated negotiations with Zhinvali Development Consortium on the terms the latter at their own cost were to implement* the design, engineering, technical and financial study of the project... *Since the Consortium was asked to undertake the preparation*

> *of the project at its own cost... the Government granted certain rights to the consortium...* The Consortium has since conducted thorough engineering and hydrological studies of the tunnel... *This work resulted in a comprehensive proposal... which was approved by the Government in the middle of 1998. [T]he Government... have (sic) by now completed negotiation of the Concession Agreement...* The Consortium has committed to the Government to award all of the contracts on an open competitive basis in line with the World Bank and EBRD requirements... Such work [by the Consortium] was originally solicited by the Government and led Consortium (sic) expend significant financial resources... By withdrawing our support from the project, the Government will... default on its legal obligation vis-a-vis the Consortium. (Emphasis added.) (ZDL Submissions at 85-7.)

The Claimant received a copy of Mr Basilia's letter from the Respondent at or about the time of its transmission to Ms O'Connor. (Transcript, February 15, at 1273, Mr Landsman.)

132. On February 25, 1999, Ms O'Connor responded to Mr Basilia:

> Based on your recent letter and associated documentation, we understand that the Government does have a *legal obligation to the Zhinvali...* [Consortium]... *not to open the privatization process to competition until after May 10, 1999.* Because of this prior agreement, and for purposes of the ESAC [Energy Sector Adjustment Credit] negotiations, we can now consider this issue closed. (Emphasis added.) (ZDL Submissions at 88-9.)

133. On March 1, 1999, the Ministry of Justice informed the Ministry of Fuel and Energy of 54 comments on the draft Concession Agreement. The Ministry's letter noted:

> according to the Article 7 of the Law of Georgia about Concessions..., the draft Concession Agreement must be enclosed with its feasibility study, with the assessment of its economic efficiency and its influences on the environment, as well as solvency guarantees of the Concessionaire (Georgia's Submissions at 23 11-5 and 2320.)

134. On March 8, 1999, the Ministry for Protection of Environment and Natural Resources provided similar comments to Mr Buchukuri, including:

> The Draft Concession Agreement must inevitably include... feasibility study... [and] results of environmental protection audit. (Georgia's Submissions at 2323-4.)

135. On March 10, 1999, the Ministry of Finance submitted its comments to Minister Ukleba. Nine concerns were raised, the most important of which was as follows:

> From the draft Concession Agreement it is not visible for what the investments will be spent,...

what revenues will the state receive from the concession..., without which data it is difficult to judge on the reasonability of the concession... (Georgia's Submissions at 2327-8.)

136. On March 17, 1999, the Ministry of Economy reported its comments, including the need for "calculations relating to the technical-economic efficiency of the power station rehabilitation... [and] assessment of the concessionaire's solvency, without which giving permission to such a huge project will be unjustifiable risk". (Georgia's Submissions at 2331.)

137. On March 22, 1999, the Ministry of Fuel and Energy wrote to Mr Buchukuri, stating that its comments on the draft Concession Agreement had "been taken into consideration. We have no other comments...". (ZDL Submissions at 90.)

138. By this time, confusion had arisen as to which draft of the Concession Agreement was operative. As a result, on March 24, 1999, Claimant's Georgian attorneys, GCG, the Georgia Consulting Group, sent a letter to MSPM clarifying the various drafts of the Concession Agreement and noting: "[A]s for the feasibility study of the project, [the Claimant] for the present time is completing the works on this document and in the nearest future will furnish it to you...". (Georgia's Submissions at 2338-9.) According to the Respondent, the Claimant never supplied a copy of any such feasibility study to the Respondent. (Respondent's Rejoinder at 24.)

139. On March 30, 1999, GNERC advised MSPM of 11 issues in relation to which it had concerns over the draft Concession Agreement, including the lack of any "... preliminary projection of the power tariff generated by [the Project]". (Georgia's Submissions at 2344-5.)

140. On March 30, 1999, the Anti-Monopoly Service provided its comments. (Georgia's Submissions at 2342.)

141. On March 31, 1999, the Premier of the City of Tbilisi, Mr Sheradze, wrote to MSPM to the effect that its comments had also been taken into account and that the Concession Agreement was "ready to be reviewed, for execution". (ZDL Submissions at 91.)

142. On April 8, 1999, the Premier of the City of Tbilisi wrote again to Mr Fares to inform him that the City and MSPM had concluded that the draft Concession Agreement was "ready to be reviewed for further execution". The Premier issued an invitation to Mr Fares to return to Tbilisi for meetings on April 12-14, 1999. (ZDL Submissions at 92.)

143. In his witness statement, Premier Sheradze had the following to say with regard to these two letters of March 31 and April 8 "I have also seen page 13 of the Claimant's memorial in which it is suggested by ZDL that by these letters [31 March 1999 and 8 April 1999] I confirmed that the Concession Agreement was ready to be signed. This was not what was said in my letters, and the implications ZDL raised on these documents are incorrect. When I said that the agreement was, 'ready to be reviewed for execution' (document 91),... I did not say... that this Concession Agreement was in its final form for execution." (Witness Statement of Premier Sheradze, para. 4 at 2.) According to the Respondent, "the use of the word 'review' makes clear further negotiations and amendments were still required...". (Respondent's Rejoinder at 24.) Premier Sheradze, however,

was not made available at the Oral Procedure for cross-examination by the Claimant.

144. On April 13, 1999, the Deputy Minister for Fuel and Energy wrote [to] Mr Fares to the same effect as the earlier March 31 and April 8 letters. (ZDL Submissions at 93.)

145. On April 28, 1999, Mr Fares wrote to MSPM attaching a revised draft Concession Agreement. (Georgia's Submissions at 2348-55.) He noted that after addressing "some" remaining issues, the Concession Agreement "would be ready for execution". To achieve this, he proposed a visit to Tbilisi "no later than May 10, 1999". He stated that he planned, among others, to "negotiate the Lease Agreement which we understand (the Georgian Government] is currently preparing".

146. On May 3, 1999, Mr Fares prepared a "file note" stating:

> In a number of conversations with Constantine Rizkinashvili [a lawyer with ZDL's Georgian law firm. GCG], he reported back to us that he had been informed by Mr Basilia, Mr Buchukuri and others concerned that the [May 10, 1999] deadline was not an issue and that the Government will continue with us beyond this deadline until finalisation of the [Concession] Agreement. (ZDL Submissions at 94.)

147. On May 10, 1999, the nine-month exclusivity period expired. According to the Respondent, it:

> never promised or represented to the Claimant that it would extend the 9 month exclusivity period... The Claimant refers loan internal file note to evidence the extension... [T]his is self-serving and should be given no weight... [and] cannot be corroborated... (Respondent's Rejoinder at 26.)

In any event, the Claimant did *not* receive any formal extension of this nine month "sole source" commitment from Georgia.

148. Georgia's Submissions contain an undated document at about this time from the Deputy Minister of State Property Management advising:

> On the 14th day of May this year, the Ministry..., together with the Merrill Lynch Investment Bank, financial adviser, in compliance with the World Bank requirements, published the Request for Proposals... Zhinvali... is not included in the list of such facilities... The World Bank requires that [Zhinvali] be included in the list... (Georgia's Submissions at 2371-4.)

The Deputy Minister attached to his letter a "list of the issues over which no agreement has been reached with [ZDL] till the 10th of May this year"

149. With the expiration of the nine-month exclusivity period, negotiations intensified between ZDL and Georgia. On May 21, 1999, an important meeting took place in Georgia at which President Shevardnadze was in attendance.

150. On May 22, 1999, the Press Service of the President of Georgia issued a press release stating that the Concession Agreement was "already prepared and *its main aspects introduced to the President of Georgia".* (Emphasis added.) In referring to the May 21 meeting, the release reported that "it was decided that within the following few days, *after clarifying details,* (the Concession Agreement] will be prepared between (sic) parties". (Emphasis added.) (ZDL Submissions at 95.)

151. On May 31, 1999, Mr Fares wrote to the President of Georgia regarding a new Presidential Decree that ZDL understood was about to be signed that, in its view, would undermine ZDL's position:

> Mr President, we hope you are aware of the fact that based upon the obligations assumed by, and the agreements reached with, the Government, particularly your aforementioned Decrees of January 17th and February 15, 1999 our Consortium used considerable efforts and financial resources for preparation of the project... [Y]our signature to the said draft Decree poses considerable threat to the legal interests, and rights of our Consortium... [which] has already spent 1.5 million US dollars for the development of this project which can be lost now... [W]e think, that if the project is put for bidding, all bidders would unlawfully benefit in the work we performed and paid for... (Georgia's Submissions at 2392-9.)

152. On June 5, 1999, President Shevardnadze issued Presidential Decree No. 669 which stated:

> 1. The Basic Assets of Zhinvali Hydropower shall be offered for lease to potential investors...
>
> 3. *The Directive of the President #29, dated January 17, 1999... and Section 2 of Presidential Resolution # 111, dated February 15, 1999... shall be revoked.* (Emphasis added.) (ZDL Submissions at 100.)

153. On June 29, 1999, Mr Fares sent a letter to James Wolfensohn, President of the World Bank, complaining about the June 5, 1999 Presidential Decree. He wrote that negotiation of the Concession Agreement:

> continued until May 10, 1999, when the agreement was ready for execution. At that time, GOG [the Government of Georgia] requested an extension of a few days to allow for internal government consultation... On May 21, 1999..., the President reconfirmed his and GOG's commitments to our Consortium, and instructed the officials concerned to conclude the matter within five days... The Consortium is at the risk of sustaining substantial damage if the present situation continues. (Georgia's Submissions at 2,364—5.)

154. On July 1, 1999, the Supreme Court of Georgia issued a ruling after reviewing a June 8, 1999 petition that ZDL had filed in Tbilisi Regional Court asking for the suspension of Presidential Directive #669 of June 5, 1999. The Tbilisi Regional Court on June 8, 1999, ruled against ZDL and the next day, ZDL filed a private claim in the same Court seeking revocation of the June 8 ruling. The Regional Court did not hear the private claim but rather sent it for review by the Georgia Supreme Court which agreed "there is no ground for suspension of Presidential Directive # *669".* However, the Supreme

Court held that the "State of Georgia... shall be prohibited to transfer to any third party the results of the completed works... submitted to the State by the Zhinvali Development Group, LLC" until after a full review of ZDL's rights and interests. (ZDL Submissions at 336-8.)

155. On July 12, 1999, Johannes Linn, Vice President of the World Bank, responded on behalf of Mr Wolfensohn to Mr Fares' letter. Mr Linn informed Mr Fares that, in the course of its assistance to Georgia:

> [T]he Bank has advised the Government that power privatization in Georgia should take place through a competitive process rather than by directly-negotiated deals, except where competition is precluded by a legally-binding contract between the Government and a commercial party... As *no such privatization agreement was concluded [before the end of the exclusivity period, the Zhinvali Project] has now been offered by competitive tender...* (Emphasis added.) (Georgia's Submissions at 2370-1.)

156. On July 31, 1999, Mr Buchukuri wrote to President Shevardnadze regarding the Project and reciting its history to date:

> In June 1998, consortium makes to Government of Georgia a concrete offer... which was considered and approved by Ministry of Fuel and Energy... Your decree #29 of January 17, 1999... approves proposals. On May 21,... you once again have confirmed support [and]... assigned the respective agencies within live days to sign a concession agreement. Ministry of State Property Management of Georgia has not signed the concession agreement... [I]t is... absolutely unacceptable for us the position of Ministry of State Property Management. (ZDL Submissions at 97-9.)

157. On July 14, 1999, Zhineri's United States attorney sent an accusatory letter to Merrill Lynch in London:

> Merrill Lynch has undertaken steps to solicit proposals for the privatization of [the Zhinvali Project], In taking these steps, Merrill Lynch has acted in steady disregard of the rights of Zhineri.... Your failure to correct this abusive conduct will leave Zhineri with no alternative but to seek judicial intervention in this matter and an award of damages on account of your wrongful conduct... (Georgia's Submissions at 2428-9.)

158. On October 26, 1999, Minister Ukleba sent a letter commenting on letters filed September 7 and October 14, 1999, from the Claimant's American counsel[2] in which ZDL, according to Minister Ukleba, offered three alternatives to Georgia, either (1) "go forward within 30 days with the execution of both the Concession Agreement and the Power Purchase Agreement" or (2) compensate ZDL for its "expenses... which up-to-date are estimated to be over 2 M USD" or (3)

[2] For reasons unknown to the Tribunal, these two letters were not submitted into evidence.

arbitration. With regard to the second alternative. Minister Ukleba wrote:

> [I]f ZDL presented the documentation about amount spent in connection with Zhinvali Project, this amount would be compensated to them from the amount paid by the winner of the tender. Besides, ZDL without discrimination could have participated in the mentioned lender, where it would have natural priority... because it had worked on this project, and because their competitors had probably to pay 2 M USD more amount. (ZDL Submissions at 101-2.)

159. On December 3, 1999, ZDL submitted the Claimant's Request for Arbitration to ICSID.

160. According to the Claimant, by this time, ZDL had, over a three year period, "carried out substantial engineering, hydrological, financial and legal work in relation to the Project, making a major investment in Georgia". (Claimant's Request for Arbitration, para. 3 at 21.) The Claimant's Reply listed the extensive documentation that the Claimant asserted that ZDL had prepared over the course of its negotiations with Georgia, in addition to the initial proposal, the MOU, the HOA and the Harza report. Among those cited by the Claimant are the following:

> Concession Agreement.
>
> Power Purchase Agreement "[to] govern financial and institutional aspects of the project and relations between the seller and purchaser(s) of power...". (Claimant's Reply at 9.)
>
> Hydrology and Power Generation. "This technical study analyzed the hydrologic record and technical features of the Zhinvali reservoir...". (Claimant's Reply at 9.)
>
> Questionnaire to the Georgia National Electricity Regulatory Commission ("GNERC").
>
> Detailed Financial Model for the Zhinvali Hydropower Project.
>
> Electromechanical Inspection of the Plant.
>
> Bidding Documents "... for a turn-key construction contract". According to the Claimant: "The Bidding Documents... were partially completed by Harza but not shown to anyone in Georgia as they represent considerable value of a proprietary nature..." (Claimant's Reply at 9.)
>
> Lease Agreement.
>
> Due Diligence on Zhineri.
>
> Joint Venture Agreement.
>
> Technical Assessment Study by Fichtner GMBH & Co. According to the Claimant: "In order to provide an independent assessment of the Plant's condition... and provide a Project cost estimate to satisfy the lenders (since Harza, which performed the original assessment, is a member of ZDL), ZDL hired Fichtner GMBH & Co., of Stuttgart, Germany." (Claimant's Reply at 9.)

161. In late 1999, the Government of Georgia sought to remove Zhineri as the lessee of the Project through a lawsuit supported by the Ministry of State Property Management. On January 27, 2000, the Supreme Court of Georgia ruled in favor of Zhineri.

162. In early 2000, after the Claimant had commenced this ICSID arbitration, Georgia and ZDL renewed discussions about the Project. As a result, on February 7, 2000, the Parties executed an addendum to the February 11, 1998 "Heads of Agreement". A preambular clause stated: "... due to reasons beyond the control of the Parties, delays occurred which prevented [ZDL] from concluding the due diligence... [B]oth parties agree to extend the HOA retroactively from the original terminal date of February 28, 1999 until February 28, 2001." (ZDL Submissions at 304.) The Tribunal is uninformed as to the intent of the addendum as neither Party addressed the subject in its pleadings.

163. On April 21,2000, President Shevardnadze issued Presidential Ordinance No. 157. (ZDL Submissions at 105-6.) Ordinance No. 157 confirmed the assignment of the Plant and the Tailrace Tunnel "to the assets of Tbiltskalkanali Ltd", the Tbilisi water utilities company. The Presidential Ordinance authorized the "Tbilisi Government" to "resolve issues regarding the development" of the Project; io "negotiate with foreign investors on behalf of Georgia"; to "prepare and execute appropriate agreements on ownership, investment and technological issues"; and to "represent" Georgia in the "relations with foreign investors" about the Project. Presidential Ordinance No. 157 also declared Presidential Decree No. 669 of June 5, 1999 to be "null and void". Pursuant to this Ordinance, the Claimant again renewed discussions with the Respondent. (Respondent's Rejoinder at 28.)

164. On May 3, 2000, the Premier of the City of Tbilisi, Mr Sheradze, wrote to Mr Fares, acknowledging that the recent Presidential Ordinance "authorized" Tbilisi "to represent the state on the negotiation and execution of investment projects in respect of Zhinvali and 'Tbiltskalkanali'". The Premier invited Mr Fares to come to Georgia for further negotiations later in May. (ZDL Submissions at 104.)

165. On May 22, 2000, the Chairman of Zhineri wrote to Premier Sheradze informing him that Zhineri "agrees to transfer and assign the rights to ZDL under the conditions acceptable for our company and under the laws of Georgia." (Georgia's Submissions at 2283.)

166. On May 25, 2000, ZDL presented Mr Sheradze in Tbilisi with a draft agreement in both English and Georgian that addressed various outstanding issues. (Respondent's Rejoinder at 28.)

167. On May 26, 2000, Premier Sheradze and Mr Elwan met in the Premier's oilice for the purpose of executing the draft agreement. According to Mr Elwan:

> lust before... Mr Sheradze was to execute this agreement, he had a call... from Mr Ukleba, and I don't remember how long, but it was anywhere between 20 and 40 minutes of a conversation... The gist of that... was an attempt by Mr Ukleba to advise Mr Sheradze against signing the agreement... Mr Sheradze said, '"I've been authorized to do it. I think this is the right thing to do. and I am going to do it." (Transcript, February 12, at 398-9. Mr Elwan.)

According to the testimony of Mr Maishavili at the Oral Procedure, he could not recall whether

there was such a call and, if so, with whom. (Transcript, February 13, at 567.) Mr Maishavili was the only Georgian witness present at the May 26,'Olli) meeting who was available for cross-examination by the Claimant at the Oral Procedure. According to Mr Fares:

> During the negotiations, I specifically recall holding up a copy of the May 21, 1999, draft of the Concession Agreement and saying that we are not renegotiating a new document but rather finalizing "this one". No one from Georgia disagreed with my position about finalizing rather than renegotiating the already negotiated Concession Agreement. (Witness Statement of Mr Ramzi Fares, paras. 108-9 at 29.)

168. The May 26, 2000 Agreement is a live page document between:

the Government of the City of Tbilisi, acting on behalf of the State of Georgia ("SOG"), represented by the Premier of the Government of the City of Tbilisi, Mr George Sheradze, and Zhinvali Development Limited, a company organized and existing under the laws of Ireland ("ZDL"), represented by its Chairman, Mr Ramzi Fares. (ZDL Submissions at 107-11.)

169.

The May 26, 2000 Agreement began with eleven "Whereas" recitals, including the following of significance for our purposes:

> Whereas, ZDL in October 1997 was requested by SOG and agreed to study, develop and finance the rehabilitation and undertake the operation of the Zhinvali Hydropower Complex (the "Project");
>
> Whereas,... SOG granted to ZDL the rights to lease, design, finance, rehabilitate and operate the Project for a period of no less than 25 years (the "Rights") and undertook to promptly execute all Project agreements... ;
>
> Whereas, by May 1999 ZDL performed all its obligations undertaken to SOG and stood prepared to execute the key Project Agreements which had been substantially negotiated with and approved by SOG instrumentalities;
>
> Whereas, in reliance on SOG undertakings to ZDL and the Rights so granted, ZDL has to date expended substantial financial and human resources in the development and towards implementation of the Project;
>
> Whereas,... SOG. on June 5, 1999, abrogated ZDL Rights;...
>
> Whereas, in March 2000, SOG has approached ZDL to settle the Dispute amicably through negotiations, so as to avoid ICSID arbitration... (ZDL Submissions at 107— 11.)

170.

The Parties to the May 26, 2000 Agreement, following these preambular clauses, agreed in relevant part as follows:

> 1. SOG represents and warrants that the Government of the City of Tbilisi has the power, authority and right... to execute and perform this Agreement... on behalf of SOG.
>
> ...
>
> 3. SOG hereby acknowledges that, by May 1999, ZDL had performed all of its obligations undertaken to SOG in the development of the Project.
>
> 4. SOG hereby irrevocably reinstates ZDL in its rights to the Project...
>
> 5.... *SOG agrees to negotiate and execute... the following key Project Agreements*
>
> ...
>
> 5.1 *Agreement on Rehabilitation... substantially in the form of the May 21, 1999 draft Rehabilitation Agreement between ZDL and SOG, amended as may be necessary to reflect developments which may have taken place since then,* as agreed by the Parties, no later than July 15, 2000. (Emphasis added.)

The Respondent claims that the Georgian version of the introductory language of Article 5 is different from the English version and, when properly translated into English, reads as follows:

> ... SOG agrees, in *case of reaching agreement,* to negotiate and execute... the following key Project Agreements... (Emphasis added.)

The Respondent regards this as affirmation that the May 26, 2000 Agreement was no more than an "agreement to agree".

171. In the May 26, 2000 Agreement, the Parties agreed in Article 6 for "as long as negotiations toward a comprehensive settlement proceed in good faith" not to "initiate any action intended to expedite the ICSID Arbitration...".

172. Article 8 of the May 26, 2000 Agreement dealt with the contingency of a dispute and stipulated in that regard:

> 8. The Parties additionally agree that any dispute, controversy or claim, arising out of, relating to or requiring the interpretation of this Agreement or the breach, termination or validity thereof, shall be submitted for resolution to ICSID in the pending ICSID Arbitration.

173. Following execution of the May 26, 2000 Agreement, ZDL sent a team to Georgia. According to Mr Fares: "It soon became clear that Georgia was not interested in finalizing the deal... in line with the provisions of the May 26, 2000 Agreement." (Witness Statement of Ramzi Fares, para. 111 at 30.)

174. On July 7, 2000, Premier Sheradze wrote a letter to ZDL care of its Tbilisi attorney, Mr Rizhinashvili of GCG. Mr Sheradze referred to the renewal of negotiations on June 29, 2000 and noted a "few important issues that should be clarified", including, for example, "detailed schedule of

investments, issues of tariff calculation [and] schedule [of] construction". He complained of various drafts not yet received from ZDL such as the Lease Agreement, incorporation papers for the proposed joint venture company, and the "security package" documents. (ZDL Submissions at 112.)

175. On July 10, 2000, Mr Elwan sent a letter to the Commissioner of GNERC. Mr Elwan asked for a "list of the licenses" which the "new" joint venture company would require as well as a list of the "consents and approvals required by GNERC" and the "proposed structure in terms of the composition of the tariff...". (Georgia's Submissions at 2418.)

176. On July 15, 2000, Premier Sheradze sent Mr Fares a six-page, singlepaced letter that detailed seventeen "very important issues agreement on which has not been reached". (ZDL Submissions at 113-18.) Mr Sheradze recounted that the current drafts of these items were "unacceptable" to Georgia. Mr Sheradze complained that this was the situation after "over 50 hours" of negotiations since June 28, 2000. Among the seventeen issues cited were:

> 1. The proposed lease structure was "totally unacceptable". The letter cited as an example the requested extension for an "additional 25 years" and suggested that ZDL "directly... enter into lease arrangements with Ibillskalkanali".
>
> 2. The letter objected to English law as governing since Georgian law should control. The letter also objected to British courts having any jurisdiction over the matter.
>
> 3. The State had no power to control Tbiltskalkanali as it was a "private law legal entity".
>
> 4. Proposals for a State guarantee of the obligations of Tbiltskalkanali were "totally unacceptable".
>
> 5. The State would not accept guaranteed convertibility into foreign currency.
>
> 6. Any waiver of State sovereign immunity was "totally unacceptable".

The July 15, 2000 letter suggested new provisions for insertion into the Concession Agreement such as the liability of ZDL for any "break down of the tunnel".

177. On July 21, 2000, Premier Sheradze wrote to Mr Fares in response to his letters of July 14 and 18.[3] He stated:

> We fully kept all our promises [under the May 26, 2000 Agreement] and in our letter dated July 15 this year we provided the list of all [our] issues, but unfortunately, you have not yet submitted the revised version of Draft Agreement... You failed to provide... important documents that makes it impossible to complete negotiations in a timely manner and accordingly, you violated the terms prescribed under the Agreement of May 26th. (Georgia's Submissions at 2419-20.)

178.

[3] For reasons unknown to the Tribunal, these two letter, were not introduce into evidence

On July 26, 2000, Mr Elwan, in a lengthy single-spaced letter, responded to the July 15 letter of Mr Sheradze and to each of its seventeen complaints. Mr Elwan wrote that in the recent round of negotiations:

> [T]he Georgian team reopened a number of issues that had already been agreed last year. This is a major departure from our Agreement of May 26, 2000... Your letter conveys a number of changes that if accepted will completely change the nature of the agreement and undermine its effectiveness in providing the safeguards and recourse needed to mobilize financing without recourse to [Georgia]... (ZDL Submissions at 120-33.)

With regard to Zhineri, Mr Elwan solicited suggestions "on how to proceed to... assign a lease to ZDL for 30 years in light of Zhineri's 5 year lease validated by the Supreme Court [of Georgia]...". He contested any notion that the Government did not control Tbiltskalkanali and he emphasized the essentiality of a waiver of sovereign immunity for the "financeability" of the Project. In sum:

> Substantial changes are proposed in your letter, which in our view are not consistent with the documentation and provisions required for securing limited recourse financing. (ZDL Submissions at 120-33.)

179. On August 3, 2000, the Chairman of GNERC responded to Mr Elwan's letter of July 10, 2000 and supplied an "Appendix" with a list of all required documents and an "application form" for a license. (Georgia's Submissions at 2423-4.)

180. As a result of the May 26, 2000 Agreement, ZDL commissioned Fichtner, a leading German engineering firm, to conduct a second, independent study of the Plant and the Tailrace Tunnel.

181. On August 18, 2000, Mr Elwan wrote to Premier Sheradze regarding a negotiating session that took place on August 11, 2000. He reported that ZDL would only make the recent report from Fichtner "available to the Georgian Team for its review once the [Rehabilitation Agreement and Lease Agreement] are executed". Mr Elwan complained that as of August 18, "none of the undertakings by [Georgia] summarized in our letter of July 26, 2000 have been fulfilled". He concluded that ZDL "is not in a position to consider a further postponement of arbitration proceedings beyond September 25, 2000, unless the deadline of September 15, 2000 is met". (ZDL Submissions at 134-8.)

182. ZDL presented Fichtner's findings to Georgia officials "at a public presentation sometime in August [2000]" (Witness Statement of Ibrahim Elwan, para. 79 at 25), but did not provide the report itself at that time.

183. At about this time in August of 2000, the Claimant provided further drafts to the Respondent and the Claimant complained in its Post-Hearing Brief:

> ZDL did. however, provide Georgia with drafts of both the power purchase agreement and the lease agreement by August 2000. Accordingly, Georgia now has three major pieces of the security package for the Zhinvali rehabilitation project, already completed for which it will not have to pay someone... The transfer of intellectual property requires compensation.

(Claimant's Post-Hearing Brief at 35.)

184. On September 7, 2000, Premier Sheradze wrote to Messrs Fares and Elwan in response to the August 18 letter. (ZDL Submissions at 139-42.) He denied that Georgia was the cause of any delay and rejected the notion that Georgia would only receive the Fichtner Report after executing the "Framework Agreement" (the name lor a new agreement that was then under consideration as a vehicle for settlement of outstanding issues) (Claimant's Post-Hearing Brief at 22) and the Lease Agreement. Premier Sheradze blamed the delay on ZDL for "not providing all the necessary documentation".

185. On September 18, 2000, Mr Fares replied to Mr Sheradze in yet another attempt to resolve the issues in dispute. He again complained about the uncertainty surrounding Zhineri which Mr Fares regarded as a major source of delay.

186. On October 10, 2000, in the absence of a response to the September 18, 2000 letter, Mr Fares informed Premier Sheradze: "Absent a definite proposal from [Georgia] for amicable resolution of the dispute in the coming days, ZDL will have no other option but to instruct its counsel to resume ICSID proceedings with immediate effect." (ZDL Submissions at 151-2.)

187. On October 11, 2000, Premier Sheradze responded to Mr Fares' September 18, 2000 letter and reiterated that "the whole row of arguments stated in your letter of July 26 were unacceptable to us". He attached live pages of additional comments in the draft Framework Agreement. (ZDL Submissions at 153-60.)

188. ZDL decided at or about this time to reinitiate the ICSID arbitration, resulting in the First Session of the Tribunal on December 19, 2000. Georgia blamed the failure of the negotiations with ZDL, among others, on "the refusal by the Claimant to provide copies of the feasibility study, a detailed technical analysis of the work to be undertaken [and] confirmation as to the tariff agreed with GNERC". (Respondent's Rejoinder, para. 142 at 33.) The Claimant in (urn castigated the Respondent for what the Claimant regarded as a lack of good faith on (Georgia's part in carrying out the May 26, 2000 Agreement.

V. SUBMISSIONS: THE PARTIES' CLAIMS AND RESPONSES

A. *Introduction and Overview*

189. With this chronological factual recitation, the Tribunal now turns to the submissions of the Parties. Certain pivotal factual events engendered considerable controversy, as, for example, the meaning and legal effect of the May 26, 2000 Agreement.

190. According to the Claimant in a summation of its grievances, the Respondent "broke three separate promises to sign the Concession Agreement (re-named the Rehabilitation Agreement at Georgia's

request)...". (Claimant's Post-Hearing Reply Brief at 1.)

191. The Claimant regarded the first broken promise as the "representation made to ZDL in late November 1998 that the Concession Agreement was fully negotiated and ready for execution... It is the unfulfilled nature of the promise to sign that created both a preliminary agreement and grounds for promissory estoppel under Georgian law." (Claimant's Post-Hearing Reply Brief at 2.) The Respondent responded that this alleged "promise" was no more than an unenforceable agreement to agree and in any event did not meet the dictates of Georgia law because any such promise, which it denied, was oral rather than in writing.

192. The Claimant regarded the second broken promise as one allegedly made by President Shevardnadze of Georgia at the meeting on May 21, 1999. "The President asked if there were any problems with the agreement and, hearing none, directed his ministers to sign the agreement within five days... in the presence of ZDL and its potential financiers and investors." (Claimant's Post-Hearing Reply Brief at 4 and 6.) The Respondent argued that, again, any such remarks by the President amounted to a non-binding agreement to agree that was subject to conditions and dependent on the success of negotiations which never happened.

193. The third broken promise cited by the Claimant related to the May 26, 2000 Agreement, including the specific promise in Section 5.1 thereof to execute the draft Rehabilitation Agreement "substantially in the form of the May 21, 1999 draft Rehabilitation Agreement..., amended as may be necessary to reflect developments which may have taken place since then". (Claimant's Post-Hearing Reply Brief at 6-7.) In response, the Respondent cited the previously described differences in the English and Georgian versions of the introductory preambular language of Section 5. The Claimant asserted that this "slight difference" between the two versions did not alter the legal outcome because the "seventeen material changes proposed in Mr Sheradze's letter of July 15, 2000, breached the explicit requirement of Section 5.1..(Claimant's Post-Hearing Reply Briefat 8.) The Claimant further charged that the content of the Respondent's Post-Hearing Brief "underscores its own bad faith in light of the admission in September 2000 by its lawyer and chief negotiator that all of ZDL's efforts are futile because Georgia had no intention of going forward with the agreement...". [4] (Claimant's Post-Hearing Reply Brief at 9).

194. The Claimant also maintained that its charges regarding the May 26, 2000 Agreement are for straight breach of contract rather than for breach of a preliminary agreement:

> There was nothing "preliminary" about the Settlement Agreement, which was signed by authorized representatives on both sides and relied upon by the parties in staying this arbitration... (Claimant's Reply at 4.)

195. As a result of the three alleged "broken promises" cited in the Claimant's Post-Hearing Reply Brief, ZDL seeks the recovery of (a) its "development costs", that is, the sum of its alleged time charges

[4] "That Georgia was not negotiating in good faith was admitted by its negotiator, Irakli Okruashvili at a September 2000 meeting, with ZDL's Georgian counsel Mr Okruashvili said that ZDL efforts were futile because Georgia would never sign the deal with ZDL." (Claimant's Post-Hearing Brief at 26.) the Claimant criticized the Respondent for not having made Mr Okruashvili available for examination at the Oral Procedure. (Transcript, February 15, at 11114. Mr Landsman.) The Claimant referred to this alleged September 2000 event as the Irish Pub incident"

and out-of-pocket expenditures devoted to the promotion of the finance and other arrangements for the Project; (b) its "lost profits" resulting from the Respondent's allegedly wrongful failure to execute a definitive set of Project agreements; and (c) "moral damages" stemming from the purported harm to the reputation of ZDL and its three shareholders caused by the Respondent's allegedly culpable conduct. The Respondent retorts that it never agreed to reimburse the Claimant for its "development costs" and that, to the contrary, the August 10, 1998 grant of a nine-month "exclusivity period" expressly stated that all such costs were at the Claimant's risk. As for "lost profits", the Respondent disclaims any culpable behavior and contends that the Project was never financially viable and would, to the contrary, have resulted in monetary losses to the Claimant rather than in any profits, had the Project gone forward. The Respondent further argues that ZDL suffered no "moral damage" as it was a sole-purpose entity and thus had no future reputation, separate from the Project, that could suffer any harm. The Respondent added that none of ZDL's three shareholders is a party to this ICSID case and that ZDL has no right to assert any claim on their behalf in this action.

196. With this introduction, the Tribunal sets forth in greater depth the submissions of the Parties with respect to each of these alleged grounds of liability and the Claimant's accompanying compensation demands.

B. *Alleged Breach of Preliminary Agreement*

197.

Claimant contends that the Georgia Civil Code (the "GCC") recognizes the 11 incept of "preliminary agreements" and establishes "a cause of action for damages flowing from their breach". (Claimant's Memorial at 31.) For this purpose, the Claimant cites Article 327(3) of the GCC, which in the Claimant's translation at Exhibit A to its Memorial reads:

> 3. An obligation to conclude a future contract may originate by a contract. The form provided for a contract shall also apply to future contracts.

The Respondent's translation of the same Article 327(3), which is attached as an exhibit to its Rejoinder, and which is from a document purportedly issued by the United States Agency for International Development ("USAID"), states:

> 3. A contract may give rise to the obligation to conclude a future contract. The form stipulated for the [main] contract applies to the preliminary contract as well. (Georgia's Submissions at 2436.)

198.

Article 327(1) is also relevant for our purposes. The Claimant's translation is:

> 1. A contract is considered to be concluded where agreement regarding all the material terms and conditions of the contract has been reached in the required form.

The Respondent's translation is:

> 1. A contract is considered entered into if the parties have agreed on all of its essential terms in the form stipulated for such an agreement. (Georgia's Submissions at 2436.)

199. The Claimant argued that, because of the Respondent's concession in the May 26, 2000 Agreement that the "parties had agreed to all material terms and conditions in the Concession Agreement by May 1999" (Claimant's Memorial at 31), a "valid and enforceable contract" existed as of that earlier time. The Claimant cited German law, on which the GCC was based, as supporting its reading of the GCC. The Claimant also referred to Presidential Decree No. 29 of January 17, 1999 "and other verbal and written representations" by Georgia as creating the basis of a "preliminary contract" satisfying the terms of Article 327(3).

200. With regard to the treatment of the Georgian Government under the GCC in connection with this kind of contract claim, the Claimant cited Article 24.4 of the GCC which provides:

> 4. The state participates in the civil and legal relations like a legal person of private law.

The Claimant, on the basis of this provision, thus argued:

> The GCC hinds the Government to contractual and other obligations to the same extent as a private party would be bound. (Claimant's Post-Hearing Brief at 3.)

201. With particular regard to the August 10, 1998 exclusivity letter, the Respondent emphasized that all it promised was to negotiate with the Claimant as a sole source for a period of nine months. "Central to this dispute is the fact that this is (and was) the extent of the Respondent's obligation to the Claimant." (Respondent's Rejoinder at 2.) In this connection, Mr Elwan testified: "[I]t [the exclusivity letter] gave us the right to do our technical, economic analysis... and to... discuss it with the Government as options for moving forward... We were not guaranteed anything." (Transcript, February 11, at 244, Mr Elwan.)

202. But the Claimant look the stance that it never relied on the August 10, 1998 letter as a "preliminary agreement". Thus, it wrote: "ZDL has never claimed that the exclusivity commitment created an enforceable preliminary agreement. Rather, those letters served as inducement (Claimant's Post Hearing Reply Brief at 3.) And then those inducements, ZDL argues, led to further efforts by the Claimant, based on other promises along the way, that did constitute a "preliminary agreement" under the GCC.

203. The Respondent contended, however, that, under Article 327(3) of the GCC, any such "preliminary agreement" had to be in writing:

> Any preliminary agreement,... was also required to be written and executed pursuant to Article 327(3) GCC. The Claimant has not been able to refer to any written document as being the preliminary contract. (Respondent's Rejoinder, para. 172 at 39.)

204. The Claimant cited the expert opinion of Professor Chikvashvili to counter this legal interpretation by the Respondent:

> Respondent's assertion that the form of the main contract when agreed to by the Parties also controls the form of the preliminary agreement is erroneous... The parties are free to choose the form of the preliminary agreement independent of the choice of form of the future contract. (Chikvashvili, para. 34 at 10.)

205. The Respondent replied, however, that the GCC required that any "preliminary agreement", to be valid in this case, must be in writing and, for this purpose, cited the opinion of its legal expert, Professor Kakhadze:

> Preliminary contract must be entered into in the form prescribed for the future or the main contract... [P]reliminary contract is void when it is made without observance of the form and it does not give rise to the obligation to conclude the future contract. (Kakhadze, para. 3.6 at 4.)

The Respondent summarized its position by contending that the Parties "intended the Project Agreements to be in the written form... yet there was no such document". (Respondent's Rejoinder, paras. 168-9, at 39.)

206. The Claimant again cited the opinion of its Georgia law expert, Professor Chikvashvili, for the proposition that ZDL and Georgia had agreed on all "material terms" and thus had satisfied the dictates of Article 327(1) of the GCC.

> In the present case, because Georgia and ZDL had reached agreement on all of the key terms of the Concession Agreement and because Georgia represented to ZDL that it was going to sign the Concession Agreement, the parties created a future contract to execute the Concession Agreement. (Chikvashvili, para. 12 at 5.)

207. The Respondent, however, responded to this contention by further relying on the opinion of Professor Kakhadze:

> [T]he parties shall have the obligation to conclude the future contract to the extent if the preliminary contract provides the essential terms of the main one. (Kakhadze, para. 3.2 at 3.)

Based on this legal requirement, the Respondent wrote in its Post-Hearing Brief:

> A preliminary agreement is still required to be a binding contract... That is not the position here. There was no meeting of minds between the parties at any time. There was no agreement as to the essential terms of the Concession Agreement at any time. (Respondent's Post-Hearing Brief, para. 158 at 39.)

208. The Respondent next disputed the Claimant's position regarding the events of November of 1998:

> It is clear that the [Claimant's] statement... "only the formality of signing the Concession Agreement [is] yet to be done" is a statement that bears no resemblance to the state of affairs that existed in or around November 17-21, 1998... We would estimate that only about 5% of the legal work necessary to finalize the Project had been completed by then. From this point until 10 May 1999 (the end of the exclusivity period), there is little evidence of any substantive progress in preparing the necessary documents or finalising the negotiations. (Respondent's Rejoinder at 20.)

209. Based on these facts, the Respondent saw no responsibility to the Claimant once the nine-month exclusivity period ended on May 10, 1999, and added:

> [H]ad it been important to the Claimant that its development/startup costs would be reimbursed, it is somewhat surprising that ZDL did not seek an agreement for the repayment of their costs. (Respondent's Post-Hearing Brief at 7.)

210. The Respondent emphasized its view that the Claimant's proposals for the Project were not "viable" and that this was the true cause of their failure rather than any "culpable" conduct of Georgia:

> [T]hese proposals were from the outset (a) unworkable in engineering terms, (b) unrealistic (in the sense that there is no evidence of any commitment by any financiers), (c) ill-conceived (and still at the preliminary stages from a legal and documentary perspective) and (d) financially unfeasible. (Respondent's Rejoinder at 3.)

211. As an example of the Claimant's purported failure to put the necessary building blocks in place, the Respondent made much of the fact that the Claimant had hardly begun to talk with GNERC even as late as the summer of 2000:

> The Claimant met with GNERC once on Sth July 2000... As the Claimant withheld its business plan. GNERC was unable to set the level of the tariff or even give estimates. (Respondent's Rejoinder, para. 13.3 at 31.)

A project of this sort without a firm tariff agreed is a project which can only ever be contingent in nature. (Respondent's Post-Hearing Reply Brief at 11.)

212. But the Claimant did not accept these GNERC characterizations by the Respondent:

> The important point... is that GNERC's regulations require it to set a tariff that will attract foreign investors... (Claimant's Post-Hearing Brief at 43.)

213. Nevertheless, the Respondent blamed the Claimant's own shortcomings as the reason for the lack of any final agreement. In this regard, the Respondent complained, for example, about the lack of such a basic agreement as the EPC contract (Engineering, Procurement and Construction contract):

> [T]he central contract (EPC contract)... was in a preliminary state; no detailed design had taken place (Respondent's Post-Hearing Brief at 30.)

214. But the Claimant raised the following retort to this line of attack :

> The EPC contract would not be finalized until after the Concession was granted because the EPC contract would be with the contractor winning the bid to do the actual construction... [E]ven Mr McCredie [of KPMG], Georgia's only expert with any development bank experience, recognized that no reasonable developer would undertake that type of work and expose itself to that level of risk without having the Government's commitment firmly in writing through a concession agreement. (Claimant's Post-Hearing Brief at 33.)

215. Whatever arguments the Respondent set forth in opposition to the Claimant's "preliminary agreement" stance, the Claimant presented the May 26, 2000 Agreement as having overridden any and all such arguments. Thus, the Claimant wrote in its Reply:

> Georgia acknowledged in the Settlement Agreement that... Georgia had "abrogated ZDL's rights" by refusing to execute the Project Agreements in mid-1999... This admission in the Settlement Agreement confirms that Georgia breached a preliminary agreement... (Claimant's Reply at 12.)

216. The Claimant complained that, if Georgia had executed the Concession Agreement as it had undertaken to do, then the financial backing would have fallen into place:

> The Concession Agreement... is the backbone of the security package that must be in place before the lenders and investors will commit to the project. (Claimant's Posl-Hearing Brief at 14.)

217. On the technical engineering side, the Respondent cited the Fichtner Report, contracted by the Claimant, as undermining the Claimant's own position, including Harza's conclusions:

> Fichtner specifically recommended against constructing a new bypass tunnel (this was the Claimant's proposal) as the risks were considered high due to the complex geology of the site; and the proposal in itself would not remedy the tailrace problem. (Respondent's Rejoinder at 7.)

218. But the Claimant responded:

> Harza never concluded that a by-pass tunnel was the best option but instead simply did what Georgia asked: it analyzed what would be required to restore the Zhinvali hydropower plant to full capacity by means of building a by-pass tunnel in place of the deteriorating tailrace tunnel. (Claimant's Post-Hearing Brief at 28.)

219. As noted in Part III, the Respondent heavily criticized the Claimant for never having submitted to Georgia a feasibility study for the Project:

> Because of its "confidential" nature, the Claimant stated that it would only provide this information to the Respondent once an agreement for the rehabilitation and operation of Zhinvali had been signed with ZDL. (Respondent's Post-Hearing Brief, para. 8 at 3.)

220. With regard to the Claimant's reliance on the January 17, 1999 Presidential Decree to support its assertion that the Government of Georgia had made enforceable promises to ZDL, the Respondent charged in its Counter-Memorial that the Tribunal had no right to consider such an argument:

> [W]e would like to make you aware that Georgian party considers it impermissible that the following legislative acts of the President of Georgia... be considered by any court of arbitrators... [A]ccording to the general principles of International Law public act cannot become the subject matter for review by any foreign jurisdiction. (Respondent's Counter-Memorial at 4-5.)

221. The Claimant replied to this challenge as follows:

> Georgia's position, if accepted, would essentially render ICSID jurisdiction meaningless... The Contracting States are sovereign nations that have agreed to submit to ICSID's jurisdiction to resolve investment disputes with foreign investors. (Claimant's Reply at 12.)

222. Interwoven with the Claimant's "preliminary agreement" arguments, which focused on the Respondent's refusal to execute the Concession Agreement as allegedly promised, was the Claimant's reliance on Article 317(2) of the GCC which it translated as follows:

> 2. A participant in a negotiation may demand from the other participant the indemnification of the expenses incurred by him for concluding the contract, however, this contract has not been concluded due to the other participant's action in tort. (Exhibit A to the Claimant's Memorial.)

The Respondent's translation of this Article, which it cited as Article 317(3) rather than Article

317(2), reads:

> 3. A party in a negotiation may require from the other party reimbursement for expenses he has incurred for concluding a contract that, nevertheless, has not been concluded by reason of the other party's culpable action. (Georgia's Submissions at 2432.)

Thus, the Claimant contended that the Respondent's behavior in failing to proceed with the Project's "preliminary agreement" constituted a "culpable action" that entitled ZDL to recover its "development costs". In this regard, the Claimant argued that the Respondent's April 7, 1998 letter of support, its August 10, 1998 exclusivity letter and the January 17, 1999 Presidential Decree combined to create the necessary circumstances for triggering Article 317 "because of the promises contained therein". (Claimant's Memorial at 33.)

223. The Respondent maintained, however, that it did nothing wrong:

> In the present circumstances, it cannot be said that the failure to conclude the various draft agreements was the fault of the Respondent. (Respondent's Rejoinder at 35.)

The Respondent concluded that, consequently, no "culpable action" for purposes of GCC Article 317(3) is present in this case.

224. The Respondent also cited Article 394(1) of the GCC in support of its position:

> In case of breach of an obligation by the Obligator, the Obligee may claim damages arising from the breach. This rule shall not apply when the Obligor is not responsible for a breach of the obligation.

The Respondent argued that, to the extent it had any obligations to the Claimant, Georgia's conduct fell within the exception contained in the second sentence of Article 394(1).

225. For purposes of meeting the requirements of Article 317 of the GCC, the Claimant cited other conduct by the Respondent which the Claimant regarded as bad faith or intentional interference with Claimant's efforts to conclude the transaction. One of the Claimant's Georgian lawyers included the Zhineri story as another example of alleged "culpable actions" by Georgia:

> It is apparent in retrospect that the "Zhineri issue" was a mere manipulative lactic by Georgia to frustrate the negotiations and make it difficult if not impossible for the deal to be consummated... The Zhineri developments... were demonstrative of [Georgia's] bad faith tactics. (Witness Statement of Rizhinashvili, paras. 23 and 26 at 9 and 11.)

The Government's infighting over the Zhineri lease disrupted ZDL's plans time and again, according to the Claimant. Mr Fares reported that shortly after the May 26, 2000 Agreement, the Government advised ZDL "of its decision to revoke Zhineri's lease to the Project" and further advised ZDL not

to "deal with Zhineri" as the Government would take care of the matter. After the July 15, 2000 letter from Premier Sheradze, with its seventeen points of criticism, meetings took place where the Claimant says the Respondent insisted that ZDL "disengage" from Zhineri:

> No alternative legally attainable mechanism for the transfer and/or grant of lease rights to ZDL was proposed by Georgia. In light of a contemporaneous decision of Georgia's Supreme Court sustaining the rights of Zhineri, it was not apparent to ZDL how the Project could be undertaken without including Zhineri. (Claimant's Memorial at 20.)

226. Mr Elwan summarized ZDL's position with regard to Zhineri as follows:

> The Zhineri episode is just such a striking example of everything that the Government did... to make this deal difficult if not impossible to close. You have two Government representatives... declaring out of the blue that, by the way. we decided to cancel Zhineri's lease tomorrow or in the next coming days. So forget about Zhineri. How can we forget about Zhineri when this will reconfigure the entire project?... [F]or a responsible government to be using those tricks and to be incorporating external political infighting into its decision that might provoke a major default like this one, to me was incomprehensible. (Transcript. February 12, at 401-2, Mr Elwan.)

227. The Claimant's final word on this subject of "preliminary agreement" and its relationship to the Claimant's "development costs":

> A party who breaches a preliminary agreement must put the injured party in the position it had been in without the breach. If not for Georgia's breach, ZDL would have recouped its development costs when the investors came in. (Claimant's Post-Hearing Reply at 11.)

C. *Alleged Breach of May 26, 2000 Agreement*

228. As recorded in Part III hereof, the Claimant, in advancing its case, relied heavily on the May 26, 2000 Agreement:

> After this Arbitration began, Georgia entered into a Settlement Agreement that essentially admitted its liability on all crucial points... Georgia nevertheless refused repeated requests to execute the Agreements. (Claimant's Memorial at 2.)

229. The Claimant cited various provisions of die Georgia Civil Code in support of the proposition that Georgia was in breach of its obligations under the May 26, 2000 Agreement. First, the Claimant cited Article 24(4) to which reference has previously been made. In addition, the Claimant refers to: Article 319(1) which provides: "Subjects of private law may within limits of a law, freely

conclude contracts..Article 361(2) which provides: "An obligation shall be performed properly, conscientiously in time and at the place agreed"; and the previously quoted Article 394(1). On the basis of these various provisions, the Claimant concluded that the May 26, 2000 Agreement is "an enforceable contract under Georgian law", for the breach of which the Claimant is entitled to damages. (Claimant's Memorial at 29.)

230.

The Claimant especially relied on Article 5(1) of the May 26, 2000 Agreement cited in the Introduction to this Part V. The Claimant asserted that that provision "proscribes any renegotiation of significant terms, yet Georgia treated the Settlement Agreement as an invitation to return to square one and to try to impose fundamental changes to the Rehabilitation Agreement unrelated to any intervening developments". (Claimant's Memorial at 30.) In this regard, the Claimant cited the seventeen "fundamental" changes demanded in the Respondent's letter of July 15, 2000.

> The July 15, 2000 letter referred to issues on which agreement had purportedly not been reached included issues that had specifically been concluded. For example, in item 1, he [Premier Sheradze] claimed that it was unacceptable for Georgia to consent to an extension of the lease agreement for 25 years. Yet, President Shevardnadze had specifically mandated that the lease be extended for 25 years in his Decree No. 29. (Witness Statement of Ramzi Fares, para. 111 at 29-30.)

Insistence on the proposed changes was therefore viewed by the Claimant as a deliberate breach of the May 26, 2000 Agreement by Georgia. (Claimant's Memorial at 21.)

231.

In response, the Respondent objected to the Claimant's characterization of the May 26, 2000 Agreement as a "Settlement Agreement":

> [I]n neither version is the May Agreement entitled a "Settlement Agreement" and... it is clear that the only obligation on the Respondent arising out of this agreement was to continue negotiations in good faith. Hence, the Respondent objects to the Claimant's nomenclature of this agreement... (Respondent's Rejoinder at 3.)

The Respondent cited in support of its position Paragraph 6 of the May 26, 2000 Agreement which in part says: ",. Furthermore, nothing herein shall be deemed a waiver of, or be used to prejudice any claims asserted by ZDL in the ICSID arbitration if a settlement is not achieved within the time foreseen in this agreement." Thus, the Respondent viewed the May 26, 2000 Agreement as setting a road map for negotiations toward settlement but not as constituting any comprehensive settlement in and of itself.

232.

The Respondent therefore concluded:

> All of the above points highlight that the true purpose of the May Agreement was as the Respondent believed, to allow a further window for negotiations... It is an agreement to agree and that is not enforceable under Georgian law. (Respondent's Post-Hearing Brief at 23.)

233. In reply, the Claimant cited those portions of the Respondent's CounterMemorial that expressly acknowledged the "settlement" nature of the May 26, 2000 Agreement:

> The Counter-Memorial was at least honest enough to admit that the May 26 agreement was indeed a settlement agreement, and that it was initiated by the Georgians. (Transcript, February 11, at 146, Mr Landsman.)

234. In a further effort to undermine the legal effect, if any, of the May 26, 2000 Agreement, the Respondent denied Premier Sheradze's authority to execute the agreement to which the Claimant responded:

> No Georgia witness... challenged Premier Sheradze's authority to sign the Settlement Agreement (Claimant's Post-Hearing Reply at 14.)

In rebutting this contention by the Respondent, the Claimant relied on the previously quoted excerpts from Presidential Ordinance No. 157 of April 21, 2000 and the May 26, 2000 Agreement.

235. The Respondent likewise had numerous responses to the Claimant's substantive assertions regarding the May 26, 2000 Agreement. These responses included for example:

> At no time did the Respondent consider the May agreement to be (as now suggested by the Claimant) a document obliging the Respondent to award the Zhinvali contracts to the Claimant on any favorable terms the Claimant chose to insert. (Respondent's Rejoinder, para. 122 at 29.)

236. The Claimant for its part contested such defenses by the Respondent:

> The admission in the Settlement Agreement that ZDL had performed all of its obligations as of May, 1999 should preclude any argument to the contrary, especially where, as here. Georgia has offered absolutely no documentary evidence of any failure to complete any required work. (Claimant's Reply at 6.)

237. Furthermore, the Claimant condemned the Respondent for having indirectly brought the action in Georgia domestic court to set aside the May 26, 2(XX) Agreement a lawsuit which the Claimant regarded as "collusive" and which resulted in the Claimant's Provisional Measures Motion described in Part III:

> If there had been any conflict between the Settlement Agreement and Georgian Law, Georgia misrepresented its ability to perform the contract and should not be allowed to take advantage of its own culpable conduct. (Claimant's Reply at 6.)

Several days following the filing of the Respondent's Rejoinder, the Georgian Regional Court ruled that "under Georgian law this agreement is void *ab initio"*. (Respondent's Post-Hearing Brief, para. 86 at 20.) This ruling was shortly followed by the Tribunal's Order and Recommendation on the Claimant's Provisional Measures Motion.

D. *Alleged Unjust Enrichment*

238.

The Claimant further argued that it is entitled to compensation from the Respondent under the principle of "unjust enrichment" as codified by Georgia in Article 991 of the GCC. Article 991 stipulates:

> A person who has unjustly enriched at other person's expense by means other than those stipulated in this chapter is obliged to restitute the owner. (Claimant's Memorial, Exhibit A.)

The Claimant sees the facts of this case as falling squarely within Article 991:

> Georgia's (1) request that ZDL undertake substantial work for Georgia's benefit, (2) retention of many of the benefits of that work, and (3) refusal to compensate ZDL for any of their work meet all of the requirements to render Georgia liable under GCC 991. (Claimant's Reply at 16.)

ZDL argues that, as a result, it is entitled "on the principles of unjust enrichment and *quantum meruit* to be compensated for the time and expenses it incurred...". (Claimant's Memorial at 34.)

239.

In responding to this claim for unjust enrichment, the Respondent referred to Article 976 of the GCC which sets forth those situations in which "restitution" on the grounds of unjust enrichment may be claimed and those situations in which "restitution is precluded". The Respondent observed in its Counter-Memorial:

> It is clear in the given case, that the Plaintiff would not be able to present the claim based on the Article 976 and did not even try to do so, because the existing relationship between the sides shows that there was nothing given to the Georgian side by [ZDL], as... the Plaintiff views them [its activities] as his property, no matter how odd it might seem. (Respondent's Counter-Memorial at 11.)

240.

In its Rejoinder, the Respondent added:

> The draft agreements are in a form which could apply to any project. In summary, the Respondent has not been provided with anything which has or could have enriched them. (Respondent's Rejoinder, para. 198 at 45.)

241.

To this, however, the Claimant replied:

> The Georgian Court confirmed that the materials that ZDL had prepared for Georgia were of value when it ruled on Inly 1, 1999, that Georgia could not transfer the results of the work to anyone else (Claimant's Post-Hearing Submission at 34.)

And in fact, we learned just how valuable Georgia considered that (the draft Concession Agreement] from the testimony of Ramzi Fares that he found out on one of his visits to Georgia that the Government had actually given to somebody else a copy of our draft Concession Agreement to use as a model. (Transcript, February 15. at 1121, Mr Landsman.) [5]

242.

But the Respondent, while never denying Mr Fares' charge, disclaimed any "value" received from the documents supplied by ZDL:

> The decision of the [Georgian] court in this case did not relate to any "value" that the documents prepared by ZDL may have had, as ZDL suggests. What the court ruled was that the documents which had been prepared could not be passed on to a third party. (Respondent's Post-Hearing Reply Brief at 12.)

243.

At the Oral Procedure, Claimant's Counsel summarized the Claimant's case on "unjust enrichment" as follows:

> First of all. Georgia learned... the structure of the whole transaction which enables Georgia to reproduce the process.
>
> Secondly, Georgia now has drafts... in... the final form of all agreements it would need to go forward with somebody else on a project.
>
> Third, and I think most importantly, are the Harza and Fichtner Reports. Now, the Fichtner Report was not at the time given to Georgia in its actual complete written form, but Georgia got the benefit of... a great deal of engineering expertise that the Government now has and it hasn't paid us for. (Transcript, February 15. at 1121-2. Mr Landsman.)

E. *Alleged Promissory Estoppel*

244.

The Claimant's next claim was that Article 317 of the GCC applies to the facts of this case not only for the purposes of the Claimant's "preliminary agreement" arguments but also for the purposes of

[5] When in the course of subsequent negotiations..., the term sheet was expanded in November 1998 into a full Concession Agreement (about 65 pages) the Government decided (without prior clearance from us) to give a copy to another US company negotiating with Georgia at the time on a smaller but similar project, as a model Concession Agreement to be used by them. We were told of this fact, and thanked by the executives of the company when we met them in Tbilisi at the end of November 1998." (Witness Statement, Ramzi Fares, para, 65.)

its "promissory estoppel" claim. The Claimant based its promissory estoppel argument on the following rationale:

> Georgia represented to ZDL on more than one occasion, both orally and in writing, that it would execute an agreement with ZDL... ZDL relied on these representations in continuing to negotiate with Georgia, foregoing other business opportunities, and investing substantial resources in developing the project... That reliance directly resulted in substantial injury. (Claimant's Memorial at 35.)

245. The Claimant cited its Georgia legal expert. Professor Chikvashvili, as to the meaning of the words "culpable action" found in the Respondent's translation of Article 317(3):

> "Culpable action"... simply means that the other party was at fault or otherwise to blame for the fact that the contract was not concluded. It could include any knowing, intentional or negligent bad faith action... No higher standard of blameworthiness is required. (Chikvashvili, para. 19 at 7). (Claimant's Post-Hearing Brief at 4.)

246. The Respondent countered by espousing the position that the Georgian codified legal system does not acknowledge any notion of promissory estoppel:

> [T]he Claimant is relying on the obligation contained in Article 317(3), GCC. which is headed "Grounds Giving Rise to an Obligation".... As can be seen, this is not the same as the concept of promissory estoppel. (Respondent's Post-Hearing Brief, paras. 169-70 at 41.)

247. The Claimant replied that Article 317(3) does reflect the doctrine of promissory estoppel and that the facts of this case meet the statutory test:

> Article 317(3) recognizes that a party must be compensated for any expenses incurred in the course of preparing a contract, it the contract had not been entered into due to the intentional or negligent actions of the other side... The culpable action part of that statute simply means that the other party was at fault. (Transcript, February 15. at 1118-19. Mr Landsman.)

248. The Respondent, however, stressed that, even if there were a notion of promissory estoppel contained in Article 317(3), which it denied, there was nonetheless an absence of any "culpability" on Georgia's part:

> Firstly, the Claimant has not and. indeed, in our submission could not argue that the Presidential decrees constitute culpable conduct on the part of the Republic of Georgia. Secondly,... Presidential Decree No. 29 dated 17 January 1999... does not reflect any agreement of the parties whatsoever on the essential terms required... Thirdly.... Presidential Decree No.

29 cannot be regarded as concluding the Concession Agreement. (Respondent's Post-Hearing Brief, para. 173 at 42.)

F. *Claimant's Damages Claims*

1. *Relevant Articles of Georgian Civil Code*

249. Flowing from the above asserted grounds of liability, the Claimant seeks damages under several provisions of the Georgian Civil Code in the nature of reimbursement of development costs, recovery of lost profits and assessment for moral harm.

a. *Restitution ("unjust enrichment')*

250. The Claimant cites the previously noted Article 394(1) of the GCC for the consequences of Georgia's alleged "breach of obligations" to ZDL.[6] The Claimant next refers to Article 408(1) as the source of its restitution argument and, somewhat inconsistently, its unjust enrichment claim:

> 1. A person who is liable for damage shall restore the state which would have existed unless the compensation-binding circumstances occurred. (Claimant's Memorial, Exhibit A.)

The Respondent's USAID translation of the same Article is:

> 1. A person who is obligated to compensate for damages must restore the state of affairs that would have existed if the circumstance giving rise to the duty to compensate had not occurred. (Georgia's Submissions at 2438.)

251. The Claimant calls attention also to Article 409:

> Where the compensation of damage through the restoration of the original state is impossible or requires unreasonably high expenses, a creditor may be given a monetary compensation. (Claimant's Memorial. Exhibit A.)

The Respondent's translation of the same Article is:

> If the compensation for damages is impossible by restoration of the original state of affairs, or if such restoration would require [unreasonably] high expenditures, then the obligee [claimant] may be given monetary compensation. (Georgia's Submissions at 2438.)

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[6] Respondent's Rejoinder included the following rendition of Article 19-1(1): In case of breach of an obligation by the Obligor, the Obligee may claim damages arising from the breach. This rule shall not apply when the obligor is not responsible for a breach of the obligation. (Respondent's Rejoinder. para, 154 at 35)

The Claimant analogizes this provision to a call for compensation where specific performance is not possible. (Claimant's Memorial at 36.)

b. *Lost profits*

252.

The next Article of the GCC cited by the Claimant is Article 411 which addresses the issue of "lost profits":

> A damage shall be compensated not only for the actual material loss but also for the unreceived income. Unreceived is the income which is not received by a person and which he would receive had the obligation been properly performed. (Claimant's Memorial, Exhibit A.)

Respondent's USAID translation of the same Article is:

> Damages shall be compensated not only for the loss of property actually incurred, but also for lost profit. Profit is deemed to be lost if the person did not receive it, but would have received it if the obligation had been duly performed. (Georgia's Submissions at 2438.)

c. *Moral damages*

c. *Moral damages*

253.

Lastly, the Claimant seeks "moral damages" as well, citing Article 18(6) of the GCC:

> Where the offence is inflicted as a result of guilty actions a person may demand the compensation of the harm (damage). In the case of a guilty offence an authorized person is entitled to demand also the compensation of non-property (moral) harm. Moral harm may be compensated independently from the compensation of property harm. (Claimant's Memorial, Exhibit A.) [7]

The Claimant reads the phrase "authorized person" in its English translation of Article 18(6) as meaning "injured person". (Claimant's Memorial at 40.)

2. *Reimbursement of development costs*

254.

[7] Georgia's Submissions did not include a separate translation of this Article

In this category of damages, ZDL seeks reimbursement for "professional, legal and consulting fees and travel expenses". (Claimant's Memorial at 36.) The Claimant broke down these expenses in its Memorial as follows:

> Professional Fees $ 2,176,129
> Legal Fees 552,965
> Travel Expenses 277,581
>
> Consultants' Fees
>
> Fichtner 160,000
> GCC 28,000
> Harza 365,827
> Other 2,730
> Other 113,181
>
> TOTAL $ 3,676,413
>
> (Georgia's Memorial at 37.)

In its final brief, the Claimant, based on alleged further costs incurred since the filing of the Claimant's Memorial, increased the total damages claimed in this category to US $4,323,433 but did not provide a comparable breakdown. (Claimant's PostHearing Reply Brief at 19.)

255.

The general tenor of the Respondent's defense to this claim is, as noted in Parts IV and V, that Georgia never undertook any obligation to ZDL to reimburse it for any such "development costs":

> [W]hen asked by Mrs Blanch whether it was the case that "there is no suggestion now that there was ever an agreement that your cost would be reimbursed by the Government", Mr Fares replied: "correct". (Respondent's Post-Hearing Brief, para. 39 at 9.)

256.

The Respondent also made much of the fact that, in its opinion, the Claimant's own evidentiary documentation failed to show that the claims were those of ZDL, the Claimant in this action, rather than those of its corporate shareholders, Profidev, ICG and Harza, none of which is a party to this arbitration:

> The documents provided by the Claimant are invoices and expenses in relation to Profidev, ICG and Harza which were never invoiced to the Claimant company ZDL... (Respondent's Post-Hearing Brief, para. 188 at 46.)

[T]he only invoice to be submitted from any of the shareholder companies to the Claimant was from Harza (in the sum of US $366,000). The Claimant has produced no evidence that this invoice has been paid by ZDL (and that ZDL has therefore incurred any loss). (Respondent's Post-Hearing Reply Uriel at 8)

257. The Claimant, however, responded as follows :

> The proper party to bring an action in ICSID is the entity that entered into the agreement with the host state. Here, ZDL was the special purpose company created to enter into agreements... Profidev, ICG and Harza were the foreign investors who... undertook the financial risk of the project... To ensure that the purpose of ICSID is not frustrated by a narrow interpretation of an investor, Profidev, ICG and Harza should be compensated... (Claimant's Post-Hearing Submission at 35-6.)

258. The Claimant also relied on its audited financial statements:

> Georgia argues that ZDL is not entitled to recover expenses incurred by its three shareholders, but these expenses were all charged to ZDL. as reflected in the financial statements. (Claimant's Post-Hearing Reply Brief at 10.)

259. Mr Elwan testified on this subject at the Oral Procedure:

> Q. Did you, as one of the developers, bill ZDL for your expenses?
> A. Absolutely. Absolutely.
> Q. And how are those costs reimbursed?
> A.... As it stands right now, ZDL being the company that developed the project, has in its balance sheets accounts payable to all of the three developers that have been involved... The payment for these services would ultimately take place at financial close.
> Q. Does ZDL produce financial statements?
> A. Yes.
> Q. Are they audited?
> A. Yes...
> President Robinson: So, if I understand the testimony,... the expenses incurred by the three... shareholders of... the Irish corporation... are on the books of the Irish corporation as accounts payable, so they were billed to ZDL itself.
> The witness: Absolutely
>
> (Transcript, February 14, at 994-6. Mr Elwan.)

260. On March 15, 2002, after the close of the Oral Procedure, the Claimant submitted ZDL's "audited financial statements for the period ending 31 December 2000". Previously, only fiscal year 1998 and 1999 financial reports were available to the Tribunal and the Respondent. In the ZDL Balance Sheet for the period ending 11 December 2000 appears a "Fixed Assets" category in which "Intangible assets" are listed at US $4,230,064. Footnote 4 lists these "Intangible Fixed Assets" as "Development Costs". The same ZDL Balance Sheet lists on the liability side of the ledger a category entitled "Creditors (amounts falling due within one year)" in the amount of US $ "(2,380)" and a category entitled "Creditors (amounts falling due after one year") in the amount of US $ "(4,129,540)". Footnote 5 allocates the former amount between ""Trade creditors" and "Accruals". The large latter

amount is described in Footnote 6 as a "Shareholders loan".

261. In response to Mr Elwan's testimony, the Respondent's experts did not accept the Claimant's accounting treatment. KPMG's Mr Haberman wrote in a supplemental report attached as an exhibit to the Respondent's Post-Hearing Brief as follows:

> SSAP 13 [one of the Irish accounting principles]... states that, where development expenditures are incurred under a firm contract which includes reimbursement of that expenditure, it should be accounted for as contract work in progress and not as development expenditure. The inclusion of the fixed asset entitled "Development Expenditure" therefore implies that the Claimant was accounting for the expenditure under SSAP 13, which means it did not believe it had a contractual entitlement to reimbursement of the expenditure... In my view... the costs should have been written off to its profit-and-loss account. (Supplemental Haberman Report at 7 and 9.)

262. The Claimant made the following reply to the accounting arguments of the Respondent:

> Because ZDL has not been compensated for its development costs, it has not been able to pay Profidev, ICG or Harza for the costs they incurred to develop this project. Accordingly, ZDL carries those costs on its financial statements. (Claimant's PostHearing Brief at 39.)

263. The Claimant also used the GCC restitution law in connection with its development costs claim:

> We are not contending that there was an agreement that said Georgia would pay us back, but the contention... comes from basic principles of "but for" causation and the Georgian Civil Code that says... you put the non-breaching party back in a position where it would have been if the breach hadn't occurred. (Transcript, February 11, at 153, Mr Landsman.)

264. As previously noted, one of the Respondent's answers to this argument was that industry practice is such that these development costs, in the absence of express agreement to the contrary, are "eaten" by the sponsor of the proposed project. The Respondent's first written pleading stated on this subject:

> It is typical for every civilized legal system, that parties should incur the cost for the preparation of the agreements, if the agreement was not conducted through the fault of one of the parties. But in given case, Georgian party has no fault and the party that had the expenses bears risk of cost. (Respondent's Counter-Memorial at 13.)

265. The Claimant next advanced the proposition that this development stage is an integral part of every project finance transaction and is just as much a part of the ultimate "investment" as any other

stage in the cost cycle. Mr Elwan testified during the hearing:

> [A]ll of these things that carry on in the process, which is referred to as a development stage, these are genuine costs that are audited, reviewed, and normally enter as part of the overall cost of the project.... So, in essence, the project is comprised of three main components in terms of its cost: It is the development costs associated with it; it is the actual nitty-gritty of construction of what we call hard costs; and then there is the... soft cost, which is the financing cost. (Transcript, February 15, at 1107-8, Mr Elwan.)

266. The Claimant questioned Mr Haberman on this point at the hearing, who confirmed in cross-examination:

> Q. Let me ask you about a definition of development costs. Would you agree with me that project capital costs would comprise all project development and construction costs, including but not limited to pre-feasibility, engineering, legal and auditing services?
> A. Yes.
>
> (Transcript February 15, at 1194-5, Mr Haberman.)

267. The Respondent countered, however, that, unless the project financing proposal results in a binding contract, industry practice calls for ZDL to absorb these development-stage costs:

> Mr Haberman stated... that pre-contract costs are an occupational hazard and only under very specific conditions, negotiated in advance, would they be recoverable. (Respondent's Post-Hearing Brief, para. 194 at 48.)

In making this point, the Respondent cited testimony of Mr Elwan:

> In his own words, every developer will undertake some work which in itself is of high risk... [E]ssentially most developers will take a project on, do the work, and if they fail, then they load the cost of what they failed into other successful projects and proceed. (Respondent's Supplemental Post-Hearing Brief, para. 42 at 13.)

268. But Mr Elwan's full testimony on this point contained its own response to the Respondent's argument:

> I believe that this is... true, but only when you're bidding for a project, and normally in the business practice, it is not more than 0.25 percent of the total estimated cost of the project. That means somewhere in the range... between $150,000 or $160,000 [for this Project]. (Transcript, February 11, at 247, Mr Elwan.)

So, Mr Elwan concluded that if the transaction is a "sole source" situation, if the other side induces the sponsor, and if the development costs are way above the norm, then there is a breach of faith

and the other side should pay.

3. *Recovery of lost profits*

269. We next turn to the Claimant's lost profits claim. The Claimant cited the Georgian Civil Code in support of its right to recover lost profits under the facts of this case:

> Georgian Law explicitly... entitles an injured party to recover lost profits... Here, the only way to restore ZDL to the state it would have been in if Georgia had fulfilled Its obligations under the [May 26, 2000] Settlement Agreement is to award the profits it would have made under the project agreements, (Claimant's Reply at 14.)

270. In its Counter-Memorial, the Respondent asserted that this claim for lost profits was "absolutely ungrounded...". (Respondent's Counter-Memorial at 13.) In its Post-Hearing Reply Brief, the Respondent took the Claimant to task for having reduced its lost profit claim by almost 50% during the course of the case up to that time and emphasized that the Respondent's experts, KPMG, had reached the "clear conclusion... that the Claimant suffered no loss of profit". (Respondent's Post-Hearing Reply Brief at 2.) In its final written pleading, the Claimant asked for $7,694,280 in lost profits rather than the "at least $23 million" that appeared in the Claimant's Memorial. (Claimant's Post-Hearing Reply Brief at 19.)

271. The Respondent also contended that, even if the Claimant does have a successful "preliminary agreement" argument, which the Respondent denies, then the Claimant can only gain reimbursement of its expenses but not damages for any "lost profits":

> It is quite uncertain why the Plaintiff asked for the compensation for lost profit along with the compensation of expenses for the preparation of agreement, while... it is clearly written into Section 3 of Article 317 of Civil Code of Georgia that only the expenses for the preparation of the agreement are reimbursable. (Respondent's CounterMemorial at 12.)

272. The Respondent supported this position with the expert legal opinion of Professor Kakhadze:

> Where there is any violation of the preliminary contract, the law [Article 317(3) of the GCC1 reaffirms the principle of compensation of incurred expenses *i.e.,* positive damages only. Consequently, the liability of the damage inflicting party... in no way extends to the lost profits... (Kakhadze expert opinion, para. 3.12 at 6.)

273. The Respondent's main financial argument is that, even if the deal had gone through, the Claimant

would have lost money and that thus there were no profits at stake. The Respondent used its KPMG experts to support this contention, citing the "Report to the Tribunal prepared by Philip Haberman, a Partner in KPMG in the United Kingdom (January 25, 2002)" (the "Haberman Report")

> Once a realistic discount rale is applied to the [Claimant's financial] model, the lost profits claimed by ZDL are shown to be non-existent... (Haberman Report, para. 6.8.2 at 36.)

During his expert testimony, Mr Haberman added further points to this line of reasoning:

> Q.... was the project that was being proposed financially viable?
> A. From what I've seen, it wasn't. I see no calculations which would give an idea of a project that would produce a sufficient rate of return to investors to warrant investors entering into the project. (Transcript, February 13, at 777, Mr Haberman.)

With the range of rates of return hypothesized by the Claimant, the Haberman Report's calculations resulted in losses rather than in profits:

> It a discount rate of 25 percent is applied to the model, the net present value of the project is negative $4.3 million (Haberman Report, para 6.4.4 at 31.)

274.

However, in cross-examination, the Claimant made the point that if the leasing fee for the Plant and Tailrace Tunnel were less, then the issue of financial viability would change, thereby positively affecting the return on investment:

> Q. Now, if the Fichtner report is the accurate assumption about what the leasing fee will be of $1.23 million rather than $3.81 million... [y]ou could either lower the tariffs because of the lower leasing fee or if you kept the same tariffs based upon the $1.23 million leasing fee, you'd make a whole for more money.
> A. Yes.
>
> (Transcript, February 14, at 894, Mr Haberman.)

The Claimant set forth a second comparable analysis in its Post-Hearing Brief:

> [Also, the Financial Model] used a total project cost of $64.45 million [whereas Option 1 of the Fichtner report] was estimated to cost only $49.1 million. (Claimant's PostHearing Brief at 45.)

275.

The Claimant also tied the question of "financial viability" to the notion of "bankability". For example, Mr Elwan testified:

> A. I think if you take any infrastructure project anywhere in the world and secure a 24 percent or a 23 percent or a 22 percent return on investment, this is not a small value project... The return on investment in the United States on utilities is between 8 and 15 percent. (Transcript, February 14, at 1011-15, Mr Elwan.)

But the Respondent's experts, in response, again made much of the discount rale assumptions of the Claimant:

> At a discount rale of 20 percent, the cumulative present value becomes positive in 2018; that's 20 years after the beginning of the project. At 25 percent and 30 percent, it never becomes positive... On the basis of these cash Hows... I doubt very much that the project would be bankable no matter how one defines that. (Transcript, February 15, at 1177-80, Mr MacCauley.)

276.

Meanwhile, the Respondent's expert, Mr McCredie, argued that this whole project development scheme should have been the subject of a separate contract:

> Q.... having heard Mr Elwan, are you still of the view that this project is suitable for private finance?
> A. I think it is not structured appropriately for private finance... Normally, this development work... should have been structured such that the funding was separate from the investigative and design work.
>
> (Transcript, February 15, at 1160-1, Mr McCredie.)

277.

Previous international arbitral awards have set basic standards for "lost profit" claims. Thus, an earlier ICSID award adopted the following stance on this issue:

> Furthermore, according to a well-established rule of international law, the assessment of prospective profits requires the proof that "they were reasonably anticipated, and that the profits anticipated were probable and not merely possible",... with reference to ex tensive supporting precedents disallowing "uncertain" or "speculative" future profits. (Citations omitted.) (*Asian Agricultural Products Ltd(AAPI)* v. *Republic of Sri Lunka* (ICSID Case No. ARB/87/3), para 104 at 569) (the *"AAPL Case'.)*

A leading *ad hoc* UNCITRAL ease further amplified on this principle:

> The Claimants have made a compensation claim based on the future lost profits of MDCL... The Claimants have not provided any realistic proof of the future profits of the company... [T]he Tribunal agrees with the Respondents that this [financial] report was not an economic forecast of profits, but a projection intended to encourage potential investors. *(Biloune and Marine Drive Complex* v. *Ghana Investments Centre and the Government of Ghana,* at 228 (October 27, 1989).)

The Iran-United States Claims Tribunal in a prominent decision followed a similar standard:

> The Tribunal cannot agree that SICAB had become a "going concern"... so that such elements of value as future profits and good will could confidently be valued. In the case of SICAB. any conclusions on these matters would be highly speculative. *(Phelps Dodge Corp.* v. *Iran,* para. 30 at 132.)

4. *Assessment of moral damages*

278. The last damage claim of the Claimant related to the reputation of ZDL and its shareholders. The Claimant asserted:

> Georgia's blatant breach of its obligations caused considerable damage to the professional reputation and standing in the industry of ZDL and each of its constituent members... ZDL has suffered moral damages and loss of business good will as a direct result of Georgia's defamatory allegations. (Claimant's Memorial at 39-40.)

279. As a result of these considerations, the Claimant sought in its initial Memorial "an award of US $2 million" as "appropriate compensation for the moral harm done to it by Georgia's repudiation of its agreement and defamatory comments". (Claimant's Memorial at 40.) In its last written submission, the Claimant asked for an award of "moral damages that the Tribunal finds fair and reasonable". (Claimant's Post-Hearing Reply Brief at 19.)

280. It was in connection with this moral damages claim that the Respondent made reference to Article 25(1) of the ICSID Convention in its CounterMemorial:

> c) As for the goodwill and moral damage allegedly suffered by plaintiff, we shall not stop on this issue, because plaintiff suffered no moral damage from the Georgian party. Anyway this issue can not be a subject of examination of the Tribunal, because under Paragraph 1 of the Article 25 of the Washington Convention "the jurisdiction of the centre shall extend to any legal dispute arising directly out of an investment", while the claim of plaintiff originates not from investment, but from the abuse of his honor and dignity. (Respondent's Counter-Memorial at 13.)

The Claimant responded to this contention in its Reply brief:

> Once a dispute is within ICSID's jurisdiction nothing in the rules limits the types of damages the Tribunal may award (Emphasis added [sic] (Claimant's Reply at 15.)

281. In making its "moral damages" claim, ZDL referred to previously mentioned provisions of the Georgia Civil Code:

> Under Article 18.2 of GCC, a person is entitled to demand in court the refutation of information defaming his honor, dignity or business reputation. Furthermore: "... in the case of a guilty offense an [injured] person... is entitled to demand also the compensation of non-property (moral) harm..(Claimant's Memorial at 40.)

The Claimant demanded moral damages not only for itself but also for two of its three shareholders:

> Two of the companies forming the ZDL consortium. Profidev and ICG, are also entitled to moral damages to compensate for the loss of goodwill they suffered with the development banks and strategic investors necessary to their business. That they claim those damages through the special purpose vehicle they formed for the investment should not be an impediment to recovery. (Claimant's Post-Hearing Brief at 2.)

282. The Respondent responded that the Claimant can only make claims on its own behalf because it is the only party to this case. And since ZDL was a sole purpose company formed for this Project alone, there could be no damage to its reputation when the transaction fell through. Mr Fares was asked about this by Respondent's Counsel during the Oral Procedure:

> Q. Do you believe ZDL has suffered damage to its credibility?
> A. ZDL, as mentioned before, was set up for the purpose of undertaking this project.
> So to the extent this project is not going to be conducted, ZDL doesn't have any other business.
>
> (Transcript. February 11, at 212. Mr Fares.)

283. Finally, the Respondent adopted the position that the ICSID Convention does not permit this type of claim:

> ICSID has no jurisdiction to award ZDL moral damages... as it is not a "legal dispute arising directly out of an investment...".
>
> (Rejoinder, paras. 191-2 at 44.)

G. *Conclusion*

284. Because of the jurisdictional decision that follows in Part VI, it has been unnecessary for the Tribunal to rule on these liability and damage claims and responses as submitted by the Parties.

VI. JURISDICTIONAL ISSUES

A. *Introduction*

285. This case has presented the Tribunal with difficult and disturbing issues related to jurisdiction, especially with regard to the meaning of the word "investment" In Article 25(1) of the ICSID Convention. This "investment" issue is difficult because there is limited precedent, legislative history and scholarly analysis available. The jurisdictional issues are disturbing because of the extreme delay that occurred before the Respondent raised them and the Parties became fully joined

in debating them.

286. To begin with, the Respondent chose to raise for the first time, not in its Counter-Memorial but in its Rejoinder, the question of the Respondent's "consent" to the jurisdiction of ICSID. Furthermore, it was only just before the beginning of the Oral Procedure that the question of whether any qualifying ICSID "investment" was present came into focus in a clear and direct fashion.

B. *Article 25(1) of the ICSID Convention*

1. *Its text and its five tests*

287. Because of the significance of these jurisdictional issues, here follows the full text of Article 25(1) of the ICSID Convention, the controlling provision for the Tribunal's purposes:

> *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 it unilaterally. (Emphasis added.)

Satisfaction of the dictates of Article 25(1) is foundational to any case to come before ICSID. Failure to do so ousts the Centre of any "jurisdiction" over the matter. If the Centre has no jurisdiction, then no tribunal established under the ICSID Convention has the competence to hear the merits of the case.

288. Article 25(1) presents live tests that each request for arbitration must ultimately meet. Four of these tests have to do with subject matter jurisdiction, or *ratione materiae,* and one of them has to do with personal jurisdiction, or *ratione personae.*

289. The four subject matter jurisdiction tests are as follows:

> i. There must be an "investment";
>
> ii. There must be a "legal dispute";
>
> iii. The "legal dispute" must "arise directly" out of the "investment" concerned; and
>
> iv. The "parties to the dispute" must "consent in writing to submit" that "legal dispute" to ICSID's dispute settlement process.

The sole personal jurisdiction test is the following:

> i. The "legal dispute" must be "between a Contracting State" and a "national of another

Contracting State".

2. Ratione materiae: *the presence of a "legal dispute"*

290. With regard to the four *ratione materiae* tests, neither Party has contested that this mallei involves a "legal dispute" That there is a "dispute" is obvious from the pleadings of the Parties and that this "dispute" is 'legal" is evidenced by the differences of view between the Parties as to their respective rights and obligations under various provisions of Georgia's domestic statutory law and under various articles and rules of ICSID.

291. Our finding is confirmed by the ruling in *FEDAX NV and The Republic of Venezuela* (ICSID Case No. ARB/96/3) (the *"FEDAX Case"):* "Although the term 'legal dispute' is not defined in the [ICSID] Convention, its drafting history makes abundantly clear that... 'the dispute must concern the existence or scope of a legal right or obligation...'." (Citations omitted.) *(FEDAX Case,* para. 15 at 8.) Here, the Claimant has asserted numerous "rights" and the Respondent has denied the existence of those rights.

3. Ratione materiae: *"arising directly"*

292. Because of the primacy of the conflict as to whether this case involves any "investment" at all within the meaning, context and purpose of Article 25(1) of the ICSID Convention, the Parties, in their written and oral pleadings, paid scant attention to the "arising directly" test. If the Tribunal were to conclude that a qualifying "investment" is present under the facts of this case, only then would it be necessary for the Tribunal to consider whether the "legal dispute" that is involved "arises directly" out of that "investment".

4. Ratione personae

293. With regard to the sole *ratione personae* test, there is no controversy between the Claimant and the Respondent as to the adherence of both Georgia and Ireland to the ICSID Convention or as to the Claimant's Irish corporate nationality.

294. However, this test is indirectly and importantly involved in this case to the extent that the Parties disagree as to whether the Claimant has the right and the power under the ICSID Convention to assert a claim not only on its own behalf but also on behalf of its separately incorporated shareholders that are not parties to this arbitration (two of which are nationals of a third State, the United States of America, that is also a Contracting State to the ICSID Convention). Later in Part VI.I.6., the Tribunal rules on this question.

5. *Dispute as to* ratione materiae: *"consent" and "investment"*

295. Of the live tests set forth in Article 25(1), this review, therefore, leaves for resolution by the Tribunal two of the four *ratione materiae* tests, those dealing with the "consent" of the Parties and with the requirement of an "investment". After addressing some introductory matters, the Tribunal turns to these two criteria.

C. Governing Law in Deciding Jurisdictional Dispute as to "Consent" and Investment"

296. In deciding the "consent" and "investment" issues raised by the Respondent under Article 25(1), the Tribunal must first determine what law will govern. In this connection. Article 42 of the ICSID Convention provides guidance:

> *Article 42*
>
> (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply *the law of the Contracting State party to the dispute* (including its rules on the conflict of law) *and such rules of international law as may be applicable.* (Emphasis added.)

In this case, the Parties never reached a binding, written agreement as to applicable law either before or after the commencement of this arbitration. However, during the course of their respective pleadings, the Parties have shared common ground in acknowledging the governing role of the law of Georgia. [8]

297. The Tribunal, however, must also consider under Article 42 how "such rules of international law as may be applicable" interact with that Georgian law. The tribunal in its 1986 award in the *Letco Case* wrote of this issue in the following manner:

> The only question is whether Liberian law is applied on its own... *or in conjunction with applicable principles of public international law.* According to Article 42 of the ICSID Convention,... in the absence of any express choice of law by the parties, the Tribunal must apply a system of concurrent law. *The law of the contracting state is recognized as paramount within its own territory, hut is nevertheless subjected to control by international law...* [Problems only arise] if there is divergence on a particular point between national and international law. No such problem arises in the present case... (Emphasis added.) *(Letco Case* at 358-9.)

Thus, in applying the ICSID Convention, an ICSID tribunal must first, in the absence of express

[8] "Both parties agree that Georgian law governs the contract dispute between the Parties" (Claimant' Post Hearing Brief at 2); and "As the parties have agreed that Georgian law applies to this dispute ..." (Respondent's Post Hearing Brief, para 145 at 36)

agreement between the parties to the contrary, pay heed to the domestic law of the respondent State but then must test the requirements of that domestic law against the tenets of public international law to the extent "applicable".

298.

One of the architects of the ICSID Convention, the late Aron Broches, a distinguished General Counsel of the World Bank for many years, created a considerable amount of the ICSID Convention's drafting history, and on this point the following has been said:

> In his Hague Academy lecture, he (Broches] described the relationship between municipal law and international law...: "The Tribunal will first look at the law of the host state and that law will in the first instance be applied to the merits of the dispute. Then the result will be tested against international law... In that sense... international law is hierarchically superior to national law under Article 42(1)." (Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,* 392 *(Recueil des Cours)* (1972) *quoted in* Okezie Chukwumerije, *International Law and* Article 42 of the ICSID Convention, 14 Journal of International Arbitration 79, 96 (1997).)

299.

In response to criticism by a delegate to the dialling session that Article 42(1) would be difficult to apply in cases of conflict between the two sources of law, Mr Broches replied:

> [T]he Legal Committee had been clearly in favor of permitting the tribunal to apply international law particularly in cases where a State changed its law to the detriment of an investor and in violation of an agreement not to do so. In such a case international law would not question the power of the sovereign State to change its law. but could hold that State liable in damages to the investor whose rights it had violated through an act inconsistent with international law. *(Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. Documents concerning the origin and formation of the Convention* at 985 (1968) *quoted in* Okezie Chukwumerije, *International Law and* Article 42 of the ICSID Convention, 14 Journal of International Arbitration 79,97 (1997).)

300.

The March 18, 1965 Report of the Executive Directors of the World Bank on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "1965 Executive Directors' Report") provided guidance as to how to discover the applicable rules of international law in any given case:

> 40.... 'The term "international law" as used in this context [of Article 42(1)] should be understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.

This Article 38(1) of the Statute of the World Court lists the particular sources of "international law" that that international judicial body can properly take into account in reaching its judgments.

301. Thus, the questions of whether the necessary "consent" or the requisite qualifying "investment" under Article 25(1) is present in this case are, on the basis of the above learning, a mixed issue of both Georgia national law and international law,

D. *Applicable Rules of Interpretation*

302. In applying this governing law framework, the Tribunal must next determine the rules of interpretation that it intends to follow. The ICSID Convention and the ICSID Arbitration Rules are silent on the subject of appropriate rules of interpretation, except that Article 44 of the ICSID Convention provides in part: If any question of procedure arises which is not covered by this section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."

303. In exercising this prerogative, the Tribunal has decided to adhere to the general rules of interpretation set forth in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331) (the "1969 Vienna Convention"). These two provisions of the 1969 Vienna Convention are viewed as reflective of customary international law:

> *Article 31*
> *General Rules of Interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes...:
>
> 3. There shall be taken into account, together with the context...:
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> *Article 32*
> *Supplementary means of interpretation*
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
>
> (a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

304. The Tribunal has no reason to suspect that Georgia's rules of interpretation for its own domestic statutes and regulations are in any way inconsistent with the general parameters of these treaty rules of interpretation, and neither of the Parties has ever contended as such. The only Georgian statutory rule of interpretation cited by the Respondent was Article 337 of the GCC:

> Further, pursuant to Article 337 of the Georgian Civil Code, headed: "Interpretation of Particular Expressions in a Contract" if particular expressions in a contract may be interpreted differently, then preference shall be given to the version that is commonly used at the place of residence of the parties to the contract. If the parties reside in different places, then the interpretation according to the offeree's [the Respondent's] place of evidence shall prevail. (Respondent's Rejoinder, para. 147 at 34.)

In this connection, the Respondent cited this Article of the GCC with respect to the previously quoted Article 5 of the May 26, 2000 Agreement and argued:

> Pursuant to this Article, the Georgian version of the provision in question should be dominant. (Respondent's Rejoinder at 34)

305. In response to the Respondent's reference to Article 337, the Claimant's expert opinion of Professor Chikvashvili of February 4, 2002 stated:

> 26. It also should he noted that it is erroneous to rely solely on Article 337 without reference to general rules of interpretation, found, inter alia, in Article 52 [of the GCC], which states:
>
> > In interpreting the declaration of intent, the intention shall be ascertained as a result of reasonable deliberation, and not only from the literal meaning of its wording.
>
> ... Consequently, the Respondent's utter reliance on the verbatim language... contradicts the rules of interpretation set forth in the relevant Articles of GCC (at 9-10).

Other than in these two respects, that is, where there exist discrepancies between the English and Georgian versions on any given issue (and, in this case, the Respondent has only cited one), and where there is a question of the intent of the Parties, the Tribunal has been cited no other pertinent provision in the Georgian Civil Code on the subject of rules of interpretation that is of possible relevance to this arbitration. While the Tribunal finds the meaning of Article 52 obscure, the Tribunal detects no derogation in the Georgian internal law from the international law of interpretation. Thus, the Tribunal will otherwise apply comparable rules of interpretation whenever it is necessary to discern the meaning of Georgian national law or of the ICSID Convention and its implementing rules.

306.

The Tribunal takes judicial notice of the fact that prior ICSID cases have addressed this issue of standards of interpretation. The 1983 award in the case of *Amco Asia Corporation and Others* v. *Republic of Indonesia* (ICSID Case No. ARB/81/1) (the *"Anico Case")* described one of the relevant principles in these terms:

> [A] convention... is to be construed in a way which leads to find out and to respect the common will of the parties; such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda,* a principle common, indeed, to all systems of internal law and to international law. *(Amco Case,* para. 14 at 394.)

307. Yet another ICSID case has made further interpretive contributions that shed light on the meaning of the previously cited provisions of the 1969 Vienna Convention. The 1990 award in the *AAPL Case* stated:

> The first general maxim of interpretation is that it is not allowed to interpret what has no need of interpretation. (Citations omitted.)
>
> It is a uniform rule of construction that effect should be given to every clause and sentence of an agreement. (Citations omitted.)
>
> A clause must be so interpreted as to give it a meaning rather than so as to deprive it meaning. *(AAPL Case.* para. 40 at 540-2.)

308. With the Tribunal taking its lead from Articles 31 and 32 of the 1969 Vienna Convention, these are together the interpretive standards that the Tribunal will apply in deciding this case.

E. *Burden of Proof*

309. Another matter of importance is the applicable standard for burden of proof, a subject that is not addressed in either the ICSID Convention or in the ICSID Arbitration Rules, and neither Party cited any statute of Georgia as bearing on the issue. It is standard practice that a party has "the burden of proving the facts relied on to support his claim or defense", this formulation being found in the rules of the United Nations Commission on International Trade Law ("UNCITRAL"). ("UNCITRAL Arbitration Rules", Article 24(1), UN General Assembly Resolution 31/98, 31st Session, Supp. No. 17, UN Dec. A/31/17 (1976).)

310. One ICSID award, that in *Southern Pacific Properties (Middle East) Limited* v. *Arab Republic of Egypt* (ICSID Case No. ARB/84/3) (the *"SPP Case"),* formulated the rule insofar as jurisdictional claims and defenses are concerned as follows:

> Thus, jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and *jurisdiction will he found to exist if - but only*

if - the force of the arguments militating in favor of it is preponderant. (Emphasis added.) (Citations omitted.) *(SPP Case,* para. 63 at 144.)

311. The tribunal in the *AAPL Case* described the general burden of proof rules that it intended to follow:

> There exists a general principle of law placing the burden of proof upon the claimant...;
>
> Hence, with regard to "proof of individual allegations advanced by the parties in the course of proceedings, the burden of proof rests upon the party alleging the fact.. (Citation omitted.)
>
> *The international responsibility of the State is not to be presumed. The party alleging a violation of international law giving rise to international responsibility has the burden of proving the assertion..* (Emphasis added.)
>
> [I]n case a party adduces some evidence which *prima facie* supports his allegation, the burden of proof shifts to his opponent..
>
> In cases where proof of a fact presents extreme difficulty, a tribunal may thus be satisfied with less conclusive proof, i.e.. *prima facie* evidence. *(AAPL Case,* para. 56 at 549.)

312. The Tribunal adopts these aforementioned guidelines as its governing principles as to burden of proof.

F. *Claimant's Procedural Challenge as to Respondent's Objections to Jurisdiction: Rule 41 and Rule 27 of the ICSID Arbitration Rules and Article 41 of the ICSID Convention*

313. In addition to the explicit jurisdictional mandates of Article 25(1) of the ICSID Convention, this Tribunal must also address the requirements of certain of the ICSID Arbitration Rules. Rule 41, and its interaction with the "waiver" provision of Rule 27, have presented the Tribunal with interpretive issues. These issues relate to (i) the Respondent's belated challenges to jurisdiction and (ii) the legal effect, if any, of that delay.

314. Rule 41 of the ICSID Arbitration Rules provides:

> *Rule 41*
> *Objections to Jurisdiction*
>
> (1) *Any objection that the dispute* or ancillary claim *is not within the jurisdiction of the*

Centre or, for other reasons, is not within the competence of the Tribunal *shall be made as early as possible. A party shall file the objection* with the Secretary-General *no later than the expiration of the time limit fixed for the filing of the counter-memorial,* or, if the objection relates to an ancillary claim, for the filing of the rejoinder - *unless the facts on which the objection is based are unknown to the party at that time.* (Emphasis added.)

(2) *The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute,* or any ancillary claim before it. *is within the jurisdiction of the Centre* and within its own competence. (Emphasis added.)

(3) Upon the formal raising of an objection relating to the dispute, the proceeding on the merits shall be suspended. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

(4) *The Tribunal* shall decide whether or not the further procedures relating to the objection shall be oral. It *may deal with the objection as a preliminary question or join it to the merits of the dispute.* If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures. (Emphasis added.)

(5) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, it shall render an award to that effect.

315.

This Rule 41 is in implementation of Article 41 of the ICSID Convention which provides:

Article 41
Powers and Functions of the Tribunal

1. The Tribunal shall be the judge of its own competence;

2. *Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre,* or for other reasons is not within the competence of the Tribunal, *shall be considered by the Tribunal* which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute. (Emphasis added.)

These terms of Article 41 are written in mandatory terms insofar as the Tribunal's obligations are concerned, in distinction from the mandatory terms of Rule 41(1) insofar as the obligations of an objecting party are concerned.

316.

As previously described, the Respondent for the first time raised with clarity any Article 25(1) jurisdictional objection only in its Rejoinder, not in its Counter-Memorial as specifically mandated by the second sentence of Rule 41(1). Indeed, the Respondent's Counter Memorial, by negative implication, acknowledged ICSID's jurisdiction insofar as recourse to its dispute settlement mechanism is concerned, in for example, when it stated:

> ... and the fulfillment of the Plaintiff's claims must be rejected by the Tribunal (Respondent's Counter-Memorial at 1).
> The Georgian side, regardless of being confident about complete invalidity of the claims of the plaintiff attempted to avoid the arbitration process as long as it would in no case be of positive consequences for Georgia as a state... (Respondent's CounterMemorial at 7.)

Thus, not only did the Respondent in its Counter-Memorial fail to deny that it had granted the necessary "consent" to ICSID jurisdiction but statements in that Counter-Memorial implied, to the contrary, a recognition of that "consent".

317. The Respondent never claimed in its Rejoinder or thereafter that its delay in raising its jurisdictional objections was based on "facts... unknown" at the time that it had filed its Counter-Memorial. Indeed, the Respondent based the jurisdictional objection in its Rejoinder upon the Respondent's interpretation of a statute of Georgia that was promulgated into law several years prior to the filing of the Claimant's Request for Arbitration on December 3, 1999. This statute is the November 12, 1996 "Law of Georgia on Promotion and Guarantees of Investment" (the "1996 Georgia Investment Law"). Il is this law on which the Claimant based its argument that Georgia had "consented" to the submission of this dispute before ICSID. The Respondent chose, on whatever ground, to contest that argument only in its Rejoinder. Thus, the Tribunal concludes that there is no foundation for finding an exception based on lack of knowledge at the time of the filing of the Respondent's Counter-Memorial. Consequently, the Respondent has, in the Tribunal's judgment, failed to meet the plainly mandatory requirements of Rule 41(1).

318. After the filing of the Respondent's Rejoinder, the Claimant, as noted in Parts III and IV, vigorously objected to the Respondent's tardy behavior and claimed prejudice to its position. In asserting the conclusive effect of this delay as to the Centre's jurisdiction, the Claimant called the Tribunal's attention not only to Rule 41 (1) but also to Rule 27 of the ICSID Arbitration Rules, which provides in pertinent part:

> *Rule 27*
> *Waiver*
>
> A party which knows or should have known that a provision... of these Rules... has not been complied with and which fails to state promptly its objections thereto, shall be deemed... to have waived its right to object.

Thus, the Claimant concluded, the Tribunal was without any competence to hear the Respondent's objections to jurisdiction because the Respondent had already "waived" any right to raise the issue. The Claimant confirmed its adherence to this position in its Post-Hearing Reply Brief:

> Georgia waived the right to assert a jurisdictional challenge long ago... (Claimant's Post-Hearing Reply Brief at 2.)

319.

With respect to the liming of its objection, the Respondent's Rejoinder recognized the awkwardness of its position mult i the ICSID Arbitration Rules:

> We mention this challenge to jurisdiction now while conscious that it would have been more appropriate for the Respondent to have raised this issue at an earlier stage (Rule 41). However, (1) as Article 41 (ICSID rules) contemplates hearing challenges to jurisdiction at the same time as a hearing on the merits; and (2) as, we submit, the Claimant will suffer no real prejudice arising from the Respondent's delay in addressing this point, we request that the Tribunal makes a ruling on jurisdiction. (Respondent's Rejoinder, para. 216 at 48.)

320. The Tribunal's obligation under Article 41 of the ICSID Convention to assess the applicability and effect of Rule 41 and Rule 27 of the ICSID Arbitration Rules is the same with regard to the Respondent's jurisdictional challenge based on an alleged lack of "investment" as it is with regard to the Respondent's challenge based on an alleged lack of "consent".

321. Despite the Respondent's failure to comply with Rule 41(1), the Tribunal, in its letter dated February 5, 2002, described in Part III, found, in keeping with the dictates of Article 41 of the ICSID Convention, that it had no alternative but to follow Rule 41 (2)'s invitation to the Tribunal "on its own initiative" to consider "at any stage of the proceeding, whether the dispute... is within the jurisdiction of the Centre and within its own competence". The Tribunal further concluded, because of the timing of the Respondent's objection, that the issue of jurisdiction should be "join[ed]... to the merits of the dispute" under the terms of Rule 41(4).

322. The Tribunal reached its decision under Article 41 and Rule 41(2) in spite of Claimant's repeated references to the encyclopedic and comprehensive work by Professor Christoph Schreuer entitled "A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States" (Cambridge University Press, 2001) (the "Schreuer Commentary"). The Schreuer Commentary reviews and analyzes the meaning and legislative history of various Articles of the ICSID Convention and of the implementing regulations thereunder, including Rule 27. On that score, the Claimant cited the following excerpt from the Schreuer Commentary:

> Under Arbitration Rule 27, a party that knows that a jurisdictional requirement has not been met and which fails to state its objections thereto promptly shall be deemed to have waived its right to object... If the alleged lack of jurisdiction relates to a party's consent, failure to raise an objection before the Tribunal may be interpreted as consent to jurisdiction. (Schreuer Commentary, para. 155 at 939.) (Claimant's Post-Hearing Brief at 49.)

The Schreuer Commentary also contains the following relevant analysis:

> [A] party might be tempted not to raise an objection while it is still optimistic about the outcome of the case... [I]t is impossible to deny that a party must be estopped from arguing lack of consent after not raising it as a jurisdictional objection early in the proceedings and after pleading on the merits. (Schreuer Commentary, para. 337 at 230-1.) (Claimant's Post-Hearing Brief at 49.)

323. The effect of the February 5, 2002 decision by the Tribunal described in Part III was a judgment that, in keeping with the mandatory nature of Article 41 of the ICSID Convention, Rule 4 1(2) not only constituted an exception to Rule 41(1) but also took priority over the waiver provisions of Rule 27. Whatever the effect of its own delay upon the rights of the Respondent, the mandate of the Tribunal remains, and that is that the Tribunal must satisfy itself of the Centre's jurisdiction and of its own competence.

324. The Tribunal notes that Article 41 uses the verb "shall" whereas Rule 41(2) uses the verb "may". Under the particular facts of this case, the Tribunal believes that it must act "on its own initiative" in spite of the Respondent's egregious delay. The only counter-argument would be that, because of Rule 41(1) and Rule 27, the Respondent's belated objection is legally deemed to constitute no objection at all. But even under that rationale. Article 41 remains, as does the discretion granted the Tribunal by Rule 41(2). In sum, the Tribunal concludes that any "waiver" by the Respondent of its rights would not, and could not, foreclose this institutional prerogative of the Tribunal.

325. The fact that the Respondent did deny in its Counter-Memorial the presence of any "investment" under Georgian law and the fact that the Counter-Memorial contained the oblique reference to Article 25(1) provide, in the view of the Tribunal, added justification to the Tribunal's decision in this regard, as does the fact that Georgia is a newly independent State, having only recently emerged from decades of Communist rule where the notion of private investment was alien to Soviet economic culture. As a struggling developing country, Georgia is here experiencing its first exposure to ICSID arbitration, which the Tribunal also regards as a fact that it reasonably may take into account.

326. The Tribunal notes in support of its decision that, in the recently released award in the case of *Alex Genin, Eastern Credit Limited, Inc. and A S Baitoil and the Republic of Estonia* (ICSID Case No. ARB/99/2) (the *"Genin Case"),* it was stated:

> [T]he Tribunal considers it imperative to recall the particular context in which the dispute arose, namely, that of a re-nascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown. This is the context in which Claimants knowingly chose to invest in an Estonian financial institution... *(Genin Case,* para. 348 at 99.)

The Tribunal likewise recalls a statement in the award in *American Manufacturing & Trading, Inc.* v. *Republic of Zaire* (ICSID Case No. ARB/93/1) (the *"AMT Case")* where the tribunal in that case noted that the Claimant was:

> ... an investor who, rightly or wrongly, has chosen to invest in a country like Zaire, believing that by doing so the investor is constructing a castle in Spain or a Swiss chalet in Germany without any risks political or even economic or financial or any risk whatsoever. *(AMT Case,* para. 7.15 at 38.)

While not attributing any such beliefs to the Claimant in this case, the Tribunal is of the view that the circumstances in which the Respondent State finds itself are factors that are appropriate for

this Tribunal to consider in reaching its decisions.

327. The Tribunal has, therefore, concluded that it must appraise and determine these "consent" and "investment" questions under Article 25(1) of the ICSID Convention. however belatedly injected into these proceedings by the Respondent.

G. Ratione Materiae: *Did the Parties "Consent in Writing to Submit" this "Legal Dispute" to the "Jurisdiction of the Centre"?*

328. We now turn to the first *ratione materiae* disputed test with which the Tribunal is confronted, namely whether both Parties have granted their "consent in writing" to ICSID jurisdiction.

329. In its Rejoinder of January 15, 2002, the Respondent wrote as follows:

> 211. The Claimant states... that the Respondent's consent is contained in [Article 16(2) of the 1996 Georgia Investment Law]...
>
> 212. This is incorrect. The wording of the relevant law is:
>
> > ... disputes between a foreign investor and a government body, if the order of resolution is not agreed between them, shall be settled at the Court of Georgia *or* at the International Centre for the Resolution (sic) of Investment Disputes...
>
> 213. There is clearly no consent expressed in this wording (as required under Article 25(1) above).
>
> 214. The Claimant also failed to inform the Tribunal about the mandatory provisions of the [1994] Concession Law of the Republic of Georgia... Article 19 of the [1994] Concession Law states:
>
> > All disputes occurred in relation to the Contractual Agreement shall be resolved through negotiations. If the understanding is not achieved, the case shall be referred to the Court.
>
> 215. The reference to "Court" is clearly to the Court in Georgia (not an ICSID tribunal). The mandatory nature of Article 19 overrides the "option" in the Law on Promotion and Guarantees of Investment. Therefore, under Georgian law (and the Claimant maintains throughout that Georgian law applies) ICSID has no jurisdiction. (Respondent's Rejoinder at 48.)

330. Following the submission of the Respondent's Rejoinder and in advance of the February 11-15, 2002 Oral Procedure, extensive correspondence ensued between the Parties' Counsel as to the propriety and timeliness of the Respondent's objection to jurisdiction, which correspondence is described in Part III hereof.

331. The World Bank's 1965 Executive Directors' Report on the then recently concluded text of the ICSID Convention addressed the issue of consent to jurisdiction in the following terms:

> 23. Consent of the parties is the cornerstone of the jurisdiction of the Centre...
>
> 24. *Consent of the parties must exist when the Centre is seized...* Nor does the Convention require that the consent of both parties be expressed in a single instrument. *Ilins, a host State might in its investment legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing.* (Emphasis added.) (1965 Executive Directors' Report at 8.)

Here, at the time that the Claimant filed its Request for Arbitration on December 3, 1999, there was (a) no bilateral investment treaty in force between Ireland and Georgia and (b) no written agreement between the Parties that submitted disputes to ICSID jurisdiction. Accordingly, the question becomes whether Article 16(2) of the 1996 Georgia Investment Law, in spite of Article 19 of the earlier 1994 Georgia Concession Law, did constitute Georgia's written offer to submit this dispute to ICSID, which offer was later accepted by the Claimant when it commenced this arbitration.

332. The Claimant disagreed with the Respondent's reading of Article 16(2) of the 1996 Georgia Investment Law on a number of grounds. First, the Claimant argued that the choice of forum set forth in Article 16(2) was for the Claimant alone to make as that election was solely for the benefit of the foreign investor. Second, the Claimant emphasized that the 1996 Georgia Investment Law was enacted into law later in time than the 1994 Georgia Concession Law and, because of the inconsistency between the two, took priority over the earlier law. Third, the Claimant noted that the draft agreement, albeit never executed between the Parties, was ultimately styled as a "Rehabilitation Agreement" rather than as a "Concession Agreement" and that this renaming was purposely done to avoid any applicability of the 1994 Georgia Concession Law to the Project.[9] Lastly, the Claimant made reference to the express terms of the May 26, 2000 Agreement:

> In paragraph 8 of the May 26, 2000 Settlement Agreement, the parties agreed "that any dispute, controversy or claim, arising out of, relating to, or requiring the interpretation of this Agreement, or the breach, termination or validity thereof, shall be submitted to resolution to ICSID in the pending ICSID arbitration". Georgia therefore.... by referring to the pending ICSID arbitration, confirmed its consent to ICSID jurisdiction over ZDL's initial Request for Arbitration. (Claimant's Post-Hearing Submission at 53.)

333. At the opening of the Oral Procedure on February 11, 2002, Counsel for the Claimant maintained its position that, under Article 16(2) of the 1996 Georgia Investment Law, "no preference is given to either of those fora [that is, the Georgia Court or ICSID]. The plaintiff is entitled to choose" (Transcript, February 11, at 54, Mr Landsman). Counsel for the Respondent for its part acknowledged that "we agree that if there is an inconsistency (between the 1996 Georgia

[9] Claimant's Counsel argued at the Oral Procedure:[I]t is not at all clear that the Law of Concessions applies to this cause at all because... as Georgia finally decided, they weren't going to call the agreement a Concession Agreement. They were going to call it a Rehabilitation Agreement, and presumably that was their way of gelling around the Concession Law ('Transcript February 11, at 55, Mr Landsman.)

Investment Law and the 1994 Georgia Concession Law], the later statute would be applicable, but in our view, there is no inconsistency" (Transcript, February 11, at 29, Ms Blanch).

334. The Claimant had previously submitted to the Tribunal on February 4, 2(X)2 the expert opinion from Professor Chikvashvili confirming the Claimant's interpretation:

> In circumstances when different courts have jurisdiction over a particular dispute, the Civil Procedure Code of Georgia, Article 20 provides that the choice of venue unconditionally lies with the plaintiff... Article 25.2 of the [Georgia] Law of Normative Acts provides that in the event of a discrepancy between two normative acts of the same hierarchical standing (which is the case with the Law of Concessions and the Investment Law), the provisions of the Normative Act adopted later, i.e., the Investment Law, prevail. (Chikvashvili, paras. 51 and 52 at 15-16.)

The Respondent never took exception to this reading of Georgian law.

335. In its deliberations, the Tribunal has considered the purpose as well as the context of Article 16(2) of the 1996 Georgia Investment Law. That purpose and context, we believe, support the Claimant's position that the election between recourse to the Georgia courts or to an ICSID tribunal is solely for the Claimant to make.

336. This result is backed by the text of other provisions of the 1996 Georgia Investment Law. Thus, Article 7 stipulates in subparagraph 3 thereof:

> 3. Decision on seizure of investment as well as the compensation terms may be appealed against at the Court, and *if the investor is an alien, the matter shall he settled in accordance with the rule established by Article 16 of this law.* (Emphasis added.) (Exhibit A to the Claimant's Memorial.)

The Tribunal is of the view that this Article 7(3) clearly intimates that the choice found in Article 16(2) is specifically for the benefit of the "alien" or foreign investor.

337. Furthermore, the Tribunal is of the opinion that the second sentence of paragraph 2 of Article 16 supports the Claimant's reading of the first sentence of that paragraph. Paragraph 2 reads in its entirety:

> 2. Disputes between a foreign investor and governmental body, if the order of its resolution is not agreed between them, shall be settled at the court of Georgia or at the International Centre for the Resolution (sic) of Investment Disputes. *Should [the] dispute not be considered in the International Centre* for the Resolution of Investment Disputes *the foreign investor is entitled to refer a dispute to the additional institution* of the Centre *or to any international arbitration* established in accordance with regulations provided by the Arbitration and International Agreements of the Commission of the United Nations for International Trade Law - UNCITRAL.

(Emphasis added.) (Exhibit A to the Claimant's Memorial.)

This second sentence provides additional underpinning for the proposition that it is the foreign investor that is "entitled" to decide what avenue of redress he prefers in seeking to resolve an "investment" dispute with the Government of Georgia.

338. The Tribunal's decision means that the Tribunal does *not* accept the Respondent's argument that the Georgia 1996 Investment Law and the 1994 Georgia Concession Law "were not inconsistent" (Respondent's Post-Hearing Brief, para. 130 at 32). 'flic Tribunal has instead concluded that the election granted the foreign investor in Article 16(2) is in contradiction with the mandatory nature of Article 19 of the 1994 Georgia Concession Law which calls solely for recourse to local Georgia courts.

339. The last issue on this subject is whether any supervening international law rule is contrary to this Georgia internal law. Other ICSID cases have also addressed this "mixed issue" of national and international law. In *Ceskoslovenska Obchodni Banka* v. *The Slovak Republic* (ICSID Case No. ARB/ 97/4) (the *"CSOB Case"),* the Tribunal there addressed what law would govern the question of "consent" under Article 25(1):

> *The question of whether the parties have effectively expressed their consent to ICSID jurisdiction is not to be answered by reference to national law. It is governed by international law as set out in Article 25(1) of the ICSID Convention.* (Emphasis added.) *(CSOB Case,* para. 35 at 264.)

Based on the facts present in this case, the Tribunal differs with this articulation in that, here, we are dealing with an internal statute rather than a bilateral agreement and hence the Tribunal believes that, if the national law of Georgia addresses this question of "consent", which the Tribunal finds that it does, then the Tribunal must follow that national law guidance but always subject to ultimate governance by international law. The same question of "consent" under Article 25(1) arose in the 1988 *SPP Case:*

> The Claimants contend that Egypt's Law No. 43... constitutes consent to the Centre's jurisdiction in the circumstances of the present case... *While Egypt's interpretation of its own legislation is unquestionably entitled to considerable weight, it cannot control the Tribunal's decision as to its own competence. (SPP Case,* paras. 53 and 60 at 140, 142.)

This conclusion is in keeping with our own.

340. Other than the arguments previously described, neither Party provided any reference to any other provision of Georgia law as being pertinent to this question of "consent". Here, Article 16(2) of the 1996 Georgia Investment Law, the Tribunal believes, is completely in keeping with any international law principles that may be applicable. Thus, we have reached our conclusion on the basis of our reading of Georgia's own law, which, in this case, we sec no reason to view as in any way divergent from international law.

341. Because of this decision, it is unnecessary for the Tribunal to address the effect of the May 26, 2000 Agreement, if any, on this question of consent. The Claimant argued that the May 26, 2000 Agreement constituted a clear, *ex post facto* confirmation of consent whereas the Respondent cited the provisions of Article 25(3) of the ICSID Convention and argued that the execution by Premier Sheradze of the City of Tbilisi of the May 26, 2000 Agreement did not, without more, satisfy its terms. The Respondent also raised questions of inter-temporal law:

> The ICSID arbitration commenced on 3rd February (sic) 1999. The issue is whether *at that time,* the Tribunal had jurisdiction. Reference in the May 2000 Agreement to a "pending ICSID arbitration" does not give life and validity to a Tribunal which does not have jurisdiction. (Respondent's Post Hearing Uriel at 33.)

Because of out conclusion on other grounds, the Tribunal declines the opportunity to enter into these further controversies between the Parties.

342. In sum, the Tribunal holds that the provisions of Article 16(2) of the 1996 Georgia Investment Law, being later in time than, and inconsistent with, Article 19 of the 1994 Georgia Concession Law, govern and that they constitute a "consent in writing" by the Respondent to the jurisdiction of ICSID, which offer the Claimant later accepted in writing when it filed its Request for Arbitration.

H. Ratione Materiae: The *Meaning of "Investment": The Recent Decision in the Mihaly Case*

343. After the conclusion of the Oral Procedure and after the submission of the Parties' Post-Hearing Briefs but before the scheduled filing of the Post-Hearing Reply Briefs, the March 15, 2(X)2 decision in *Mihaly International Corporation* v. *Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/00/2) (the *"Mihaly Case")* became publicly available. Because of its relevance to this case, the Tribunal delayed the submission date for the Post-Hearing Reply Briefs to May 24, 2002 so that the Parties and their Counsel could take that decision into account.

344. Under Article 53(1) of the ICSID Convention, the award in the *Mihaly Case* is of course only "binding on the parties" to that action. Nonetheless, its learning is enlightening for our purposes, and other ICSID tribunals have referred to awards in prior ICSID cases during the course of their opinions as appropriate sources of international law. As the tribunal wrote in the *Letco Case:*

> Though the Tribunal is not bound by the precedents established by other ICSID tribunals, it is nonetheless instructive to consider their interpretations... *(Letco Case* at 352).

And, taking into account the previously cited Article 38 of the Statute of the International Court of Justice and the 1965 Executive Directors' Report, it is proper by analogy for this Tribunal to consider the *Mihaly Case* award in its decision-making as a qualifying "judicial decision" of relevance.

345. The *Mihaly Case* involved a claim under the 1991 Bilateral Investment Treaty between the United States of America and Sri Lanka (the "US-Sri Lanka BIT'). At the very first session of the tribunal in the *Mihaly Case,* the respondent there confirmed that it was "raising objections to jurisdiction" *(Mihaly Case,* para. 5 at 2). There ensued an exchange of written pleadings on this preliminary question of jurisdiction, an oral hearing on the same subject and the submission of post hearing written briefs. Thus, unlike in the situation before us, the respondent in the *Mihaly Case* made its objections to jurisdiction known at the earliest possible nine in keeping with Rule 41(1) of the ICSID Arbitration Rules.

346. The portion of the award in the *Mihaly Case* that has special pertinence to this case deals with the meaning of the word "investment" under Article 25(1) of the ICSID Convention, also in the context of "development costs" in a project finance transaction that failed to materialize. Sri Lanka described the case as a claim "lor reimbursement of expenditures made pursuing a possible investment in a proposed power project in Sri Lanka that never happened" *(Mihaly Case, para* 11 at 4, quoting from Sri Lanka's Counter Memorial on Jurisdiction).

347. Because of their relevance to our own deliberations on whether a qualifying "investment" exists under the facts of this case, the Tribunal recites the following extensive excerpts from the *Mihaly Case* award:

> 34.... The *Claimant* contended that the development phase activities are as essential for the successful commercial operation of the BOT [build - operate - transfer] project as the physical construction of a plant, and that it is standard practice accepted by host governments, lenders and other equity investment to include the sponsors' development expenditures in the investment cost. (Emphasis in original.)
>
> 35. *The Respondent did not reject the possibility for accounting purposes of including the sponsors' development expenditures in the investment cost, provided always that there was finally an agreement or consent of the host government to receive or admit the investment in question...* (Emphasis added.)
>
> 36. The Claimant contended that without a precise definition of "investment", it was appropriate to give the term a broad interpretation to encourage a freer flow of capital into developing countries... The Respondent, for its part, contended that developing countries would find it difficult to adhere to the Convention, if, by means of a broad interpretation, the Tribunal were to hold the expenditures in the present case to be an "investment" in the absence of their explicit consent... (Emphasis in original.) *(Mihaly Case* at 10-11.)

348. During the course of its award, the *Mihaly Case* tribunal noted that no agreement between the parties was ever reached to receive or admit any "investment" into Sri Lanka and that the duly executed "Letter of Intent" in that case, for example, specifically stated that it did "not constitute an

obligation binding on any party". *(Mihaly Case,* para. 41 at 12-13.) The tribunal concluded that no binding agreement between the claimant and the respondent in that case ever transpired:

> 48. It is in this factual situation that the Tribunal has been asked to consider whether or not the undoubted expenditure of money,... in pursuit of the ultimately failed enterprise to obtain a contract, constituted "investment" for the purposes of the Convention... *The operation of [the project] was contingent upon the final conclusion of the contract with Sri Lanka, thus the expenditures for its creation would not be regarded as an investment until admitted by Sri Lanka.* (Emphasis added.)
>
> 49.... The Tribunal repeats that, in other circumstances, similar expenditure may perhaps be described as an investment.
>
> 50.... *By capitalizing expenses incurred during the negotiation phase, the parties in a sense may retrospectively sweep these costs within the umbrella of an investment /where the transaction is a successful one].* (Emphasis added.)
>
> 51.... *Ultimately, it is always a matter for the parties to determine at what point in the negotiations they wish to engage the provisions of the Convention by entering into an investment... The Respondent clearly signalled... that it was not until the execution of a contract that it was willing to accept that contractual relations had been entered and that an investment had been made.* (Emphasis added.) *(Mihaly Case* at 14-16.)

349. This decision in the *Mihaly Case* raises the question of whether the fact', in contention here between ZDL, and Georgia require a similar or different result It appears under the learning of the *Mihaly Case* that a different result would only appropriately occur if this Tribunal were to conclude that Georgia, either expressly or implicitly, had consented "to receive or admit" the ZDL development costs in question as an "investment" in Georgia.

I. Ratione Materiae: *Do the Facts of this Case Present an "Investment" within the Meaning (a) of the 1996 Georgia Investment Law and (b) of Article 25(1) of the ICSID Convention?*

1. *Introduction*

350. There has been considerable debate over the years as to the meaning of the word "investment" under Article 25(1) within the context and purpose of the ICSID Convention, and the recent *Mihaly Case* has added to that library of learning. Because of the importance of this issue, the Tribunal will begin with a description of its understanding of the history behind the use of the term "investment" in Article 25(1). The Tribunal will then review the pertinent Georgian statutory law.

2. *Lack of definition in the ICSID Convention*

351. The 1965 Executive Directors' Report addressed the intended scope of the term "investment" as follows:

> *No attempt was made to define the term "investment" given the essential requirement of consent by the parties...* (Emphasis added.) (1965 Executive Directors' Report, para. 27 at 9.)

In fact, however, the legislative history of the development of the text of Article 25(1) devoted considerable lime and attention to the question of whether a definition of this term was or was not advisable.

352. As previously noted, the late Aron Broches made many revealing comments during the course of the drafting sessions for the ICSID Convention. The Schreuer Commentary reports:

> Especially Mr Broches explained that, since jurisdiction was optional in character, there was no need to give precise definitions. *It was always up to the parties to give or withhold consent... In other words, it should be the terms of consent that ultimately define the Centre's jurisdiction...* Mr Broches insisted that the precise delimitation of the Centre's jurisdiction was best left to the parties... (Emphasis added.) (Schreuer Commentary, para. 5 at 90.)

353. The *FEDAX Case* award likewise recalled this legislative history:

> An account of these negotiations [over Article 25(1)] given by Mr A. Broches is also most pertinent:
>
> > During the negotiations several definitions of "investment" were considered and rejected. It was fell in the end that a definition could be dispensed with "given the essential requirement of consent by the parties". *This indicates that the requirement that the dispute must have arisen out of an "investment" may be merged into the requirement of consent to jurisdiction...* (Citations omitted.) (Emphasis added.) *(FEDAX Case,* para. 21.)

354. Another well known ICSID authority, Georges R. Delaume, has also written on this topic:

> This lack of a *definition,* which was deliberate, has enabled the Convention to accommodate both traditional types *of investment* in the form of capital contributions and new types *of investment,* including service contracts and transfers of technology.[10]... In the context of contemporary thinking and practices, an economic concept of investment is progressively being substituted for the traditional notion of investment in capital.[11] (Emphasis in original.)

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[10] Citations omitted Georges R. Delaume, Economic Development and Sovereign Immunity, 79 American Journal of International l aw 319, 339 (1985).

3. *Relevant ICSID case law*

355. Four ICSID cases have found that their facts did produce a qualifying "investment" within the meaning of Article 25(1) and only one, the recent *Mihaly Case,* found that they did not. These four affirmative cases are *Alcoa Minerals of Jamaica, Inc.* v. *Jamaica* (ICSID Case No. ARB/74/2) (the *"Alcoa Case"); Kaiser Bauxite Company* v. *Jamaica* (ICSID Case No. ARB/74/3) (the *"Kaiser Case");* the *FEDAX Case;* and the *Letco Case.*

356. The *Alcoa Case,* as reviewed in the 1975 *Yearbook of Commercial Arbitration,* found the presence of the requisite "investment":

> First, the tribunal noted that Alcoa's operations in Jamaica fit within the ordinary meaning of "investment" as a contribution of capital. The arbitral tribunal reasoned that: "[A] case like the present, in which a mining company has invested substantial amounts in a foreign state *in reliance upon an agreement with that State,* is among those contemplated by the Convention." (Emphasis added.) *(Alcoa Case* at 207.)

357. The *Kaiser Case* award concluded in nearly identical language:

> The Tribunal finds that the dispute arises directly out of an investment... [I]t seems clear to the Tribunal that a case like the present, in which a mining company has invested substantial amounts in a foreign State *in reliance upon an agreement with that State,* is among those contemplated by the Convention. (Emphasis added.) *(Kaiser Case,* para. 17 at 303.)

358. The *FEDAX Case* tribunal in its decision found a qualifying investment in the nature of loans and pointed out that it:

> *is within the sole discretion of each Contracting State to determine the type of investment disputes that it considers arbitrable in the context of ICSID.* (Emphasis added.) (Citations omitted.) (FEDAX Case, para. 22.)

359. The *Letco Case* is the fourth ICSID award to have discerned the existence of the requisite "investment" for jurisdictional purposes:

> The Concession Agreement between the Government of Liberia and Letco provides for an extensive outlay of capital by Letco which was to be dedicated to the harvesting and processing of forest products in Liberia... There is... no doubt that, *based on the Concession Agreement..., this legal dispute has arisen directly from an "investment" as that term is used*

[11] Citations omitted Georges R Delaume,ICSID Arbitration and the Courts 77 American Journal of Intel national Law 789, 795 (1983)

in the Convention. (Emphasis added.) *(Letco Case* at 349-50.)

360. To repeal, the *Mihaly Case* is the first ICSID reported decision to conclude, following an objection, that, on its facts, the qualifying "investment" lest of Article 25(1) was *not* met. In reaching this conclusion, the tribunal there adopted the following, previously mentioned line of reasoning:

> 48.... A crucial and essential feature of what occurred between the Claimant and the Respondent in this case was that first, the Respondent took great care in the documentation relied upon by the Claimant to point out that *none of the documents,* in conferring exclusivity upon the Claimant, *created a contractual obligation* for the building, ownership and operation of the power station. *Second, the grant of exclusivity never matured into a contract.* To put it rhetorically, what else could the Respondent have said to exclude any obligations which might otherwise have attached to interpret the expenditures of the moneys as an admitted investment? (Emphasis added.) *(Mihaly Case,* para. 48 at 14—15.)

The *Mihaly Case* award also cited the lack of evidentiary support for the proposition that development costs constituted an investment for purposes of Article 25(1):

> 60.... *The Claimant has not succeeded in furnishing any evidence of treaty interpretation or practice of States,* let alone that of developing countries or Sri Lanka for that matter, to the effect *that pre-investment and development expenditures* in the circumstances of the present case could automatically *be admitted as "investment" in the absence of the consent of the host State to the implementation of the project... (Mihaly Case,* para. 60 at 18-19.)

361. The major differences between the facts of this case and those of the *Mihaly Case are:* first, the belatedness of the Respondent's challenge to jurisdiction; second, the absence of any bilateral investment treaty between the two States involved; and third, the presence of a domestic investment statute which provided the host State's express consent to ICSID's dispute settlement process but *not* express consent to the Claimant's alleged "investment".

362. These excerpts from prior ICSID awards call into prominence the statutory scheme chosen by Georgia to deal with foreign investment. Many States exclude certain categories of business opportunities from those eligible for foreign investment and "admit" other categories, which may, under certain State regimes, require special permit or license before the particular alien investment is ultimately approved. The 1996 Georgia Investment Law applies by its terms to both "foreign and domestic investments". This fact may help to explain why the two-step process found in certain States' national laws that apply only to foreign investment does not appear in the 1996 Georgia Investment Law.

4. *History of this case with regard to the question of "investment"*

363. For a better understanding of the challenge confronting the Tribunal, it is instructive to review the Parties' handling of this qualifying investment controversy.

364. As required by Rule 2(1)(e) of the ICSID Institution Rules, the Claimant's Request for Arbitration set forth, in the words of the Rule, "information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an investment". The Claimant's Request for Arbitration thus specifically stated

> The Centre has jurisdiction over this dispute as it arises directly out of ZDL's investment. (Claimant's Request for Arbitration, para. 9 at 4.)

The Claimant's Request for Arbitration thereafter explained the rationale for this conclusory recitation of the governing words of Article 25(1):

> At GOG's [Government of Georgia's] request. ZDL created substantial intellectual property in connection with this project... This intellectual property was created solely for the purpose of contributing and using it in connection with the rehabilitation and management of the Plant, an entrepreneurial activity. The work has no value to ZDL or anyone else except to further the rehabilitation and management of the Plant. (Claimant's Request for Arbitration, paras. 12 and 13 at 5.)

365. In its Request for Arbitration, the Claimant listed various agreements, drafts and studies that it regarded as constituting such an "intellectual properly" investment. While thereafter arguing compliance with the terms of the 1996 Georgia Investment Law, the Claimant did *not,* either in its Request for Arbitration, in its Memorial or in its Reply brief, address, other than in the terms previously described, any accompanying satisfaction of the terms of Article 25(1) of the ICSID Convention, presumably on the theory that compliance with the requirements of the 1996 Georgia Investment Law was all that was necessary for this purpose in the absence of any objection from the Respondent with regard to the jurisdictional requirements of Article 25(1).

366. Later in the Claimant's Request for Arbitration, the Claimant recalled a phrase from the April 7, 1998 "support" letter from Mr Lekishvili to Mr Fares: "We understand that in all countries Government support is a key component for the financing of private power projects, which involve heavy investments with a long gestation period." (Claimant's Request for Arbitration, para. 26 at 8.) The Claimant cited this reference as a recognition by Georgia that the Project's financing would entail "investments". But that conclusion is not debatable had the Project gone forward, which il did not.

367. Despite these and other explicit references by the Claimant both in the Claimant's Request for Arbitration and in the Claimant's Memorial,[12] Georgia's Counter-Memorial did *not* contest the Claimant's characterization of its purported development costs as an "investment" within the meaning of Article 25(1) of the ICSID Convention, even though the Respondent's Counter-Memorial *did* attack the notion of any "investment" having been made by the Claimant within the context of the 1996 Georgia Investment Law. The relevant statements in this regard that are contained in the Respondent's Counter-Memorial are as follows:

[12] "ZDL's investment in Georgia during that time [from late 1997 to May 19991 included substantial engineering, hydrological, financial and legal work in relation to the project All of this work was done at the urging of Georgia." (Claimant's Memorial at 1-2.)

> According to the statement of "Zhinvali Development Group" they made an investment in Georgia and this, by their viewpoint, is composed of the conclusions concerning the work performed by them, which, allegedly, is their own properly. It should be noted, however, that the majority of those documents... is completely unknown for the Georgian party... *All mentioned above makes it cleat: that there were no investments made by Plaintiff, as under Article 1(1) of Georgian law* on "Support and Guarantees of Investment Activities", investment means all kinds of property and intellectual values or rights - and used on the territory of Georgia by management activity in order to gel profit... (Emphasis added.) (Counter-Memorial at 7-8 and 11.)

The Respondent's Counter-Memorial failed to shed any further enlightenment as to the Respondent's intended meaning and consequences of these statements.

368. As previously noted in Part V, the only point at which the Respondent made any reference to "investment" in its Counter-Memorial in connection with Article 25(1) of the ICSID Convention was in the context of Georgia's response to the Claimant's "moral damages" claim.

369. The Tribunal has had difficulty in comprehending what these various statements in the Respondent's Counter-Memorial were intended to convey. The statements from page 11 of the Counter-Memorial quoted above and in Part V appear to deny the existence of any investment under Article 1(1) of the 1996 Georgia Investment Law but do not explain any rationale for this result other than the argument, as we understand it, that since the Claimant continued to assert property rights in its purported "contribution" to Georgia, no "investment" on "the territory of Georgia" had been made. The Tribunal does not understand the basis of this argument since retained property rights often come into play when the terms of an investment are alleged to have been violated.

370. In turn, the statement on page 13 of the Respondent's Counter-Memorial recited in Part V adopts the stance that moral damages claims are ineligible for "investment" status under Article 25(1) but is silent as to whether the Claimant's "development costs" are likewise ineligible for "investment" treatment under the same provision of the ICSID Convention.

371. For its part, the Claimant, for reasons never articulated, did *not* make any reference in its Reply brief to the denial contained in the Respondent's CounterMemorial of any qualifying "investment" under the 1996 Georgia Investment Law. All that the Claimant asserted in its Reply in this area was, as previously described, to take exception with the Respondent's "moral damages" point:

> *Once a dispute is within ICSID's jurisdiction, and Georgia admits that this dispute is, nothing in the rules limits the types of damages the tribunal may award.* The applicable law - here, Georgian law - determines the available remedies, not the jurisdiction of the Tribunal. (Emphasis added.) (Claimant's Reply at 15.)

In asserting in the Claimant's Reply that the Respondent had "admitted" the jurisdiction of ICSID, the Claimant overlooked the Respondent's reference to the 1996 Georgia Investment Law and instead may have relied on the implications of other statements contained in the Respondent's

Counter-Memorial (such as those referenced in Part VI.G.).

372. In its Post-Hearing Brief, the Claimant simply declared:

> ICSID's jurisdiction over this dispute was unchallenged until the belated submission of Geogia's Rejoinder... It was not until the beginning of the hearing, after all witness statements had been dialled and submilted, that Georgia for the first time contended that the dispute did not arise from an investment. (Claimant's Post-Hearing Brief at 49.)

373. To add to the uncertainty, the Respondent's Rejoinder did *not* refer either to the rejection in the Respondent's Counter-Memorial of any "investment" having been made under the 1996 Georgia Investment Law or to the obscure "moral damages" attack under Article 25(1) of the ICSID Convention. Instead, the Respondent's Rejoinder adopted the line that the Respondent had not previously mounted *any* challenge to ICSID jurisdiction:

> *We note that the issue of the jurisdiction of the Tribunal has not been raised by the Respondent.* (Emphasis added.) (Respondent's Rejoinder, para. 209 at 48.)

Furthermore, as earlier noted, rather than questioning the existence of any qualifying investment, the Respondent's Rejoinder instead made its jurisdictional attack solely on the basis of the purported lack of consent by Georgia to ICSID jurisdiction.

374. With this murky background, the Tribunal now undertakes to analyze whether or not any qualifying "investment" is present in this case.

5. *The definition of "investment" under the 1996 Georgia Investment Law*

375. As earlier mentioned, both Parties are in accord that the law of Georgia is to govern this case.[13] The Tribunal must follow this choice, barring some incompatibility of that law with international law, under the "governing law" rules outlined in Part VI.C. Thus, the Tribunal must first determine whether any or all of the Claimant's purported expenditures qualify as an "investment" under the 1996 Georgia Investment Law. If these expenditures do not so qualify, then that is the end of the matter insofar as ICSID jurisdiction is concerned, unless that Georgia law is in some fashion violative of, or inconsistent with, international law, which proposition neither Party has alleged.

376. As previously noted, the 1996 Georgia Investment Law states in its preamble that it applies to both domestic and foreign investment. A primary objective is to promote investment by providing enumerated protections, one of which is the dispute resolution process set forth in Article 16(2), which the Tribunal has already examined in Part VI.G.

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[13] Please see footnote 8 on p. 68

377.

Chapter 1 of the 1996 Georgia Investment Law contains a series of "General Provisions", Article 1 of which, entitled "Investment", contains a definition of that term that the Tribunal must now apply to the facts of this case. Other definitions contained in the 1996 Georgia Investment Law are also relevant for the Tribunal's purposes as will be seen from the description and analysis that follow. Article 1, in an English translation accepted by both Parties, reads in its entirety:

> *Article 1. Investment*
>
> 1. Investment is *any kind of property or intellectual value or right to be contributed and used in the entrepreneurial activity carried out on the territory of Georgia* for earning of possible income. (Emphasis added.)
>
> 2. *Such value or right may be:*
>
> (a) funds, shares, stocks and other securities;
>
> (b) movable and immovable property land, buildings, equipment and wealth;
>
> (c) land tenure or right to use other natural resources (concession, as well), patent, license, *"know-how", experience and other intellectual value:* (Emphasis added.)
>
> (d) *other legally recognized* property and intellectual value or right. (Emphasis added.)

378.

As described in Parts IV and V hereof, the Claimant asserts that among the "development costs" for which it claims reimbursement from the Respondent is intellectual properly that the Claimant "contributed" to the promotion of the Project by sharing their content with the Respondent. At the Oral Procedure, Claimant's Counsel argued:

> [A]ll this work that we did constitutes very valuable intellectual property ... (Transcript, February 11, at 54, Mr Landsman.)
>
> An investment is when you sink money into something expecting to get a return back. And that's exactly what ZDL did here. They sank $4.3 million into this project, and it wasn't a donation to the Government of Georgia. It was with an expectation of a fairly substantial return on that money. (Transcript, February 11, at 41, Mr Landsman.)

379.

The Claimant made a similar point in its Post-Hearing Brief:

> Even if Georgia did not have the final written report [of Harza and Fichtner), it has had the benefit of conclusions reached and the reasons therefor that were the result of much lime, effort and expense. The value of this intellectual property is shown by the fact that in November 1998, Georgia provided a copy of the draft Concession Agreement of November 1998 to a third party as a model draft. (Claimant's Post-Hearing Brief at 34.)

380.

The Respondent, however, takes the position that none of the Claimant's purported contributions falls within any of the four categories defined in subparagraph 2 of Article 1 of the 1996 Georgia Investment Law. In making this argument, the Respondent points out that the critical date for inter-temporal law purposes is the date that ICSID became seized with the dispute, which in this case is December 3, 1999, the date of the Claimant's submission of its Request for Arbitration. The Respondent argues in this connection:

> At the time of submission to the jurisdiction of ICSID (3 February (sic) 1999)[14] the only documents that had been provided to the Respondent by the Claimant were a draft Concession Term Sheet and a 17 page proposal for the rehabilitation of Zhinvali. At that time, any documents in existence were merely at the negotiation stage. We consider it implausible that such documents could have any kind of "intellectual value" or "right". (Respondent's Post-Hearing Submission at 36.)

In reviewing the four categories of "value or right" set forth in Article 1(2) of the 1996 Georgia Investment Law, the Respondent stated:

> (a) and (b) clearly do not lit the circumstances of this case; they apply once the right has been granted, not while the right is being negotiated, (c) is clearly referring to something with "value" not to general negotiations for a contract. Likewise, it would be a nonsense to construe brief outline proposals and a draft term sheet as having an intrinsic value. The reality is that if the Claimant had considered that they were "of value" they could have taken appropriate steps to protect them; their failure to do so reflects that the parties were just in negotiations and nothing more. (Respondent's Post-Hearing Brief, para. 148 at 36-7.)

381.

Article 2 of the 1996 Georgia Investment Law contains other relevant definitions. Article 2 contains three separate subparagraphs, the first of which states:

> 1. *Investor is any physical or legal person,* or international organization *realizing investments in Georgia.* (Emphasis added.)

This subparagraph 1 raises several questions, the most important of which are (a) whether ZDL alone, or instead ZDL and its three shareholders, can claim coverage by this definition and (b), in either case, whether ZDL and/or any of its shareholders were "realizing" investments in Georgia.

> 2. Foreign investor may be:...
> d. a legal person registered outside Georgia. (Emphasis added [sic].)

Whatever the answer under subparagraph 1 of Article 2, ZDL and all of its shareholders satisfy subparagraph 2(d) because both ZDL and Profidev are Irish corporations and both ICG and Harza are United States corporations.

> 3. *The investment on the territory of Georgia may be contributed into an object of any legal*

[14] The Tribunal is unaware of any reason for the Respondent's reference to this date and assumes it was an unintended error the Tribunal deals below with any further documents produced by the Claimant, and shared with the Respondent, between February 3, 1 999 and December 3, 1999 when the Claimant's Request for Arbitration was filed.

type where investing is not prohibited as per Article 9.1 of the present Law. Investing in objects listed in Articles 9 and 12 of the present Law may be realized on the grounds of appropriate special permit or license only (emphasis added).[15]

Subparagraph 3 of Article 2 poses the question of whether the use of the words "on the territory of Georgia" is intended to reline the meaning of subparagraph 1's phrase "realizing investments in Georgia". Article 1 of the Georgia Investment Law defines "investment", as quoted above, as involving "entrepreneurial activity carried out on the territory of Georgia". Under the rules of interpretation set forth in Part VI.D., the inclusion of the notion of territorial presence is the correct reading of subparagraph 1 of Article 2. Obviously, the "investment" project must sooner or later take place "on the territory of Georgia" to qualify under the 1996 Georgia Investment Law. Thus, while non-territorial expenditures might ultimately, under the rationale of the *Mihaly Case,* be "swept up" in a completed transaction under the "umbrella" of a qualifying "investment", the law of Georgia contemplates the core expenditures to be "realized" as an "investment" on the "territory" of Georgia. To conclude that a given "legal person" can qualify as an "investor" for purposes of subparagraph 1 of Article 2 of the 1996 Georgia Investment Law, without having realized investments on the territory of Georgia, is, in the Tribunal's opinion, *not* in keeping with the definition of that term.

382.

Chapter II of the 1996 Georgia Investment Law provides for the "Legal Status of Investment Entities" and begins in Article 3 with a list of "Investor's Rights". Subparagraph 6 of Article 3 describes certain financial rights of foreign investors:

> 6. A foreign investor after payment of taxes and other charges is entitled to convert *the earnings (income) gained...* as well as to repatriate them abroad without any limitation. (Emphasis added.)
>
> Those funds include:
>
> a. any contribution to the equity of an object established with foreign investment;
>
> b. any profit and dividend as well as assets remained [sic] after the entire or partial sale of the foreign investment after liquidation;
>
> c. payments related to contractual obligations and acknowledgements of debt;
>
> d. property use tax to be determined as the royalty for use of others' property, including natural resources, copyright, patent, as well as management payment and other rent.

Because ZDL and Zhineri never established any Georgia special purpose corporation as contemplated by the October 15, 1997 MOU, subparagraph a. is inapplicable. Similarly, since there was no profit, dividend or sale, subparagraph b. does not comport with the facts of this case either. With regard to subparagraph c., we know that Georgia has made no "payments" whatsoever to ZDL

[15] This last sentence of subparagraph 3 poses difficulty because the activities listed in Article 9 of the 1996 Georgia Investment Law are "banned" whereas those listed in Article 12 are "regulated" However. the Tribunal need not address this ambiguity because the funding. of a transaction involving a power plant and a tailrace tunnel do not fall within my of the "banned" categories enumerated in Article 9.

or its shareholders. Also, subparagraph d. is not relevant because none of those types of taxes or payments is present here. Furthermore, in the case of all four subparagraphs, they do not apply to the facts of this arbitration because there were no "earnings (income) gained" as a result of the contemplated transaction never having closed. This is one example of provisions of the 1996 Georgia Investment Law that do *not* fit the circumstances of this case.

383. One "Investor's Right" that specifically is not enumerated in Article 3 of Chapter II is any right of recovery of development costs in a failed transaction. This omission from Article 3's "laundry list" of rights thereby raises doubt as to the qualification of those expenditures under the 1996 Georgia Investment Law, at least in the absence of some agreement by the Government of Georgia to the contrary. This doubt carries the implication that if there is any right of recovery under the Georgia Civil Code for such development expenditures, it must come from some Georgia statute other than that dealing with "investment", at least again in the absence of some express or implied consent by Georgia. The one possible exception to this conclusion is any contribution of qualifying intellectual property, expressly referred to in the definition of "investment" in Article 1 of the 1996 Georgia Investment Law, but the burden is on the Claimant to prove not only the eligibility of its "intellectual property" for "investment" treatment but also the monetary value of any such contribution that inured to Georgia's benefit.

384. Chapter IV of the 1996 Georgia Investment Law sets forth the "Investment Protection Guarantees" supplied by Georgia, and again its provisions do *not en* compass the circumstances of this case. Article 7 of Chaplet IV addresses the "Inviolability of Investment", as, for example, subparagraph 2 of which provides: "Investment may be seized in cases directly specified by the law only... and with appropriate compensation only." Article 8 on "Compensation for Seizure of Investment" states in subparagraph 1 thereof:

> Compensation to be given to the investor shall correspond to real market value of the confiscated investment by the very moment of seizure...

Here there is no allegation of any expropriation or other "seizure" of property but rather a purported breach of contract or other culpable action by Georgia creating an alleged obligation to reimburse the Claimant for development costs and to pay lost profits and moral damages, none of which fall under the compensation regime of the 1996 Georgia Investment Law because there is no "confiscated investment" in this incomplete transaction. Furthermore, with regard to any "intellectual properly" shared with the Respondent, the Claimant did not seek any legal protection for that intellectual property under Georgian law, and it is thus unknown whether any of the Claimant's materials was entitled to "legal recognition" in the sense of the definition of "investment" contained in Article 1(2) of the 1996 Georgia Investment Law.

385. The Claimant, however, argues that the Respondent gained valuable "knowhow" from its dealings with the Claimant and even went so far. as noted above, as to use the Claimant's proposed draft transactional documents as a model for another deal with a third party, an accusation which the Respondent never denied, and which led the Supreme Court of Georgia to order the Respondent

not to do so again. In its final written pleading, the Claimant concluded:

> Moreover, Georgian law recognizes intellectual property as investment, and as Professor Rubin pointed out, intellectual properly, such as drafts of the agreements, has market value just as tangible properly does. (Claimant's Post-Hearing Reply Brief at 18.)

However, in addition to the deficiencies previously mentioned, the Claimant introduced no evidence as to the calculation of the "market value" of its claimed intellectual property contributions to the Respondent. Such evidence is essential for any unjust enrichment claim because the quantum of damages under that theory relates to the value of the benefit received by the allegedly enriched party.

386. In this instance, all we have is evidence of expenditures by ZDL's shareholders, and this evidence is more relevant to a claim for restitution rather than for unjust enrichment, at least in the absence of proof that the amount of the development costs incurred by the shareholders is in fair equation to the purported value of the benefit received by Georgia. Here, any such proof is lacking because what was provided are hotel and airfare chits, timekeeping records and other such materials of the shareholders, without the necessary linkage of those items to any "intellectual property" valuation. The only exceptions in this regard are the Harza and Fichtner reports, but we know that the Respondent only received the Harza inspection report on August 31,2001 when the Claimant submitted its Reply brief, long after the filing of the Claimant's Request for Arbitration on December 3, 1999, the critical date by which the Claimant must have made a qualifying investment Likewise, the Respondent only received a copy of the Fichtner Report in December of 2001 Thus, under the burden of proof standards set forth in Part VI It, the Claimant has failed to produce the necessary evidence of the monetary worth of any supposed "intellectual properly" benefit received by the Respondent prior to the commencement of this arbitration.

387. Further difficulties that the Tribunal has with the Claimant's intellectual property arguments are the following:

> 1. The Claimant refused to provide the electronic version of its Financial Model to the Respondent on the basis of its proprietary nature and its utility for multiple project finance proposals.
>
> 2. The Claimant has *not* provided evidence that the Claimant's forms for the proposed Concession, and later Rehabilitation, Agreement, Power Purchase Agreement and Lease Agreement had any particular monetary value beyond publicly available standard forms for project finance transactions.
>
> 3. In promoting a proposed transaction such as the Project, it appears only normal that the sponsor would seek to entice its target by providing drafts and other relevant information of an "intellectual property" character, and here the August 10, 1998 "exclusivity letter" expressly put any costs involved with such exploratory or promotional activities and materials at the Claimant's doorstep, not Georgia's.

4. The Tribunal knows from Part III that the Respondent received drafts and redrafts of the Concession Agreement before May 10, 1999.

5. Between the expiration of the exclusivity period on May 10, 1999 and the filing of the Request for Arbitration on December 3, 1999, the Tribunal is aware of no evidence presented by the Claimant as to the monetary value of any benefit that Georgia received from any "intellectual value or right" that ZDL or its shareholders "contributed" to Georgia during this specific timeframe.

388. Consequently, the Tribunal concludes that the Claimant has failed to demonstrate any intellectual property contributions that satisfy the definition of "investment" under the 1996 Georgia Investment Law. In sum, if the Claimant, under the facts presented, has any grievance with regard to misappropriated "intellectual property", it is, in the Tribunal's judgment, more akin to a tort or breach of contract claim for bad faith behavior than it is to a claim falling under the 1996 Georgia Investment Law. As a result, the Claimant's "investment" case then rises or falls depending on whether the category of "development costs" in a failed transaction is eligible for "investment" treatment under the 1996 Georgia Investment Law.

389. The Respondent, for its part, is firm in its conclusion insofar as the inapplicability of the 1996 Georgia Investment Law to the Claimant's "development costs" is concerned:

> The position under Georgian Law... is clear that negotiations and expenditure incurred in pursuing those negotiations do not constitute an investment. For the Tribunal to find otherwise would be to extend the meaning of "investment" beyond that which has been contemplated in any previous ICSID case. In our submission, it would be a dangerous step as it would open the floodgates whereby any investor would be able to force a developing country to expend time, effort and great expense in defending its position arising out of tailed negotiations... (Respondent's Post-Hearing Brief, para. 154 at 37.)

390. As earlier noted, the scheme of the 1996 Georgia Investment Law does not by its terms include any independent notion of "admission" of an investment but rather enumerates in Articles 9 and 12 thereof certain banned or regulated investment activities. This lack of a specific "admission" process that would necessarily antecede the final approval and execution of definitive Project agreements may explain the role of the Presidential Decrees and other Presidential edicts involved in this case. For example, the Presidential Decree of January 17, 1999 declared: "Rehabilitation works carried out by the Zhinvali Development Group on the Water Tunnel shall be approved." The Tribunal believes that this pronouncement, in the context of both the Presidential Decree as a whole and the statutory regime established by the 1996 Georgia Investment Law, constituted but one major step in the Georgian Government's consideration of ZDL's proposal for the Zhinvali Project. Under this rationale, the Presidential orders served as instructions to the involved Government bureaucracy to proceed in trying to bring about a "realization" of the designated investment opportunity. Whether failure to implement those Presidential directives entails any liability under Georgian law is, in the Tribunal's view, a separate question from whether any of the Presidential orders constituted the necessary "consent or other agreement by the Government of

Georgia that would turn the Claimant's alleged development costs into an "investment" falling within the confines of the 1996 Georgia Investment Law. And, on this latter question, the Tribunal sees no language in any of the Presidential edicts that would justify any such conclusion.

391. Before the Tribunal reaches any final decision as to the status of the Claimant's "development costs" under the 1996 Georgia Investment Law, the Tribunal must first resolve one outstanding, nagging issue between the Parties and that is whether ZDL may claim on behalf of its non-party shareholders in this ICSID arbitration.

6. *Does the Claimant in this case have the right to assert claims on behalf of its shareholders for purposes of Article 25(1) of the ICSID Convention?*

392. From the very first pleading in this case, the question has been presented as to whether ZDL, as the only named complaining Party that is registered under Rule 6 of the ICSID Institution Rules, can seek redress not only on its own behalf but also on behalf of its shareholders, Profidev, ICG and Harza. Like ZDL, Profidev is an Irish corporation whereas ICG and Harza are incorporated in states of the United States of America.

393. In its Request for Arbitration, the Claimant, as earlier noted, asserted that the request was "submitted on behalf of' ZDL (Claimant's Request for Arbitration at 1), but then went on to note that "ZDL is a consortium of three companies and that, as a result, "[t]his Statement of Claim will refer to ail the consortium, both before and after its incorporation, as ZDL". (Claimant's Request lor Arbitration at 2.)

394. As far as the Tribunal is aware, there is no "consortium" agreement between ZDL and Profidev, ICG and Harza. At least the Claimant provided no evidence of any such accord, and furthermore, insofar as the Irish corporation, ZDL, is concerned, the three members of the purported "consortium are shareholders of ZDL rather than partners or joint venturers. ZDL is a separate entity, standing on its own corporate feet. [16]

395. This issue of identity has import for the Tribunal's decision-making because of the liability and damage claims propounded by the Claimant. As described at length in Parts IV and V, the Respondent look umbrage at any right of ZDL to assert claims on behalf of its three, nonparty shareholders. The Respondent complained in this regard that, under the draft Concession, and later Rehabilitation, Agreement, it was specified that no recourse was to be made against the shareholders of ZDL in the event of trouble, and yet these same shareholders, the Respondent has argued, are seeking to "piggy-back" their claims against the Respondent by having ZDL make those claims on their behalf without those shareholders assuming the risk of becoming parties to this arbitration.

396. The documentary evidence that the Claimant has submitted revealed only one invoice presented by

[16] The Tribunal notes in this regard that unlike in the Mihaly Case there is no evidence that Profidev ICG or Harza endeavored to assign their claim to ZDL.

a shareholder in its name to ZDL in its name, and that bill related to Harza's engineering investigation. All the other invoices for time charges or out-of-pocket disbursements contained in the documentary record of this case were in the name of Profidev or ICG, with no evidence of either company having submitted bills for those costs to ZDL and with no evidence that ZDL itself paid for any of those charges.

397. Nonetheless, the Claimant took the position that the lack of detailed billings from the shareholders to ZDL for the expenses that they incurred in pursuing the Project was a mere technicality. Notably, the Claimant also asserted that the audited financial statements of ZDL included these shareholder costs as those of ZDL itself.

398. The Tribunal has related the drift of these accounting arguments in Part V. To recapitulate the essence of this financial statement issue, the audited Balance Sheet as at 31 December 2000 for ZDL listed the "development costs", for which ZDL seeks reimbursement from Georgia, under a subheading designated "Intangible Assets" and, on the liability side of the ledger, that same Balance Sheet referred to the bulk of these amounts as in the nature of a "Shareholders loan". But the Claimant provided no evidence that links these "Intangible Assets" or this "Shareholders loan" to any ZDL "realized investment in Georgia" as required of an "investor" under the definition of that term in the 1996 Georgia Investment Law.

399. The Claimant's proposal for the Project contemplated the formation of a Georgian special purpose entity to serve as the funnel of funds, but, as we have already learned, this joint venture with Zhineri was never consummated. In the absence of that entity, it was the Irish corporation, ZDL, that became the sponsor of the proposal for the Project. While Mr Fares and Mr Elwan were the leaders of Profidev and ICG, respectively, they ultimately acted in this matter as officers and/or directors of ZDL. It was thus ZDL that filed the Claimant's Request for Arbitration, not Profidev, ICG or Harza. Exhibit B to the Claimant's Request for Arbitration is a December 13, 1999 letter to ICSID from Mr Fares as "the Managing Partner and hairman of the Board of Directors of ZDL", confirming that "all necessary corporate action has been taken" to authorize ZDL to commence this arbitration. Likewise, Mr Fares signed the May 26, 2000 Agreement in his capacity as "Chairman" of ZDL. It was ZDL in its corporate form that became the chosen vehicle for seeking to "realize investments in Georgia", not, following ZDL's incorporation in March of 1998, Profidev, ICG or Harza.

400. Defining the scope of the rights of the purported "investor" and of the "Claimant" in this arbitration necessarily implicates the ICSID Convention and the ICSID Institution Rules and Arbitration Rules as well as the 1996 Georgia Investment Law. Article 25(1) of the ICSID Convention, for example, expressly requires that any legal dispute to come before ICSID must be between one Contracting State and "a national of another Contracting State". The publicly available ICSID case law includes a number of precedents where multiple entities from more than one Contracting State joined together as co-Claimants in the same action against one Respondent Contracting State. The Schreuer Commentary has the following to say on this subject:

> Subsequent cases show that having more than one party on the investor's side in one set of proceedings is perfectly possible. Each of these cases arose from one investment operation. In these cases the appearance of more than one party on the investor's side was the consequence of companies claiming jointly with their parent companies or their subsidiaries... The

> argument that the use of the singular "national" in Article 25(I) barred multi-partied arbitration was raised in *Klockner* v. *Cameroon* but was not taken up by the Tribunal and was apparently dropped subsequently by the Government. (Schreuer Commentary, para. 172 at 162.)

Thus, while there are ICSID cases with more than one Claimant *party,* the Tribunal is aware *of no* ICSID precedent where one single party has successfully asserted claims not only on its own behalf but also on behalf of other non-party entities which were not implicated with a specific written agreement that constituted the "consent" of the host Contracting State to such an assertion on their behalf.

401. The relevant ICSID precedents are four in number: *Holiday Inns SA and Others* v. *Morocco* (ICSID Case No. ARB/72/1); *AGIP SpA* v. *People's Republic of the Congo* (ICSID Case No. ARB/77/1); *Amco Asia Corporation and Others* v. *Republic of Indonesia* (ICSID Case No. ARB/81/1); and *Klockner Industrie-Anlagen GmbH and Others* v. *United Republic of Cameroon and Societe Camerounaise des Engrais* (ICSID Case No. ARB/81/2). The facts of these cases are different from those before this Tribunal because all four involved more than start-up costs in a failed transaction and because all four involved additional "consent" of the host Contracting State beyond that found in Article 16(2) of the 1996 Georgia Investment Law. Also, in three of the four cases, the question related to what entity or entities were proper party claimants under the relevant investment or consent agreement, and, in the fourth (the *AGIP* case), there was a combination of an investment agreement and an internal law provision that are *not* present in this case.

402. The Schreuer Commentary contains a paragraph that especially requires a reaction from the Tribunal on this issue of whether ZDL may assert claims on behalf of its non-party shareholders:

> These cases [the ones cited above] show that the [ICSID] tribunals take a realistic attitude when identifying the party on the investor's side [footnote omitted]. They look for the actual foreign investor and are unimpressed by the fact that the consent agreement only names a subsidiary. The operation of ICSID clauses will not be frustrated through a narrow interpretation of the investor's identity. What mailers is that the parent company acts in the preparation and possibly the implementation of the investment operation and that the ICSID clause is designed to work for its benefit Where companies other than those named in the consent agreement are not necessary patties but are merely economically associated with the investment or the investor, they will not be given standing in ICSID proceedings. *But the parties before the tribunal may be given the right to represent their interests and to claim on their behalf.* (Emphasis added.) (Schreuer Commentary, para. 216 at 178.)

Here we do not have any separate agreement between ZDL and Georgia as of December 3, 1999 that "only names a subsidiary", and we do not have a situation in which a "parent company" is involved where the "ICSID clause is designed to work for its benefit". This case does not have any independent investment or "consent" agreement in place between ZDL and Georgia as of December 3, 1999, the critical date on which jurisdiction must have existed in this matter. Moreover, there is no separate "ICSID clause" beyond the terms of Article 16(2) of the 1996 Georgia Investment Law, with the sole exception of Article 8 of the May 26, 2000 Agreement, which does not, however,

deal with any "consent" by Georgia to the Claimant's right to claim for "development costs" of its shareholders that are not the Claimant's own. Thus, the Tribunal regards the conclusion of the last sentence of this excerpt from the Schreuer Commentary as inapplicable and inapposite insofar as the facts of this case are concerned.

403. With further regard to the issue of the identity of the "investor" and the "Claimant", the Tribunal lakes cognizance of the fact that Rule 2 of the ICSID Institution Rules specifically requires as follows:

> 1. The request [for arbitration] shall:
> (a) designate precisely each party to the dispute;...

Likewise, Rule 47 of the ICSID Arbitration Rules deals with the contents of the awards rendered by ICSID tribunals and provides in part:

> (1) The award shall be in writing and shall contain:
> (a) a precise designation of each party;...

In this case, there is only one "precisely designated" Claimant Party and that is ZDL. There are no "Others" as co-claimant parties as was so in three of the referenced cases cited above in the Schreuer Commentary. And neither the ICSID Convention nor the ICSID Arbitration Rules contain any express provision permitting parties to assert claims on behalf of non-parties. This omission, and the case precedents previously cited, therefore, support the proposition that any such right of a complaining party requires the agreement or "consent" of the respondent Contracting State.

404. Any argument that ZDL should be permitted to assert claims on behalf of its three non-party shareholders (one of which, Profidev, has the same Irish corporate nationality as ZDL) confronts further obstacles in the Tribunal's eyes once ZDL's two United States incorporated shareholders, ICG and Harza, enter the picture, and this is so because there is a Bilateral Investment Treaty ("BIT') in effect between the Republic of Georgia and the United States of America [...]. This 1994 BIT contains its own definition of the word "investment", which is not identical to that in the 1996 Georgia Investment Law, and includes such concepts as that of: "covered investment"; "investment agreements"; and "investment disputes" which may or may not be comparable to provisions of the Georgia Civil Code. In addition, Article IX of the Georgia-US BIT contains its own detailed dispute resolution regime. The Tribunal is thus concerned that any ruling that it might make with regard to the interests of non-parties ICG and Harza might conflict with, or have other adverse implications for, the Georgia-US BIT. This particular ICSID Tribunal has no competence in this regard because the two shareholders of ZDL with rights under this BIT are *not* parties to this proceeding. ICG and Harza could have elected to seek to join as co-Claimant parties and to have argued ICSID jurisdiction based on treaty rather than on domestic Georgian law. But neither ICG nor Harza, for whatever reason, chose to take this step. The Irish corporation, Profidev, likewise elected not to become a party to the arbitration.

405. Thus, based on the facts and law before it, the Tribunal concludes that the Claimant does *not* possess the right to claim on behalf of its three shareholders. Consequently, ZDL must prove that all the claims asserted here are those of ZDL itself.

7. *Do the Claimant's "development costs" qualify as an "investment" under the 1996 Georgia Investment Law and under Article 25(I) of the ICSID Convention?*

406. In keeping with the learning of the *Mihaly Case* award, we must, in divining the presence or absence of an Article 25(1) "investment" in this case, determine whether Georgia assumed State responsibility for the Claimant's "development costs". If the answer is no, then the Tribunal will not need to address any claims in the nature of "lost profits" or "moral damages" because, if the "development costs" do not constitute an "investment", then the Tribunal does not see how any such consequential measures of damages, in a proposed project finance deal that never went forward, could be deemed "investment" within the meaning of Article 1 of the 1996 Georgia Investment Law. In this connection, the Tribunal has already postulated that, unless contrary to "international law", compliance with the 1996 Georgia Investment Law is necessary for compliance with Article 25(1) of the ICSID Convention, and so the circle is nearly complete.

407. In the absence of any *express* "consent" by Georgia, the Tribunal must determine whether Georgia's conduct gave rise to any *constructive* "consent" to the treatment of the Claimant's development costs as "investment", and, under the applicable inter-temporal law considerations, that conduct would have had to have crystallized no later than the December 3, 1999 filing date of the Claimant's Request for Arbitration, unless subsequent events, such as the May 26, 2000 Agreement, could retroactively create the "consent" that did not otherwise exist at that earlier time. And this latter issue raises its own problems for the Claimant under the ICSID Convention because, as earlier noted, the 1965 Executive Directors' Report specifically directed: "Consent of the parties must exist when the Centre is seized " (1965 Executive Directors' Report at 8.) The Tribunal reads this demand in the 1965 Executive Directors' Report as applying both to "consent" to the ICSID dispun process and to "consent" to qualifying ICSID "investment" treatment. And we have already pointed out that the submission to It ICSID dispute resolution that is contained in the May 26, 2000 Agreement has nothing to do with the issue of any consent by Georgia to accept State responsibility for the Claimant's development costs. The Tribunal concludes, therefore, that the Claimant, under the facts of this case, must have made a qualifying "investment" under Article 25(1) on or before December 3, 1999 in order for ICSID jurisdiction to exist.

408. The tribunal in the *Mihaly Case* also confronted this question of any acceptance of responsibility by a respondent State:

> 59. *The Tribunal concludes that none of these Letters* [of Intent, of Agreement and of Extension] *contains any binding obligation* either on Sri Lanka or on the Claimant *...[I]n the circumstances of this case, they are not to be treated in any way as signifying acceptance by the host State, Sri Lanka, of such [development] expenditures as constituting any investment within the sense of the Convention...* (Emphasis added.) *(Mihaly Case* at 18-19.)

In an individual concurring opinion, one of the arbitrators in the *Mihaly Case* called attention to the guidelines set out in the World Bank's "Discussion Paper" of September 1999, entitled "Submission and Evaluation of Proposals for Private Power Generation Projects in Developing

Countries", that we have previously cited in Part V. The concurring opinion stated:

> The [World Bank] document emphasizes that *in addition to Fixed O & M [Overhead and Maintenance] Costs, Financing Costs, Insurance Costs* and agreed *Equity Shareholder* returns, there should be included, *"Project Capital Costs.* These comprise all project development and construction costs, including but not limited to pre-feasibility engineering, legal and auditing services." (Emphasis in original.) *I agree with the Award's finding that the development expenditures allegedly incurred by the Claimant were not accepted by Sri Lanka as "investments" and that the Claimant has in this respect not succeeded in meeting the requirements of Article 25(1) of the ICSID Convention.* (Emphasis added.) *(Mihaly Case,* paras. 6 and 7 of concurring opinion.)

Thus, all three arbitrators in the *Mihaly Case* were of the view that the host State had to "accept" the development costs as an investment before those costs could qualify under Article 25(1).

409.

Before it was informed of the *Mihaly Case* award, the Respondent described in its Post-Hearing Brief the results of its legal research regarding the appropriate treatment of "development costs":

> All ICSID cases involve disputes over either: (1) an expropriation... or (2) a dispute over an executed contract. (Respondent's Post-Hearing Brief at 36.)

In its supplemental brief, after having reviewed the *Mihaly Case* award, the Respondent added the following observation:

> [In the *Mihaly* Case]..., as in this case, the host government did not consent to admit or receive the investment... The Respondent clearly signalled... that it was not until the execution of a contract that it was willing to accept that contractual relations had been entered into and that an investment had been made. (Respondent's Post Hearing

410.

The Claimant's reply to this line of argument during the course of the proceedings relied on industry practice. For example, Mr Elwan testified at the Oral Procedure:

> Q. We have been asked to address the issue about whether there was an investment in Georgia by ZDL. Could you describe what the nature of your investment was?
> A.... I would say that the project... is divided into three stages: the development, the implementation and the operation. Without the development... you will have no construction, you will have no operation... Therefore, it is an integral part, and it is recognized by all commercial banks and development banks as a part of the overall cost of the development of a project... I would like then to look at it from a different view. In the World Bank, the IFC and the European Investment Bank, we define a concept called "project cycle"... The... development is a well-recognized phase of the project cycle in all of the international and multilateral institutions. It goes from the point of identification of a project up to the point of financial close. (Transcript, February 14, at 1001-2. Mr Elwan.)

But the problem with this reply by the Claimant is that the proposed Zhinvali Project transaction did *not* close and, thus, the costs of the "development phase", in the words of the *Mihaly Case,* were *not* ultimately "swept up" under the "umbrella" of an integrated, three-phase investment project because the "project cycle" cited by Mr Elwan was never completed. Consequently, rather than retrospectively having become part of the overall investment expenditures of a successfully closed project finance transaction, the "development costs" in this case must either stand as an "investment" solely on their own two feet or otherwise fall by the wayside as expenditures that fail to qualify cither under the 1996 Georgia Investment Law or under the ICSID Convention.

411. ZDL naturally takes the position that this case is different from the *Mihaly Case.*

> The key ingredient missing in *Mihaly* is present here. Georgia has a binding obligation to ZDL by virtue of the preliminary agreements, promissory estoppel and the Settlement Agreement. (Claimant's Post-Hearing Reply at 18.)

But this conclusory assertion does *not* amount to proof that the Respondent consented to take responsibility for the Claimant's development costs as a qualifying investment under Georgia law. Again, the Claimant's argumentation, in the Tribunal's view, has more to do with an alleged breach of contract or other culpable conduct by the Respondent rather than with any notion of "investment".

412. Here we have a situation where, at least during the "exclusivity period" from August 10, 1998 to May 10, 1999, the Respondent expressly insisted that all expenses involved in pushing the Project forward were for the Claimant's account. So, at least to this extent, the Tribunal sees the opposite of conduct implying consent because Georgia expressly denied any State responsibility for expenditures of the Claimant during this time period. After the expiration of these nine months, we know that at no time, including under the terms of the May 26, 2000 Agreement, did the Respondent expressly agree to assume State responsibility for the Claimant's development costs, and, indeed, we have in evidence the letter from Minister Ukleba dated October 26, 1999, more than live months alter the end of the "exclusivity period" and shortly before the Claimant commenced this arbitration. This October 26, 1999 letter was in response to purported letters dated September 7 and October 14, 1999 from ZDL's United States counsel (which letters were not introduced into evidence) in which ZDL allegedly provided Georgia with the choice of (1) executing the Rehabilitation Agreement and the Power Purchase Agreement within 30 days, (2) compensating ZDL for its "expenses" or (3) going to arbitration. Minister Ukleba's letter stated:

> ... if ZDL presented the documentation about amount spent in connection with Zhinvali Project, this amount would be compensated to them from the amount paid by the winner of the tender. (ZDL Submissions at 101-2.)

While the Tribunal is uninformed as to what transpired between the October 26, 1999 date of this letter and December 3, 1999 when the Claimant commenced this action, we know that arbitration became the Claimant's chosen course, a fact which carries the implication, as does the language

of the October 26, 1999 letter, of a rejection by the Respondent of the option of compensating ZDL for its "expenses". Other than in connection with this October 26, 1999 letter, the Tribunal is *not* aware of any evidence that ZDL affirmatively sought Georgia's agreement to reimburse ZDL for its "development costs". In addition, we are informed from the Respondent's pleadings that if the Claimant had further asked for any such agreement, the Respondent would have declined.[17] And, even the Claimant does *not* maintain that the Respondent ever entered into any such express agreement.[18] On the basis of this analysis and of the chain of events described above, the Tribunal also sees no grounds for finding any constructive consent, or constructive acceptance of State responsibility, resulting from the Respondent's conduct.

413. Additionally, the Claimant's own conduct raises further questions in this area. When we consider that the Tribunal has determined that the Claimant cannot advance a claim for any development costs other than its very own, the Tribunal is then confronted (1) with documentary evidence that only one shareholder bill was submitted to ZDL directly and (2) with an acknowledgement by the Claimant that the Harza invoice was never paid by ZDL.[19] So we see no documented, individual invoices for expenditures by ZDL itself that constitute an "investment on the territory" of Georgia, thereby leaving the Tribunal with only the ZDL financial statements further to consider.

414. In this connection, the Respondent made the following points in its Post-Hearing Brief:

> Instead of categorizing the development costs claimed in this arbitration in the investment category (which is a catchall for everything which is neither a tangible nor intangible asset) the Claimant has described it as an intangible asset. The Claimant's own accountants therefore appear to be of the opinion that those development costs are *not* investments... (Respondent's Post-Hearing Brief at 34.)

415. In this regard, the Tribunal concludes that the Claimant has not successfully carried its burden of proof in showing, by the preponderance-of-the-evidence test set forth in the *SPP Case* cited above, that these ZDL financial statements should be read as persuasive circumstantial evidence from which the inference should be drawn that either the "Intangible Assets" or the "Shareholders loan" reflected on the ZDL Balance Sheet constituted "realized" costs of ZDL that qualify as an "investment on the territory" of Georgia within the meaning of the 1996 Georgia Investment Law. This is a leap in logic that the Tribunal finds unjustified on the record before it. In sum, the Tribunal finds no "investment" within the meaning of the 1996 Georgia Investment Law, first, because the "development costs" involved in this arbitration have not been shown to satisfy the definition of that term under the governing law of this case and, second, because the Government of Georgia did not otherwise agree or "consent" to undertake State responsibility for those costs as a qualifying "investment" under Georgian law.

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[17] " The Respondent would not have agreed to bear these costs, and did not agree to bear these costs." (Respondent's Post-Hearing Reply at 8.)

[18] "We are not contending that there was an agreement that said Georgia would pay us back..." (Transcript, February 11, at 153, Mr Landsman.)

[19] Because ZDL has not been compensated tor its development costs, it has not been able to pay Profidev, ICG or Harza for the costs they incurred to develop this project" (Claimant's Post Hearing Submission at 39.)

416. Finally, neither Party has contended that the 1996 Georgia Investment Law is in any way incompatible with the dictates of "international law", and the Tribunal finds no grounds for making any such assertion. If the Claimant's alleged time charges and out-of-pocket expenditures do not fall within the confines of the 1996 Georgia Investment Law and if the 1996 Georgia Investment Law in no way conflicts with international law, then the Tribunal has no grounds for concluding that those development costs could be deemed an "investment" for purposes of Article 25(1) of the ICSID Convention but *not* for purposes of the 1996 Georgia Investment Law.

417. The Tribunal has, therefore, decided that, for all the reasons previously outlined, there is no "investment" in this case that qualifies either under the 1996 Georgia Investment Law or under Article 25(1) of the ICSID Convention. As a result, the Centre is without jurisdiction, and this Tribunal is without competence, with regard to the merits of this arbitration.

418. In having come to this conclusion, the Tribunal is not unaware of the unfairness that the Claimant will surely discern in such a result, based on the time, effort and money that it has in good faith devoted to this ICSID proceeding. This outcome will, the Tribunal suspects, be especially painful for the Claimant because of the late stage in the proceedings at which the Respondent brought these jurisdictional questions to the fore. But the Tribunal is without any special equitable powers Article 42(3) of the ICSID Convention provides that an ICSID tribunal only has "the power to decide a dispute *ex aequo et bono* if the parties so agree", and here the parties have *not* so agreed. Consequently, the Tribunal can only seek fairly and properly to apply the governing law to the facts before it.

419. The Tribunal hopes that the Claimant, in confronting this Award, will find some solace in the following remark of the Respondent in its Post Hearing Brief:

> In the event the Tribunal finds that it has no jurisdiction, it would of course be open to the Claimant to seek its remedy before the Georgian Courts. (Respondent's Post-Hearing Brief, para. 155 at 38.)

In this same vein, the Tribunal recalls words from the *Mihaly Case* award:

> 51.... It may be... that during periods of lengthy negotiations even absent any contractual relationships obligations may arise such as the obligation to conduct the negotiations in good faith. These obligations if breached may entitle the innocent party to damages, or some other remedy. However, those remedies do not arise because an investment has been made... (*Mihaly Case* at 16.)

Whether the alleged promises and conduct of the Respondent are actionable under Georgia law is not for this body to judge. However, the Tribunal's decision is without prejudice to any rights that the Claimant may be in a position to advocate before any Georgian or other forum.

VII. ARBITRATION COSTS

420.

In their final Post-Hearing Reply Briefs, both Parties seek an award of costs.[20] Article 61(2) of the ICSID Convention requires tribunals to address this question in the following terms:

> (2) In the case of arbitration proceedings the Tribunal *shall,* except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and *shall* decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre *shall* be paid. Such decision *shall* form part of the award. (Emphasis added.)

The wording of this provision is mandatory, *not* discretionary.[21] Here there is no agreement of the Parties as to cost allocation and thus the only exception to Article 61(2) is *not* present in this case. Consequently, Article 61(2) applies even where the Tribunal determines that "the dispute is not within the jurisdiction of the Centre". In such instance, Rule 41(5) of the ICSID Arbitration Rules requires that a tribunal "shall render an award to that effect". And neither Article 61(2) of the ICSID Convention nor Rule 41(5) sets forth any exception to the necessary assessment of costs where jurisdiction is found lacking.

421. The Tribunal recalls that, in the letter dated February 5, 2002 permitting argument on the Respondent's tardy objection to jurisdiction, the Secretary informed the Parties on behalf of the Tribunal that the Tribunal "will at a later date decide whether invocation of Rule 28(1)(b) [of the ICSID Arbitration Rules] on costs is justified". Rule 28(1)(b) provides:

> (1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide...
>
> > (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

422. Il was in this same letter of February 5, 2002, that the Secretary informed the Parties that the Tribunal had decided to address these belated jurisdictional questions under Rule 41(2), despite the Respondent's disregard of the terms of Rule 41(1) of the ICSID Arbitration Rules.

423. In carrying out its duties under the ICSID Convention, the Tribunal has, in sum, "leaned over backwards" to give to Georgia every fair opportunity to present its response to the Claimant's case. In this connection, the Tribunal refers specifically to the extensions in time which the Respondent sought and received over protest from the Claimant as well as to the issues that the Respondent raised for the first lime in its Rejoinder rather than in its Counter-Memorial, all of which led to disruption in the adjudication of this case and to unnecessary escalation in the costs of the Claimant. The Tribunal further recalls the Provisional Measures Motion submitted by the Claimant and the resulting Order and Recommendation issued by the Tribunal. These actions stemmed from

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[20] ZDL, should also be awarded the costs of this arbitration, including attorney's (sic) fees, in an amount to set upon separate application." (Claimant's Post-Hearing Reply Brief at 19.) "... we request an Award... that the Claimant pays the Respondent's costs incurred in the defence of this action." (Respondent's Post Hearing Reply Brief, para. 49 at 15.)

[21] Rule 47(1)(j) of the ICSID Arbitration Rules also requires that an award contain "any decision of the Tribunal regarding the cost of the proceeding".

a Georgia lawsuit involving plaintiff and defendant Governmental instrumentalities, both of which appear to be controlled in fact by the Respondent, which lawsuit put at risk the exclusive jurisdiction of this Tribunal under Article 26 of the ICSID Convention to which Georgia expressly agreed when it became a Contracting State.

424. The Tribunal is in receipt of a statement of costs from both the Claimant and the Respondent, as contemplated by the ICSID Arbitration Rules. The Tribunal has decided that, just as fundamental fairness required under the facts of this case that Georgia receive a hearing of its defense to the Claimant's charges, so then fundamental fairness likewise requires that the Respondent reimburse the Claimant for attorneys' fees and other arbitration costs which the Claimant would not have incurred but for the Respondent's irregular behavior in mounting this defense.

425. The Tribunal notes that, while it has found that no qualifying "investment" exists under the facts of this case, it has also held that the Respondent did "consent" to the ICSID dispute resolution process under the 1996 Georgia Investment Law. And, as previously mentioned, Article 61(2) of the ICSID Convention contains no applicable exception to an assessment of costs in this proceeding.

426.

The Tribunal now turns to its calculation of the amount of Claimant's costs to award to the Claimant. As originally agreed at the First Session of the Tribunal, the schedule for the Written and Oral Procedure was as follows:

> Claimant's Memorial - April 2, 2001
> Respondent's Counter-Memorial - June 4, 2001
> Claimant's Reply - July 2, 2001
> Respondent's Rejoinder August 2, 2001
> Oral Procedure October 1, 2001

On March 28, 2001, Claimant's Counsel, on behalf of both the Claimant and the Respondent, requested a two month extension in time, seeking the following time limits which the Tribunal subsequently approved:

> Claimant's Memorial - June 1, 2001
> Respondent's Counter-Memorial - August 1, 2001
> Claimant's Reply - August 31, 2001
> Respondent's Rejoinder - October 1, 2001
> Oral Procedure - December 3, 2001

The Claimant's Memorial was filed on time and the Respondent's CounterMemorial, dated July 31, 2001, was forwarded to the Tribunal by the Secretary on August 6, 2001.

427. On September 28, 2001, because of the lack of hearing rooms at the World Bank headquarters for the week of December 3, 2001, the Secretary, with the agreement of the Parties, rescheduled the Oral Procedure for the week of December 10, 2001.

428. On November 1, 2001, as set forth in Part III, Respondent's new foreign Counsel sought an extension in the filing of the Respondent's Rejoinder until 21 days after the release of the Claimant's

confidential material and a delay in the Oral Procedure until March of 2002. These requests resulted in objections from the Claimant, and the Tribunal, as recorded in Part III, ultimately set the filing of the Respondent's Rejoinder for January 15, 2002 and the Oral Procedure for February 11-15,2002.

429. It was in the Respondent's July 31, 2001 Counter-Memorial that the Respondent should have raised the "consent" and "investment" objections that did not in fact unveil themselves until January of 2002. Had the Respondent made its objections when it should have under Rule 41(1), the Tribunal would have suspended the proceeding on the merits under Rule 41(3) and would have ruled on the jurisdictional objections at that stage as preliminary questions, thereby obviating the considerable additional time, effort and expense that the Claimant devoted to pursuing its case on the merits and to responding to the points introduced by the Respondent in its Rejoinder of January 15, 2002 and thereafter.

430. In a letter to the Secretary dated December 13, 2002, Counsel for the Claimant reported the Claimant's total costs related to this arbitration, including attorneys' fees, Tribunal fees and out-of-pocket disbursements. These costs for the months of August 2001 through November of 2002, as reported in the December 13, 2002 letter and its attachment, are in the total amount of US $895,687.63 (the "Post-July 31,2001 Costs"). The Tribunal, in making its best judgment as to what portion of the Post-July 31, 2001 Costs should be reimbursed by the Respondent, has concluded, after taking into account Rule 28(1)(b) and other relevant factors, that an Award in the amount of two-thirds of the Post-July 31, 2001 Costs is reasonable and appropriate. Consequently, the Tribunal awards the amount of US $597,125.09 to the Claimant for costs.

VIII. DECISION

431. On the issue of consent to jurisdiction, for the reasons previously articulated, the Tribunal decides by a vote of 3 to 0:

> 1. The Claimant and the Respondent did consent in writing to submit this legal dispute to the jurisdiction of ICSID within the meaning of Article 25(1) of the ICSID Convention.

432. On the issue of qualifying investment, for the reasons previously articulated, the Tribunal decides by a vote of 2 to 1:

> 1. No qualifying investment exists either under the 1996 Georgia Investment Law or under Article 25(1) of the ICSID Convention.
>
> 2. Accordingly, the Centre is without jurisdiction, and the Tribunal is without competence, in connection with the merits of this matter.

433. On the issue of costs, for the reasons previously articulated, the Tribunal decides by a vote of 3 to

0:

1. The Respondent's course of conduct in pursuing its interests in this arbitration, as previously described by the Tribunal, has caused the Claimant to incur costs that would not have been required but for the Respondent's conduct.

2. Because of Article 61(2) of the ICSID Convention (and, subsidiarily, because of the Tribunal's finding that the Respondent has consented to ICSID's dispute resolution process), the Centre has jurisdiction, and the Tribunal has competence, to make an award of costs despite the absence of any qualifying investment.

3. The costs of the proceedings, including the fees and expenses of the Three Arbitrators and the Centre, shall be borne by the Parties in equal shares and each Party shall bear its own costs and expenses in respect of attorneys' fees and other related expenditures involved with the Written and Oral Procedure; *except that,* for the period subsequent to July 31, 2001, the Respondent shall reimburse the Claimant for costs in the amount of US$597,125.09, and the Respondent shall pay such amount to the Claimant as soon as possible after the rendering of this Award, with interest to run at the rate of 5% per annum from and after the date hereof until such lime the Claimant receives payment from the Respondent.