

## CASES

### Saipem S.p.A. v. The People's Republic of Bangladesh (ICSID Case No. ARB/05/7)

#### Introductory Note

The Decision on Jurisdiction and Recommendation on Provisional Measures in *Saipem S.p.A. v. The People's Republic of Bangladesh* was issued in a case brought to ICSID by a company incorporated in Italy and submitted under the 1990 Agreement Between the Government of the Republic of Italy and the Government of the People's Republic of Bangladesh on the Promotion and Protection of Investments, which entered into force in 1994 (the Treaty). The underlying dispute concerned a gas pipeline construction project in the North East of Bangladesh. In 1990, the Claimant and a Bangladeshi State entity, the Bangladesh Oil Gas and Mineral Corporation (Petrobangla), entered into a contract governed by the laws of Bangladesh which contained an ICC arbitration clause with Dhaka, Bangladesh, as the place of arbitration. After the project was completed, a contractual dispute eventually led to an ICC award rendered in 2003 in favor of the Claimant. The ICC Tribunal awarded compensation with interest and ordered Petrobangla to return a warranty bond to the Claimant. Further to Petrobangla's application to set aside the ICC award, in April 2004, the High Court Division of the Supreme Court of Bangladesh held that the award could neither be set aside nor enforced. On October 5, 2004, the Claimant submitted a request for arbitration to ICSID, claiming that Petrobangla had colluded with the courts of Bangladesh to sabotage the ICC arbitration, and that its investment had, as a result, been expropriated without compensation under the Treaty. The dispute-settlement clause (Article 9) of the Treaty provides that covered disputes must relate to "compensation for expropriation, nationalization, requisition or similar measures including disputes relating to the amount of the relevant payments."

ICSID registered the request for arbitration on April 27, 2005, and the Arbitral Tribunal, composed of Prof. Gabrielle Kaufmann-Kohler (President), Prof. Christoph H. Schreuer and Sir Philip Otton, was constituted on August 22, 2005. The parties agreed on a procedural calendar whereby the Respondent's objections to the jurisdiction of the Tribunal would be dealt with as a preliminary matter. Accordingly, the parties submitted pleadings on jurisdiction and a hearing was held in London on September 21 and 22, 2006. The parties agreed that the Claimant's request for provisional measures, which had been suspended, would be decided by the Tribunal after the hearing on jurisdiction. The request for provisional measures sought to prevent Petrobangla from calling on the warranty bond and for it to return certain retention money which it had received from the Claimant, matters which were disposed of under the ICC award.

The Respondent objected that, among other things, there was no investment within the meaning of the Treaty; that it had not consented to ICSID arbitration for claims based on decisions by the courts of Bangladesh under the Treaty; that the Claimant had not exhausted all legal remedies; and that Petrobangla's acts could not be attributed to the Respondent. The Claimant argued, among other things, that its contractual right to settle disputes by arbitration was covered under the Treaty as a "right accruing by law or by contract" having an economic value; that intangible rights could be subject to expropriation; and that the actions of Petrobangla could be attributed to the Respondent as it was an organ of the State.

The Tribunal remarked in the first place that, while it was not bound by previous decisions of international tribunals, it must pay due consideration to them and adopt solutions established in a series of consistent cases, unless there were compelling grounds to the contrary.<sup>1</sup> Referring to other ICSID decisions, the Tribunal concluded that the test for establishing jurisdiction under the Treaty should be a *prima facie* showing by the Claimant of Treaty breaches. According to the Tribunal, jurisdiction is satisfied if, *prima facie*, the facts alleged are capable of constituting violations of the Treaty under a *prima facie* determination of the meaning and scope of the Treaty provisions relied on (Section IV.3.2 of the Decision). Applying this standard, the Tribunal concluded that the facts alleged by the Claimant, if established, were capable of constituting an expropriation under the Treaty, as it saw no reason why a judicial act could not result in

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<sup>1</sup> See para. 67 of the Decision: "subject to the specifics of a given treaty and of the circumstances of the actual case, [the Tribunal] has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law." (Footnote omitted.)

an expropriation (Section IV.5.2 of the Decision). In regard to the objection that the Claimant did not exhaust all local remedies, the Tribunal noted that such a requirement applies to claims based on denial of justice, but that it does not apply as a matter of principle in expropriation law (Section IV.6.1 of the Decision). Since the Claimant had brought its claim on the basis of an alleged expropriation, the Tribunal found that there was no ground on which to deny jurisdiction given that the Claimant had not exhausted all legal remedies available in Bangladesh. The Tribunal nevertheless raised the question whether an analogy should be made in this case between expropriation and a denial of justice when it came to exhaustion of local remedies, as the alleged expropriating authority was a judicial body. It therefore decided that the question should be addressed with the merits of the dispute. The Tribunal rejected the objection that the Treaty would exclude judicial acts from the scope of covered disputes (Section IV.5.3 of the Decision).

The Tribunal found that the Claimant's overall operation in Bangladesh qualified as an investment under the ICSID Convention and the Treaty. According to the Tribunal, because the notion of "investment" under the ICSID Convention must have been understood to cover all elements that make up the investment, including in this case the ICC arbitration, the dispute must have been seen to arise directly out of the investment under the Convention (Sections IV.4-5.2 of the Decision). Finally, as regards questions of attribution, the Tribunal found that it was not manifest that either the courts of Bangladesh or Petrobangla did not qualify as state organs, and stated that this question would be further examined during the merits of the dispute (Section IV.5.5 of the Decision).

With regard to the request for provisional measures, the Tribunal sought to strike a balance between the parties' divergent interests in the light of the circumstances of the case. It recommended that the Respondent take the necessary steps to ensure that Petrobangla refrain from drawing on the warranty bond, but rejected the request for the return of the retention money.

The scope of arbitrable disputes under the Treaty in *Saipem v. Bangladesh* was restricted to disputes relating to compensation for expropriation. Similar restrictions are not uncommon under bilateral investment treaties.<sup>2</sup> Issues of interpretation in this regard have arisen in a number of cases, including the question whether or not a tribunal has jurisdiction to hear issues concerning the occurrence of an expropriation in addition to issues of quantum. In *Saipem v. Bangladesh* as in *Telenor Mobile Communications A.S. v. Republic of Hungary*

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<sup>2</sup> See, e.g., early investment treaties concluded by the Soviet Union and China.

(ICSID Case No. ARB/04/15), the Tribunals found that they had jurisdiction to hear disputes regarding the actual occurrence of an act of expropriation under the dispute-settlement clauses of the relevant treaties. In *Telenor v. Hungary* the Tribunal nevertheless declined jurisdiction because it found that the claimant had failed to show a *prima facie* case of expropriation within the meaning of the relevant bilateral investment treaty.<sup>3</sup> Having analyzed the evidence before it, the Tribunal in that case concluded that it was evident that the effect of the acts of the Government fell far short of the substantial economic deprivation of the claimant's investment required to constitute expropriation.

In an investment arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce, *Vladimir Berschader and Moïse Berschader v. The Russian Federation*,<sup>4</sup> the Tribunal found that the dispute-resolution provision of the relevant treaty excluded disputes concerning whether or not an act of expropriation had in fact occurred. According to the Tribunal, only disputes arising from the amount or mode of compensation to be paid subsequent to an act of expropriation that had already been established were arbitrable under the treaty. Because expropriation had not been established prior to the arbitration, the Tribunal, by majority, declined jurisdiction. The Tribunal supported its interpretation of the treaty by the fact that the majority of investment treaties concluded by the Soviet Union in 1989 and 1990 limited the scope of covered disputes to the amount or method of compensation for expropriation, which reflected certain politico-economic considerations at the time.

An earlier award on jurisdiction and the merits in *Franz Sedelmayer v. The Russian Federation*, under an investment treaty which contained a similar dispute-settlement provision and was concluded during the same year as the treaty in *Berschader v. Russia*, did not address the issue whether the Tribunal had jurisdiction to consider if expropriatory measures had occurred.<sup>5</sup> By majority, the

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<sup>3</sup> See Award of September 13, 2006, 21 ICSID Rev.—FILJ 603 (2006). The dispute-settlement clause under the bilateral investment treaty between Norway and Hungary (Article XI) referred to disputes “either concerning the amount or payment of compensation under Article V [loss due to armed conflicts] and VI [expropriation and compensation] of the present Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article VI of the present Agreement or concerning the consequences of the non-implementation or of the incorrect implementation of Article VII [repatriation of investments] of the present Agreement.”

<sup>4</sup> See Award of April 21, 2006, available at <<http://ita.law.uvic.ca>>. The 1989 bilateral investment treaty between Belgium-Luxembourg and the Soviet Union (Article 10) provides that the treaty covers disputes “concerning the amount or mode of compensation to be paid under [the article dealing with expropriation, nationalization or other measures having a similar effect].” See also Award on Jurisdiction of October 2007 in *RosInvestCo UK Ltd. v. The Russian Federation*, available at <<http://ita.law.uvic.ca>>.

Tribunal in that case found that the acts of the State qualified as expropriatory measures and awarded compensation to the claimant.

In an *ad hoc* UNCITRAL case under an investment treaty also concluded during the same period by the Czechoslovak Socialist Republic and the Belgium-Luxembourg Economic Union, the Tribunal held that the wording “concerning compensation due by virtue of [the article dealing with expropriation or ‘other measures of direct or indirect dispossession’]” regarding covered disputes meant that claims for relief other than compensation (for example, restitution) were excluded from the Tribunal’s jurisdiction.<sup>6</sup> The Tribunal thus indicated that its jurisdiction was not limited to disputes concerning the *amount* of compensation, but that it also covered disputes concerning whether or not any event under the relevant provision had occurred.

The text of the Decision on Jurisdiction and Recommendation on Provisional Measures in *Saipem v. Bangladesh*, issued on March 21, 2007 in English, is reproduced with the parties’ consent and is also posted in PDF format on ICSID’s website at [www.worldbank.org/icsid](http://www.worldbank.org/icsid). The case is still pending before the Centre.

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<sup>5</sup> See Award of July 7, 1998, available at <<http://ita.law.uvic.ca>>. The 1989 bilateral investment treaty between Germany and the Soviet Union (Article 10) provides that the treaty covers disputes “concerning the scope or procedure of compensation pursuant to [the article dealing with expropriation, nationalization or other measures having a similar effect], or the free transfer pursuant to Article 5” (translation provided in the award).

<sup>6</sup> Limited information on the unpublished Award on Jurisdiction of May 15, 2007 in *European Media Ventures SA v. The Czech Republic* is available in the Judgment of December 5, 2007 of the High Court of Justice, Queen’s Bench Division, available at <<http://ita.law.uvic.ca>>.