

**International Centre for Settlement  
of Investment Disputes**

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**SAIPEM S.p.A.**

**CLAIMANT**

**v.**

**THE PEOPLE'S REPUBLIC OF BANGLADESH**

**RESPONDENT**

**ICSID Case No. ARB/05/07**

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**DECISION ON JURISDICTION  
AND RECOMMENDATION ON PROVISIONAL MEASURES**

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Rendered by an Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, President

Prof. Christoph H. Schreuer, Arbitrator

Sir Philip Otton, Arbitrator

Mrs. Martina Polasek, Secretary to the Arbitral Tribunal

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## TABLE OF ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT	Bilateral investment treaty; specifically “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” of 20 March 1990
C-Mem.	Bangladesh’s Counter-Memorial on the objections to jurisdiction and the merits of 14 May 2006
Contract	of 14 February 1990
Exh. C-	Claimant [Saipem]’s Exhibits
Exh. R-	Respondent [Bangladesh]’s Exhibits
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
IDA	International Development Association
Mem.	Saipem’s Statement of Claim of 20 February 2006
RA or Request	Saipem’s Request for Arbitration of 5 October 2004
Rejoinder J.	Saipem’s Rejoinder on Objections to Jurisdiction dated 14 September 2006
Reply J.	Bangladesh’s Reply on Jurisdiction dated 18 August 2006
Response J.	Saipem’s Reply [Response] on Objections to Jurisdiction of 14 July 2006
Tr. J. [I/II] [page:line]	Transcript of the hearing on jurisdiction [day one/day two]

## **I. FACTS RELEVANT TO JURISDICTION**

1. This chapter summarizes the factual background of this arbitration insofar as it is necessary to rule on Bangladesh's objections to jurisdiction.

### **1. THE PARTIES**

#### **1.1 The Claimant**

2. The Claimant, Saipem S.p.A ("Saipem" or the "Claimant"), is a company incorporated and existing under the laws of Italy. Its principal office is situated at Via Martiri di Cefalonia, 67, 20097 San Donato Milanese, Milan, Italy.
3. The Claimant is represented in this arbitration by Professors Antonio Crivellaro and Luca Radicati di Brozolo and Mr. Andrea Carta Mantiglia, BONELLI EREDE PAPPALARDO, Via Barozzi 1, 20122 Milan, Italy.

#### **1.2 The Respondent**

4. The Respondent is the People's Republic of Bangladesh ("Bangladesh" or the "Respondent").
5. The Respondent is represented in this arbitration by Messrs. Ajmalul Hossain QC, Mejbahur Rahman and Syed A Hossain, A. HOSSAIN & ASSOCIATES LAW OFFICES, 3/B Outer Circular Road, Maghbazar, Dhaka-1217, Bangladesh.

### **2. THE PROJECT AND THE DISPUTE**

#### **2.1 The pipeline contract**

6. The Bangladesh Oil Gas and Mineral Corporation (Petrobangla) is a State entity established under the Bangladesh Oil, Gas and Mineral Corporation Ordinance of 1985 as amended by the Bangladesh Oil, Gas and Mineral Corporation Act of 1989.
7. On 14 February 1990, Saipem and Petrobangla entered into a contract to build a pipeline of 409 km to carry condensate and gas in various locations of the north east of Bangladesh (the "Contract"). The contract price amounted to USD 34,796,140 and

BDT 415,664,200. The project was sponsored by the World Bank and financed to a large extent by the International Development Association (IDA).

8. Clause 1.2.5 of the Contract afforded Petrobangla the right to retain 10% of each progress payment due to Saipem as Retention Money up to an amount equivalent to 5% of the total contract price, *i.e.*, USD 1,739,807 plus BDT 20,783,210 (the "Retention Money"). The Retention Money was to be released to Saipem in two tranches, half of it not later than 30 days from the issuance of the Final Taking Over Certificate by Petrobangla, and the remaining half not later than 30 days from the issuance of the Final Acceptance Certificate by Petrobangla.
9. The same Clause 1.2.5 of the Contract provided that Petrobangla could release the second half of the Retention Money prior to the Final Acceptance Certificate against a Warranty Bond of equal value from a bank acceptable to Petrobangla (the "Warranty Bond").
10. The Contract was governed by the laws of Bangladesh and contained the following arbitration clause:

If any dispute, question or difference should arise between the parties to this Contract with regard to rights and obligations hereunder which cannot be settled amicably, such dispute, question or difference shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators, one to be nominated by each party and the third arbitrator shall be appointed by the two arbitrators in accordance with the said Rules and if the arbitrators are unable to do so, the third arbitrator shall be appointed by the Court of Arbitration of the International Chamber of Commerce under the said Rules. The venue of the arbitration shall be Dhaka, Bangladesh. The procedure in arbitration shall be in English.

(Exh. C-4)

## **2.2 The origin of the present dispute**

11. Pursuant to Article 1.1.14 of the Contract, the project was to be completed by 30 April 1991. It was, however, significantly delayed due to problems with the local population which rebelled against the project. On 29 May 1991, Saipem and Petrobangla, with the approval of the World Bank, agreed to extend the completion date by one year, *i.e.*, to 30 April 1992.

12. The project was completed and the pipeline taken over by Petrobangla with effect from 14 June 1992. Petrobangla issued the certificate of final taking over on 17 June 1992. Shortly thereafter, Petrobangla returned the first half of the Retention Money.
13. The second half of the Retention Money was to be released by Petrobangla against a warranty bond of the same amount, *i.e.*, USD 869,903.50 and BDT 10,391,605.00.
14. The warranty bond was provided on behalf of Saipem on 27 June 1992 (warranty Bond No. PG/USD/12/92 issued by Banque Indosuez; the “Warranty Bond”). Petrobangla agreed that such bond would be released no later than 30 days from the issuance of the certificate of final acceptance (see C-Mem, p. 26).
15. On 18 April 1993, Petrobangla sent an “extend or pay letter” in the following terms:

The validity of the captioned guarantee which was extended by you vide your letter No. CRDT/AU.-PG-12/92-551/93 dated 04-05-93, will expire on 30-06-93.

We have requested the Contractor to extend the validity of the said guarantee for further period up to 31-12-93 before its expiry.

If the Contractor does not give any extension of the validity of this guarantee before its expiry date *i.e.* 30-06-93, you will treat this letter as our encashment notice against the subject guarantee and in that event you will effect payment to us by a Demand-Draft drawn in favour of the Project Implementation Unit, Petrobangla.

(Exh. R-67)

16. It is undisputed that Petrobangla did not repay the Retention Money even though the Warranty Bond had been issued. The parties disagree on whether the letter to “extend or pay” just quoted constitutes a call on the Warranty Bond and whether Petrobangla initiated an action to obtain and eventually obtained payment under the Warranty Bond.
17. A dispute arose between the parties with respect to Petrobangla’s failure (i) to pay the additional costs allegedly agreed, together with the extension of time as well as other compensations and (ii) to return the Warranty Bond and the balance of the Retention Money.

### **2.3 The ICC Arbitration**

18. According to the dispute resolution procedure set forth in the Contract, Saipem referred this dispute to ICC arbitration by filing a request for arbitration on 7 June 1993.

19. An arbitral tribunal composed of Dr. Werner Melis (Chairman), Prof. Riccardo Luzzatto and Prof. Ian Brownlie, QC, was constituted on 4 May 1994 (the “ICC Arbitral Tribunal”).
20. On 27 November 1995, the ICC Arbitral Tribunal issued an award on jurisdiction dismissing Petrobangla’s challenge to its jurisdiction (Exh. C-7). It then addressed the merits of the case.
21. In substance, Saipem claimed compensation in excess of USD 11 million (USD 7,579,445 and BDT 123,350,330) and the return of the Warranty Bond. Petrobangla opposed these claims and raised several counterclaims in the total amount of USD 10,577,941.98.
22. After the exchange of the written submissions in the ICC Arbitration, a witness hearing was held on 22-27 July 1997 in Dhaka. During the hearing, the ICC Arbitral Tribunal rejected several procedural motions made by Petrobangla, in particular (i) a request to strike from the record the statement of a witness produced by Saipem who could not attend the hearing, (ii) a request that all witnesses to be heard during the hearing be allowed to stay in the hearing room, (iii) a request that a letter from Petrobangla which was not on record be filed during the cross-examination of a witness, (iv) a request to strike from the record a "draft aide-mémoire" of the World Bank and certain unilaterally prepared calculations of costs, and (v) a request for written transcripts to be made of the tape recordings of the hearing.
23. In August 1997, Petrobangla wrote to the ICC Arbitral Tribunal to request information regarding Saipem’s insurance policy and claims. The ICC Arbitral Tribunal issued an order that Saipem’s refusal to submit the requested documents would be assessed at a later stage of the proceedings, when appropriate.
24. On 16 November 1997, Petrobangla filed an action seeking the revocation of the ICC Arbitral Tribunal's authority in the First Court of the Subordinate Judge of Dhaka (Exh. R-83)<sup>1</sup>. The action was based on the arbitrators’ alleged misconduct and breach of the

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<sup>1</sup> On 23 June 1999, Saipem filed an application for “rejection of the application” on the merits (Exh. R-85), which was refused by an order dated 5 September 1999 (Exh. R-87). Saipem did not appeal from this order in the High Court Division of the Supreme Court.

parties' procedural rights when rejecting Petrobangla's procedural motions during the hearing of 22-27 July 1997<sup>2</sup>.

25. On 17 November 1997, Petrobangla seized the High Court of Dhaka of an application requesting a decision "to stay all further proceedings of the Arbitration Case No. 7934/CK pending before the arbitral tribunal and/or to restrain the opposite party and/or the tribunal by and from proceeding further with the said arbitration" (Exh. C-10.2).
26. On 24 November 1997, the Supreme Court of Bangladesh issued an injunction restraining Saipem from proceeding with the ICC Arbitration (Exh. C-10.3)<sup>3</sup>:

[Saipem] is hereby restrained by an order of ad-interim injunction from proceeding with the said arbitration case No. 7934CK for a period of 8 (eight) weeks from date.

(Exh. C-10.3, p. 2)

27. Several other decisions confirmed and maintained the stay of the arbitration, including a decision of the High Court Division of the Supreme Court of Bangladesh handed down on 23 March 1998 (Exh. C-10.4).
28. On 19 September 1999, Saipem filed a written objection to Petrobangla's action seeking the revocation of the ICC Arbitral Tribunal's authority (Exh. R-88).
29. On 5 April 2000, the First Court of the Subordinate Judge of Dhaka issued a decision revoking the authority of the ICC Arbitral Tribunal on the following grounds:

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<sup>2</sup> Petrobangla also sought an interim injunction pending the hearing of its application, which was dismissed by the Court by an order dated 16 November 1997 (Exh. C-10.1). On 17 November 1997, Petrobangla filed an appeal from this order (Exh. C-10.2). By a judgment dated 2 May 1999, the High Court allowed Petrobangla's appeal, set aside the order dated 16 November 1997 of the lower court, and granted the interim injunction in respect of the proceedings of the ICC Tribunal (Exh. C-10.5). On 30 June 1999, Saipem appealed from this judgment in the Appellate Division of the Supreme Court and requested a stay of the operation of the Judgment of the High Court Division. The Appellate Division granted the stay and extended it by two separate orders dated 4 and 18 July 1999 until 22 July 1999. After having heard both parties, on 25 July 1999 the Appellate Division rendered a judgment upholding the High Court decision of 2 May 1999.

<sup>3</sup> Saipem appealed against the judicial stay of the arbitration on the ground that the Bangladeshi courts had no jurisdiction to decide on Petrobangla's petition regarding the alleged misconduct of the proceedings by the arbitrators. Specifically, Saipem submitted that the ICC Arbitration Rules elected by the parties provided for an exclusive mechanism for disqualification of the arbitrators and that such an election had to be taken into consideration according to Section V of the Bangladeshi Arbitration Act of 1940. Pursuant to this provision, "the authority of an appointed arbitrator is irrevocable except with the leave of the court, unless a contrary intention is expressed in the arbitration agreement".

In view of the submission of the lawyers for the parties and perusal of the documents filed by both sides I hold that the Arbitral Tribunal has conducted the arbitration proceedings improperly by refusing to determine the question of the admissibility of evidence and the exclusion of certain documents from the record as well as by its failure to direct that information regarding insurance be provided. Moreover, the Tribunal has manifestly been in disregard of the law and as such the Tribunal committed misconduct.

Therefore, in the above circumstances, it appears to me that there is a likelihood of miscarriage of justice.

(Exh. C-11, as quoted in Mem., p. 21, para. 92)

30. It is common ground that Saipem has not appealed this decision.
31. On 30 April 2001, the ICC Arbitral Tribunal decided to resume the proceedings on the ground that the challenge or replacement of the arbitrators in an ICC arbitration falls within the exclusive jurisdiction of the ICC Court and not of the Bangladeshi courts. It thus held that the revocation of the authority of the ICC Arbitral Tribunal by the Bangladeshi courts was contrary to the general principles governing international arbitration (Exh. C-8).
32. On 9 May 2001, Petrobangla brought an action before the First Court of the Subordinate Judge of Dhaka to set aside the ICC Arbitral Tribunal's order of 30 April resuming the arbitration (Exh. C-12).
33. On 24 May 2001, Petrobangla filed a request for a declaration that the ICC Arbitration was unlawful on the ground that the authority of the ICC Arbitral Tribunal was revoked by the decision of the Subordinate Judge of 5 April 2000. It also applied for an interim and a permanent injunction. On the same day, the court refused to grant the interim injunction. On 27 May 2001, Petrobangla filed an appeal before the High Court Division of the Supreme Court against this refusal. On the same date, the High Court Division issued an injunction restraining Saipem from pursuing the ICC Arbitration<sup>4</sup>. This decision was confirmed by the High Court Division on 23 October 2001, 16 January 2002 and 15 July 2002.
34. On 9 May 2003, the ICC Arbitral Tribunal rendered an award holding that Petrobangla had breached its contractual obligations by not paying the compensation for time extension and additional works and ordered Petrobangla to pay to Saipem the total amount of USD 6,148,770.80 plus EUR 110,995.92 (which included the Retention Money which remained unpaid) plus interest at 3.375% from 7 June 1993. It also

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<sup>4</sup> Saipem did not appear before the Court and the case is still pending.

ordered Petrobangla to return the Warranty Bond to Saipem (the “ICC Award”; Exh. C-6).

35. On 19 July 2003, Petrobangla filed an application before the High Court Division of the Supreme Court of Bangladesh under Sections 42(2) and 43 of the Arbitration Act 2001 to set aside the ICC Award (Exhibit C-13).
36. On 21 April 2004, the High Court Division of the Supreme Court of Bangladesh denied Petrobangla’s application to set aside the Award as it was “misconceived and incompetent inasmuch as there is no Award in the eye of the law, which can be set aside” (Exh. C-21, p. 11). In the most relevant passage, the High Court Division decision reads as follows:

[...] On a perusal of materials on record and particularly Annexure-"D" that is the judgment passed by the learned Subordinate Judge, First Court, in Arbitration Miscellaneous Case No. 49 of 1997, it appears that the authority of the Arbitral Tribunal to proceed with the Arbitration Case No. 7934/CK/AER/ACS/MS has been revoked on 5.4.2000. Therefore the Arbitral Tribunal proceeded with the said arbitration case most illegally and without jurisdiction after the pronouncement of the judgment of Arbitration Miscellaneous Case No. 49 of 1997. Moreover, the Arbitral Tribunal was injuncted upon by the High Court Division not to proceed with the said arbitration case any further but in spite of that the Tribunal proceeded with the Arbitration Case and ultimately declared their Award on 9.5.2003. [...]

The applicable law of the agreement was set out in clause 1.1.1a of the agreement in the following terms: “1.1.1a The contract shall be governed and construed with reference to the law in force in Bangladesh...”. Thus it is clear the Bangladesh Court has jurisdiction to entertain a suit/proceeding if initiated by a party to the Contract. Therefore, the judgment passed by the First Subordinate Judge in Arbitration Miscellaneous Case No. 49 of 1997 and the injunction order dated 2.5.1999 passed by this Court in the Miscellaneous Appeal No. 25 of 1997 were binding upon the Arbitral Tribunal [...]

It is, thus, clear and obvious that the Award dated 9.5.2003 passed by the Arbitral Tribunal in Arbitration Case No. 7934/CK/AER/ACS/MS is a nullity in the eye of the law and this Award can not be treated as an Award in the eye of the law as it is clearly illegal and without jurisdiction inasmuch as the authority of the Tribunal was revoked as back as on 5.4.2000 by a competent Court of Bangladesh. [...]

A non-existent award can neither be set aside nor can it be enforced.

(Exh. C-21, p. 11).

## **2.4 Related litigation**

37. On 4 October 1992, at the request of a subcontractor of Saipem, a court in Bangladesh issued an injunction restraining payments by Petrobangla to Saipem. The injunction was lifted on 31 May 1993.
38. On 17 June 1993, Saipem obtained an injunction from the courts in Milan prohibiting Banque Indosuez Italy (the bank which had issued the Warranty Bond) to pay out on the Warranty Bond to Banque Indosuez Pakistan (the correspondent bank in Pakistan). This injunction was confirmed on 19 July 1993 and subsequently affirmed by the Court of Appeal of Milan on 12 August 1993<sup>5</sup>.
39. Being exposed to the risk of a call on the Warranty Bond, on 12 February 1994, Banque Indosuez Pakistan filed an action before the Court of the 4<sup>th</sup> Sub-Judge of Dhaka for a declaration that no payment should be made in favor of Petrobangla under the Warranty Bond until the injunction of the court of Milan was vacated. According to the Court's order sheet, a further hearing was set on 4 June 2006. This action was still pending at the time of the hearing on jurisdiction in this arbitration. Saipem is not a party to it (Tr. I 53:14-21).

## **2.5 The BIT**

40. The present proceedings are brought on the basis of the "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" of 20 March 1990 (the "BIT"), which entered into force on 20 September 1994 (Exh. C-1).
41. Specifically, Saipem relies upon Article 5 of the BIT, pursuant to which investments under the Treaty may not be subject to expropriation or measures equivalent to expropriation without immediate, full, and effective compensation.

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<sup>5</sup> The action on the merits, which was initiated to maintain the injunction was still pending at the time of the hearing on jurisdiction in this arbitration (Tr. II 63:22-64:3).

## II. PROCEDURAL HISTORY

### 1. INITIAL PHASE

42. On 5 October 2004, Saipem filed a Request for Arbitration (the “Request” or “RA”) with the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”), accompanied by 17 exhibits (Exh. C-1 to 17). In its Request, Saipem invoked the provisions of the BIT and sought the following relief:

#### *6.1 Claim for Declaratory Decisions*

The Claimant requests that the Arbitral Tribunal declare that:

- Bangladesh has expropriated Claimant of its investment without paying compensation;
- Bangladesh has breached its international obligations under the BIT.

#### *6.2 Monetary Claims*

The Claimant requests that the Arbitral Tribunal award it complete compensation for all the damages and losses it suffered as a result of Bangladesh's breaches of its obligations.

As the Claimant will substantiate at the proper stage of the proceedings, the loss suffered by the Claimant amounts to at least US\$ 12,500,000.00, plus interest at the proper rate.

The Claimant also requests that the Arbitral Tribunal order Bangladesh to return or extinguish the Warranty Bond.

#### *6.3 Interim Relief*

In light of Bangladesh's bad faith attempts to draw upon the Warranty Bond, the Claimant requests that the Tribunal issue a provisional order pursuant to Article 47 of the Convention ordering Respondent to refrain from pursuing – and to prevent Petrobangla from pursuing – any payment demand based on this Bond until the outcome of the present arbitration.

#### *6.4 The Costs of the Present Arbitration*

The Claimant requests that the Arbitral Tribunal order Respondent to reimburse Claimant for all the costs incurred and to be incurred by it in connection with the present arbitration, including legal fees.

(RA, pp. 27-28, paras. 121-126, footnote omitted)

43. On 12 October 2004, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the “Institution Rules”), transmitted a copy of the RA to Bangladesh.
44. After a protracted exchange of correspondence (during which the Claimant filed additional exhibits to the Request – Exh. C-18 to 21) between the parties and the Centre, on 27 April 2005, the Secretary-General of the Centre registered Saipem’s

Request, pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “ICSID Convention” or “the Convention”). On the same date, in accordance with Institution Rule 7, the Secretary-General notified the parties of the registration of the Request and invited them to proceed, as soon as possible, to constitute an Arbitral Tribunal.

45. The parties agreed on a Tribunal composed of three arbitrators with one arbitrator each to be appointed by the parties and the presiding arbitrator to be jointly nominated by the two party-appointed arbitrators. On 27 June 2005, Saipem appointed Prof. Christoph Schreuer, a national of Austria. On 4 July 2005, Bangladesh appointed Sir Philip Otton, a national of the United Kingdom. On 21 July 2005, the Secretariat informed the parties that the co-arbitrators had agreed to appoint Prof. Gabrielle Kaufmann-Kohler, a national of Switzerland, as the President of the Tribunal.
46. On 22 August 2005, the Secretary-General of ICSID, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”), notified the parties that all three arbitrators had accepted their appointment and that the Tribunal was therefore deemed to be constituted and the proceedings to have begun on that date. The same letter informed the parties that Mrs. Eloïse M. Obadia, ICSID Counsel, would serve as Secretary to the Tribunal. Mrs. Obadia was subsequently replaced as the Secretary of the Tribunal by Mrs. Martina Polasek, ICSID Counsel.
47. By decision of 11 October 2005, Sir Philip Otton and Prof. Gabrielle Kaufmann-Kohler dismissed Bangladesh’s Proposal for Disqualification of Prof. Christoph Schreuer concluding that the latter met the requirement of independence and impartiality, or, in the words of Article 14(1) of the ICSID Convention, that he had the ability to “exercise independent judgement”.
48. On 1 December 2005, the Tribunal held a preliminary session in London. At the outset of the session, the parties expressed agreement that the Tribunal had been duly constituted (Arbitration Rule 6) and stated that they had no objections in this respect. The remainder of the procedural issues on the agenda of the session were discussed and agreed upon, including a procedural calendar. An audio recording of the session was later distributed to the parties. Minutes were drafted, signed by the President and the Secretary of the Tribunal, and sent to the parties on 13 January 2006.

## **2. THE WRITTEN PHASE ON JURISDICTION**

49. In accordance with the timetable agreed upon during the preliminary session, on 20 February 2006, Saipem submitted its Statement of Claim (Mem.) accompanied by two volumes of exhibits (Exh. C-21 to Exh. C-84). Saipem did not append any witness statement or expert opinion.
50. Following a short extension, on 14 May 2006, Bangladesh submitted its Counter-Memorial on the objections to jurisdiction and the merits (C-Mem.) accompanied by five volumes of exhibits (Exh. R-1 to R-113) and four witness statements (WS of Messrs. Mohammed Quamruzzaman, Abdul Monsur Md. Azad, Salahuddin Ahmad and Abdur Razzaq). Mr. Razzaq's WS introduced a legal opinion on issues of Bangladeshi law, which was accompanied by ten annexes.
51. In accordance with the timetable agreed upon during the preliminary session, on 14 July 2006, Saipem submitted its Response on Objections to Jurisdiction (Response J.) accompanied by one volume of exhibits (Exhibits C-85 to C-99). Saipem did not append any witness statement or expert opinion.
52. On 26 July 2006, the Tribunal held a telephone conference with counsel for the parties to deal with the organization of the hearing on jurisdiction.
53. In line with the extension of time allowed by the Tribunal, on 18 August 2006, Bangladesh submitted its Reply on Jurisdiction (Reply J.)<sup>6</sup>.
54. On 14 September 2006, within the extension of time allowed by the Tribunal, Saipem submitted its Rejoinder on Objections to Jurisdiction (Rejoinder J.) accompanied by one volume of exhibits (Exhibits C-100 to C-101), without witness statements or expert opinions.

## **3. THE HEARING ON JURISDICTION**

55. The Arbitral Tribunal held the hearing on jurisdiction from 21 to 22 September 2006 in London. In addition to the Members of the Tribunal and the Secretary, the following persons attended the jurisdictional hearing:

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<sup>6</sup> In the cover letter, Bangladesh announced that a Supplemental WS by Mr. Razzaq would be filed "over the week-end".

(i) On behalf of Saipem:

- Prof. Antonio Crivellaro, Bonelli Erede Pappalardo
- Prof. Luca Radicati di Brozolo, Bonelli Erede Pappalardo
- Mr. Andrea Carta Mantiglia, Bonelli Erede Pappalardo
- Mr. Alexander Backovic, Bonelli Erede Pappalardo
- Mr. Francesco del Giudice, Saipem

(ii) On behalf of Bangladesh:

- Mr. Ajmalul Hossain, QC, A Hossain & Associates Law Offices
- Mr. Sameer Sattar, A Hossain & Associates Law Offices
- Mr. Syed Afzal Hossain, A Hossain & Associates Law Offices
- Mr. Syed Ahrarul Hossain, A Hossain & Associates Law Offices

56. During the jurisdictional hearing, the Tribunal heard witness evidence from Messrs. Abdul Monsour Azad, Salahuddin Ahmad, Abdul Razzaq and Mohammed Quamruzzaman.

57. Mr. Hossain presented oral argument on behalf of Bangladesh and Messrs. Crivellaro, Radicati di Brozolo and Carta Mantiglia addressed the Tribunal on behalf of Saipem.

58. The jurisdictional hearing was tape-recorded, a *verbatim* transcript was taken and delivered to the parties (Tr. J. J.).

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

60. The Tribunal has deliberated and thoroughly considered the parties' written submissions on jurisdiction and the oral arguments presented in the course of the jurisdictional hearing. In the following sections, it will first summarize the parties' positions (III), analyze them (IV), and then reach a conclusion on jurisdiction (V).

### **III. PARTIES' POSITIONS**

#### **1. SAIPEM'S POSITION**

61. In its written and oral submissions, Saipem has put forward the following five main contentions:

- (i) Petrobangla has resorted to the local courts which colluded with the State entity to sabotage the ICC Arbitration and deny the foreign investor's right to arbitrate under the Contract and obtain satisfaction of its claims;
- (ii) By referring to the ICC Arbitration Rules, the parties validly excluded the authority of the courts of the seat of the arbitration;
- (iii) The Contract constitutes an investment under the BIT;
- (iv) Immaterial rights can be subject to expropriation;
- (v) Saipem's right to arbitrate and more specifically its right that disputes with Petrobangla be settled by arbitration is a contractual right or, in the words of Article 1(e) of the BIT, a "right accruing by law or by contract" having an economic value;
- (vi) The actions of Petrobangla and of the courts of Bangladesh can be attributed to the Republic of Bangladesh.

62. On the basis of these contentions, Saipem requests the Tribunal to:

- (i) find that the conditions for its jurisdiction in the present case are satisfied and accordingly reject the Respondent's objections and declare itself to have jurisdiction in respect of the Claimant's claim; and
- (ii) issue a provisional measure recommending that Bangladesh refrain from calling on the Warranty Bond and return it to the Claimant together with the Retention Money without further delay.

(Rejoinder, p. 28, para. 107)

## **2. BANGLADESH'S POSITION**

63. In its written and oral submissions, Bangladesh has raised the following five main arguments:

- (i) Saipem did not make an investment within the meaning of the BIT;
- (ii) Since the seat of the ICC Arbitration was Dhaka, the courts of Bangladesh had jurisdiction to revoke the authority of the ICC Arbitral Tribunal;
- (iii) In Art. 5(1)(1) of the BIT, Bangladesh has expressly excluded consent in respect of "judgments or orders issued by Courts or Tribunals having jurisdiction";
- (iv) Saipem elected not to lodge an appeal to a higher court. It has thus deprived Bangladesh of the opportunity to rectify the alleged wrongdoings of its lower courts in connection with the ICC Arbitration;
- (v) By agreeing on ICC Arbitration in Dakha, Saipem accepted any potential failure to enforce an ICC award in its favour in Bangladesh as a calculated business risk.

64. In reliance on these arguments, Bangladesh invites the Tribunal to:

Make findings [...] that the Tribunal lacks jurisdiction to hear this case.

If the Tribunal does not wish to go into the evidence on jurisdictional facts at this stage, it should still decline jurisdiction on the basis that the Claimant has not discharged its prima facie burden of proof.

Dismiss the claim in its entirety and [...] make a declaration to that effect and make an award of costs in favour of the Respondent on a full indemnity basis.

(Reply J., pp. 19-20)

## **IV. ANALYSIS**

### **1. INTRODUCTORY MATTERS**

65. Before turning to the issues to be resolved, the Tribunal wishes to address certain preliminary matters, *i.e.*, the relevance of prior ICSID decisions (a), the law applicable to the Tribunal's jurisdiction (b), and certain uncontroversial matters (c).

## 1.1 The relevance of previous ICSID decisions or awards

66. In support of their positions, both parties relied on previous ICSID decisions or awards, either to conclude that the same solution should be adopted in the present case or in an effort to explain why this Tribunal should depart from that solution.
67. The Tribunal considers that it is not bound by previous decisions<sup>7</sup>. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it 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<sup>8</sup>.

## 1.2 The rules governing the Tribunal's jurisdiction

68. The Tribunal's jurisdiction is contingent upon the provisions of the BIT and of the ICSID Convention. The law applicable to the merits of the dispute does not govern jurisdiction.
69. The relevant provision of the ICSID Convention is Article 25(1), which reads as follows:

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

70. The relevant provision of the BIT is Article 9, which provides for ICSID arbitration in the following terms:

1. Any disputes arising between a Contracting Party and the investors of the other, relating to compensation for expropriation, nationalization, requisition

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<sup>7</sup> See e.g., *AES Corporation v. the Argentine Republic*, ICSID Case No. ARB/02/17, Decision on jurisdiction of 13 July 2005, paras. 30-32; available at [http://www.investmentclaims.com/decisions/AES-Argentina\\_Jurisdiction.pdf](http://www.investmentclaims.com/decisions/AES-Argentina_Jurisdiction.pdf).

<sup>8</sup> On the precedential value of ICSID decisions, see Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, Freshfields lecture 2006, publication forthcoming in *Arbitration International* 2007.

or similar measures including disputes relating to the amount of the relevant payments shall be settled amicably, as far as possible.

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

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

### 1.3 Uncontroversial matters

71. There is no dispute as to the competence of this Tribunal to decide on the jurisdictional challenges brought by Bangladesh pursuant to Article 41 of the ICSID Convention.
72. It is further undisputed that four conditions must be met for the Tribunal to uphold jurisdiction under Article 25 of the ICSID Convention, *i.e.*, (i) the dispute must be between a Contracting State and a national of another Contracting State, (ii) the dispute must be a legal dispute (iii) it must arise directly from an investment, and (iv) the parties must have expressed their consent to ICSID arbitration in writing.
73. With respect to the first requirement just referred to, the Tribunal notes that, at the hearing, Bangladesh has abandoned its jurisdictional objection *ratione personae* pursuant to which Saipem was not a private investor (Tr. J. II 31:12-13). The Tribunal further notes that the parties to the dispute are a State (Bangladesh) and an Italian company (Saipem), and that both Bangladesh and Italy are Contracting States within the meaning of Article 25(1) of the ICSID Convention. It thus deems the first requirement met.
74. With respect to the fourth requirement, Saipem relies upon (i) the consent of Bangladesh to arbitration contained in the BIT combined with (ii) its own consent embodied in the Request. According to a now “well established practice, it is clear that the coincidence of these two forms of consent can constitute ‘consent in writing’ within the meaning of Article 25(1) of the ICSID Convention [...] if the dispute falls within the scope of the BIT.”<sup>9</sup> This is not disputed by Bangladesh.

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<sup>9</sup> *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction of 22 April 2005, para. 108; available at <http://www.worldbank.org/icsid/cases/impregilo-decision.pdf>.

75. Bangladesh's objections concern the scope of its consent under the BIT as well as the second and the third requirements referred to above.

#### **1.4 Bangladesh's objections**

76. Bangladesh has objected to the jurisdiction of the Tribunal and/or to the admissibility of Saipem's claim upon the following main grounds:

- (i) There is no real legal dispute between the parties (Tr. J. II 23:9-20).
- (ii) Saipem has not made an investment within Article 1(1) of the BIT.
- (iii) Bangladesh's consent to arbitration does not cover disputes arising out of the acts of its courts pursuant to Article 5(1) of the BIT (Reply J., p. 15, paras. 3.14-3.16).
- (iv) The alleged breaches of the Treaty "have not crossed the necessary threshold for establishing that the actions were that of the state of Bangladesh in the exercise of its sovereign authority" (Reply J., p. 16, at para. 31.8).
- (v) Saipem's claim constitutes an abuse of process (C-Mem para. 4.40 *et seq.*; Tr. J. II 34:9 *et seq.*).

77. While recognising that there may be an overlap between some of the objections to the jurisdiction of the Tribunal and some of the objections to the admissibility of the claims<sup>10</sup>, the Tribunal will distinguish between jurisdictional objections under Article 25 of the ICSID Convention (see below 4), jurisdictional objections under the BIT (see below 5), and objections to the admissibility of Saipem's claims (see below 6). As preliminary matters, the Tribunal will discuss the law applicable to its jurisdiction (see below 2) and the relevant standard for establishing jurisdiction (see below 3).

## **2. LAW APPLICABLE TO JURISDICTION**

78. It is not challenged that the interpretation of the ICSID Convention and of the BIT is governed by international law (Reply J., p. 12, para. 3.2).

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<sup>10</sup> See also *Consortium Groupement L.E.S.I. - DIPENTA v. République Algérienne Démocratique et Populaire*, Award of 10 January 2005, p. 12 at para. 2, where the Tribunal stresses that the distinction has no practical bearing in ICSID proceedings; available at <http://www.worldbank.org/icsid/cases/lesi-sentence-fr.pdf>.

79. At the hearing, Bangladesh withdrew the argument that the words “in conformity with the laws and regulations of the latter” at the end of the first paragraph of Article 1(1) of the BIT, impose the application of national law. Bangladesh accepts that the words relate to the mode, not to the definition of the investment (Tr. J. II 20:1-2)<sup>11</sup>.
80. The parties are, however, in disagreement on the question whether the BIT refers to Bangladeshi law “in respect of the definition and construction of the word ‘investment’” (Reply J., p. 12, paras. 3.2 and 3.4).
81. According to Bangladesh, the fact that the BIT’s definition of investment uses the word ‘property’ and not ‘assets’ as in other bilateral investment treaties implies a reference to Bangladeshi law. In support of this assertion, Bangladesh submits that the word ‘property’ was chosen because it is a notion well known in Bangladesh (Reply J., pp. 13-14, para. 3.8), thus suggesting that the word ‘property’ must be interpreted according to its ordinary meaning in Bangladeshi law. That meaning is allegedly “more specific and narrower than the word ‘assets’” (Reply J., p. 14, para. 3.9).
82. The Tribunal notes that Bangladesh has indeed entered into other bilateral investment treaties in which the definition of ‘investment’ refers to the concept of ‘asset’<sup>12</sup>. However, in the absence of any indication that the contracting states intended to refer to ‘property’ as a notion of Bangladeshi law<sup>13</sup>, the Tribunal cannot depart from the general rule that treaties are to be interpreted by reference to international law. It is thus not prepared to consider that the term “investment” in Article 1(1) of the BIT is defined according to the law of the host State.

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<sup>11</sup> For the sake of completeness, the Tribunal wishes to note that the phrase “in conformity with the laws and regulations [of the host State]” following the “investment” in Article 1(1) does not limit the definition of investment under the BIT to investment within the laws and regulations of Bangladesh. Indeed, as convincingly held by the tribunal in *Salini v. Morocco*, such a “provision [*i.e.*, the requirement of conformity with local laws] refers to the validity of the investment and not to its definition” (*Salini v. Morocco*, [*supra* Fn. 22] para. 46. See also *PSEG et al. v. Turkey*, Decision on Jurisdiction, 4 June 2004, paras. 109, 116-120, available at <http://www.investmentclaims.com/decisions/PSEG-Turkey-Jurisdiction-4Jun2004.pdf>; *L.E.S.I. - Dipenta v. Algeria* [*supra* Fn. 10]; *Plama v. Bulgaria*, Decision on Jurisdiction, 8 February 2005, 44 ILM 721 (2005) paras. 126-131; *Bayindir v. Pakistan*, Decision on Jurisdiction, 14 November 2005, paras. 105-110, available at <http://www.investmentclaims.com/decisions/Bayindir-Pakistan-Jurisdiction.pdf>.

<sup>12</sup> See, in particular, the Bangladesh-UK BIT, the Bangladesh-Japan BIT, and the Belgo-Luxemburg-Bangladesh BIT mentioned in Mr. Razzaq’s supplemental WS.

<sup>13</sup> See, in a different context, the clear intent of the parties resulting from *travaux préparatoires* in *Inceysa Vallisoletana S.L. v. El Salvador*, ICSID Case No. ARB/03/26, Award of 2 August 2006, paras. 190 *et seq.*; available at <http://www.investmentclaims.com/decisions/InceysaVallisoletana-ElSalvador-Award.pdf>.

### 3. TEST FOR ESTABLISHING JURISDICTION

#### 3.1 The onus of establishing jurisdiction

83. In accordance with accepted international practice (and generally also with national practice), a party bears the burden of proving the facts it asserts. For instance, an ICSID tribunal held that the Claimant had to satisfy the burden of proof required at the jurisdictional phase and make a *prima facie* showing of Treaty breaches<sup>14</sup>.

#### 3.2 The relevant standard

84. In their respective submissions (see in particular Reply J., pp. 8-9), the parties referred to the decisions in *Impregilo* and *Bayindir*. In particular, reference was made to the following test stated in *Impregilo*:

[T]he Tribunal has considered whether the facts as alleged by the Claimant in this case, *if established*, are capable of coming within those provisions of the BIT which have been invoked.<sup>15</sup>

85. The Tribunal agrees with this test, which is in line with the one proposed by Judge Higgins in her dissenting opinion in *Oil Platforms*<sup>16</sup>. The test strikes a fair balance between a more demanding standard which would imply examining the merits at the jurisdictional stage, and a lighter standard which would rest entirely on the Claimant's characterization of its claims.

86. The Tribunal must now determine whether the claims "fall within the scope of the BIT, assuming *pro tem* that they may be sustained on the facts"<sup>17</sup>. In other words, the Tribunal should be satisfied that, if the facts alleged by Saipem ultimately prove true,

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<sup>14</sup> *Impregilo v. Pakistan* [*supra* Fn. 9], para. 79. On the *prima facie* test for purposes of jurisdiction, see among others *UPS v. Canada*, Decision on Jurisdiction, 22 November 2002, paras. 33-37; *Siemens v. Argentina*, Decision on Jurisdiction, 3 August 2004, para. 180, available at <http://www.investmentclaims.com/decisions/Siemens-Argentina-Jurisdiction-3Aug2004-Eng.pdf>; *Plama v. Bulgaria* [Fn. 11], paras. 118-120, 132; *Bayindir v. Pakistan* [Fn. 11] paras. 185-200; *El Paso v. Argentina*, Decision on Jurisdiction, 27 April 2006, paras. 40-45, 109, available at [http://www.investmentclaims.com/decisions/El\\_Paso\\_Energy-Argentina-Jurisdictional\\_Decision.pdf](http://www.investmentclaims.com/decisions/El_Paso_Energy-Argentina-Jurisdictional_Decision.pdf); *Jan de Nul v. Egypt*, Decision on Jurisdiction, 16 June 2006, paras. 69-71, available at [http://www.investmentclaims.com/decisions/Jan\\_de\\_Nul-Egypt-Jurisdictional\\_Award.pdf](http://www.investmentclaims.com/decisions/Jan_de_Nul-Egypt-Jurisdictional_Award.pdf); *Telenor v. Hungary*, Award, 13 September 2006, paras. 34, 53, 68, 80, available at [http://www.investmentclaims.com/decisions/Telenor\\_Mobile-Hungary-Award-13-09-06.pdf](http://www.investmentclaims.com/decisions/Telenor_Mobile-Hungary-Award-13-09-06.pdf).

<sup>15</sup> *Impregilo v. Pakistan* [*supra* Fn. 9], para. 254, emphasis in the original.

<sup>16</sup> *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, I.C.J. Reports 1996, II, p. 803, 810, at paras. 16-17.

<sup>17</sup> *Impregilo v. Pakistan* [*supra* Fn. 9], para. 263.

they would be capable of constituting a violation of Article 5 of the BIT. In this respect, the Tribunal agrees with the observation in *United Parcel Service v. Government of Canada* that “the reference to the facts alleged being ‘capable’ of constituting a violation of the invoked obligations, as opposed to their ‘falling within’ the provisions, may be of little or no consequence.”<sup>18</sup>

87. At the hearing, Bangladesh agreed with this approach:

If we look at paragraph 16 of the rejoinder, it is stated that it is unanimously recognised that in the jurisdictional phase issues of merits are relevant only insofar as they are necessary to enable the court or the tribunal to ascertain whether the claims brought before it fall within its personal subject matter jurisdiction.

[...] With respect, we agree. We submit that that is the way that you should approach your task.

(Tr. J. II, 7:18-25)

88. In spite of this statement, Bangladesh submitted that Saipem’s case is not supported by appropriate evidence nor is it sufficiently defined. Specifically, Bangladesh alleges that Saipem must establish the following elements: (i) the existence of an investment, (ii) the occurrence of an act of expropriation, and (iii) the threshold for treaty claims (Rejoinder J., p. 11). Bangladesh referred to a definition of the Permanent Court of International Justice (PCIJ) and to another one of the International Court of Justice (ICJ) and submitted that the facts relevant to assert jurisdiction must be proven.

89. In particular, Bangladesh referred to the PCIJ decision in *Mavromatis*<sup>19</sup>. It also relied on the following passages of the ICJ decision between Spain and Canada in the *Fisheries Jurisdiction Case*:

There is no doubt that it is for the Applicant, in its Application, to present to the Court the dispute with which it wishes to seise the Court and to set out the claims which it is submitting to it. [...]

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<sup>18</sup> *United Parcel Service v. Government of Canada* [NAFTA], Decision on Jurisdiction, 22 November 200, para. 36; available at <http://www.investmentclaims.com/decisions/UPS-Canada-Jurisdiction-22Nov2002.pdf>.

<sup>19</sup> Judgment No. 2 of the PCIJ *The Mavromatis Palestine Concessions*, 30 August 1924, Fifth (Ordinary) Session, Publications of the Permanent Court of International Justice Series A No. 2; Collection of Judgments, A.W. Sijthoff’s Publishing Company, Leyden, pp. 12-16; also available at [http://www.icj-cij.org/cijwww/cdecisions/ccpij/serie\\_A/A\\_02/06\\_Mavrommatis\\_en\\_Palestine\\_Arret.pdf](http://www.icj-cij.org/cijwww/cdecisions/ccpij/serie_A/A_02/06_Mavrommatis_en_Palestine_Arret.pdf). After having carefully considered this decision, the Tribunal was unable to discern the relevance of this decision in the present case.

In order to identify its task in any proceedings instituted by one State against another, the Court must begin by examining the Application. However, it may happen that uncertainties or disagreements arise with regard to the real subject of the dispute with which the Court has been seised, or to the exact nature of the claims submitted to it. In such cases the Court cannot be restricted to a consideration of the terms of the Application alone nor, more generally, can it regard itself as bound by the claims of the Applicant.

Even in proceedings instituted by Special Agreement, the Court has determined for itself, having examined all of the relevant instruments, what was the subject of the dispute brought before it, in circumstances where the parties could not agree on how it should be characterized [...].

It is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both Parties [...]

The Court's jurisprudence shows that the Court will not confine itself to the formulation by the Applicant when determining the subject of the dispute.

The Court will itself determine the real dispute that has been submitted to it [...]. It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence [...].

In so doing, the Court will distinguish between the dispute itself and arguments used by the parties to sustain their respective submissions on the dispute [...].

The Court points out that the establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself. Although a party seeking to assert a fact must bear the burden of proving it, this has no relevance for the establishment of the Court's jurisdiction, which is a "question of law to be resolved in the light of the relevant facts".

That being so, there is no burden of proof to be discharged in the matter of jurisdiction. Rather, it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties, "whether the force of the arguments militating in favour of jurisdiction is preponderant, and to 'ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it'<sup>20</sup>.

90. The Tribunal fails to see how these decisions could be interpreted as justifying a different approach than the one referred to above and described by the tribunal in *Impregilo*. That said, it is undisputable that the Tribunal determines its jurisdiction without being bound by the arguments of the parties.
91. To summarize, the Tribunal's task is to determine the meaning and scope of the provisions upon which Saipem relies to assert jurisdiction and to assess whether the facts alleged by Saipem fall within those provisions or would be capable, if proven, of constituting breaches of the treaty obligations involved. In performing this task, the

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<sup>20</sup> International Court of Justice, Judgment of 4 December 1998, *Fisheries Jurisdiction Case (Spain v. Canada)*, available at [http://www.icj-cij.org/icjwww/idocket/iec/iecjudgment\(s\)/iec\\_ijudgment\\_981204.htm](http://www.icj-cij.org/icjwww/idocket/iec/iecjudgment(s)/iec_ijudgment_981204.htm), paras. 29-32 and 37-38, citations omitted.

Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the relevant BIT provisions and to the assessment whether the facts alleged may constitute breaches of these provisions. In doing so, the Tribunal will assess whether Saipem's case is reasonably arguable on its face. If the result is affirmative, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits.

#### **4. JURISDICTIONAL OBJECTIONS UNDER ARTICLE 25(1) OF THE ICSID CONVENTION**

92. With respect to Article 25(1) of the ICSID Convention, Bangladesh objected that there is no legal dispute (a), that Saipem did not make an investment (b) and that the dispute does not arise directly out of the investment (c).

##### **4.1 Is the dispute a legal dispute under Article 25(1) of the ICSID Convention?**

93. At the hearing, Bangladesh submitted that the existence of a legal dispute within the meaning of Article 25(1) of the ICSID Convention presupposes the “existence of a cause of action” (Tr. J. II, 15-17). In the present case, according to Bangladesh, “there is no valid cause of action because the ingredients of such a cause of action are not supported by any or any proper evidence [and] are not sufficiently clearly defined in the formulation of the claim” (Tr. J. II 22:10-13).
94. Specifically, Bangladesh referred to the articulation of Saipem’s claim in para. 13 of the Reply J. as repeated in para. 28 of the Rejoinder J., which reads as follows:

As is clearly set out in the Statement of Claim, the Claimant’s claim relates to the expropriation by Bangladesh of (i) its right to arbitration of its disputes with Petrobangla; (ii) the right to payment of the amounts due under the Contract as ascertained in the ICC Award; (iii) the rights arising under the ICC Award, including the right to obtain its recognition and enforcement in Bangladesh and abroad; and therefore (iv) the residual value of its investment in Bangladesh at the time of the ICC Award, consisting of its credits under the Contract. All these matters are facets of the same issue. The focus of the Claimant’s case is that its right to payment under the Contract as ascertained by, and incorporated in the ICC Award has been expropriated by the unlawful decisions of the Bangladeshi courts that revoked the authority of the ICC arbitrators and declared the ICC Award null and void, thus precluding its enforcement in Bangladesh or elsewhere. The net result of all this was, obviously, to deprive the Claimant of the compensation for [the expropriation of] its investment.

(Rejoinder J., p. 8)

95. In the Tribunal's opinion, the dispute before it is a legal dispute as it involves a disagreement about legal rights or obligations. Or, to use the words of the Report of the Executive Directors of the World Bank on the Convention, the present dispute is legal in nature because it deals with "the existence or scope of [Claimants'] legal rights" and with the nature and extent of the relief to be granted to the Claimants as a result of the Respondent's alleged violation of those legal rights<sup>21</sup>.
96. The Tribunal fails to see how the alleged lack of clarity of Saipem's claim could change that conclusion. It will examine whether the claim is supported by evidence when discussing the substantiation of the claim (see below at 5).
97. The determination whether the rights asserted by Saipem do exist must await the proceedings on the merits. Subject to determining whether Saipem made an investment within the meaning of Article 25 of the ICSID Convention, which will be discussed below, the Tribunal holds that the assertion of such rights has given rise to a legal dispute which falls within the scope of the jurisdiction of the Centre as set forth in Article 25(1) of the ICSID Convention.

#### **4.2 Has Saipem made an investment under Article 25 of the ICSID Convention?**

98. In its relevant part, Article 25(1) of the ICSID Convention provides that "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment".
99. To determine whether Saipem has made an investment within the meaning of Article 25 of the ICSID Convention, the Tribunal will apply the well-known criteria developed by ICSID tribunals in similar cases, which are known as the "Salini test". According to such test, the notion of investment implies the presence of the following elements: (a) a contribution of money or other assets of economic value, (b) a certain duration, (c) an element of risk, and (d) a contribution to the host State's development<sup>22</sup>.

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<sup>21</sup> See Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States; International Bank for Reconstruction and Development, 18 March 1965, para. 26; available at <http://www.worldbank.org/icsid/basicdoc/partB-section05.htm#03>.

<sup>22</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001, 42 ILM, 2003, *passim*. The need for the last element is sometimes put in doubt, (*L.E.S.I. - DIPENTA v. République Algérienne Démocratique et Populaire*, Decision on jurisdiction of 12 July 2006, para. 72.)

100. Referring to several decisions implementing this test<sup>23</sup>, Saipem submitted that the Contract was an investment, since “Saipem invested substantial technical, financial and human resources in the project, which gave a substantial contribution to Bangladesh's economic development, and it assumed risks for a significant duration (the performance phase lasted two and a half years)” (Response J., p. 8, para. 35).
101. Bangladesh does not dispute the fact that Saipem made a significant contribution in terms of both technical and human resources. Nor does Bangladesh dispute that these resources contributed to its economic development. Bangladesh’s objection relates to the duration of the project. While it agrees that two years are generally considered as a sufficient period of time under the Salini test, Bangladesh insists on the fact that the period during which works were actually performed was less than one year (Tr. J. II 84:10 *et seq.*).
102. The Tribunal cannot follow this line of argument. Bangladesh did not put forward any particular reason why the actual duration of the work should be considered as the applicable criterion, nor did it point to any authority supporting that position. The time of the project during which the works are interrupted or suspended entails risks that may even be higher than those incurred while the works are being performed.
103. As a further line of argument, Bangladesh mainly disputed the existence of an investment on the ground that throughout the project Saipem never “was a net creditor vis-à-vis Petrobangla in respect of the Pipeline Contract having actually put its own money into the project” (C-Mem., p. 61). At the hearing, Bangladesh relied upon the following *dictum* of the Tribunal in *Soabi v. Senegal*<sup>24</sup>:

The Tribunal observes finally that the object of the general undertaking was limited to construction of a building to be paid for by the client as work progressed and could thus not be said to be an agreement concerning investments. Disputes arising thereunder could therefore not be investment disputes, as required by Article 25 of the ICSID Convention.

(quoted in Tr. J. II 83:18-22 by reference to BISHOP/CRAWFORD/REISMAN, p. 368)

104. Saipem refuted this objection with the argument that “[i]n construction and similar contracts it is often the case that the foreign investor receives a part of the funds – by

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<sup>23</sup> *L.E.S.I. - Dipenta v. Algeria* [Fn. 10], paras. 13-15 ; *Impregilo v. Pakistan* [Fn. 9]; *Bayindir v. Pakistan* [Fn. 11] paras. 104-138, *Jan de Nul N.V. v. Egypt* [Fn. 14].

<sup>24</sup> *Société Ouest Africaine des Bétons Industriels (SOABI) v. Senegal*, ICSID Case No. ARB82/1, Award of 25 February 1988, 2 ICSID Reports 190 at para. 219.

way of advances or partial payments – from the host State prior to completion of the project” and that this fact “has never been given any relevance in past case law which has characterized this type of contract as an investment”. More generally, Saipem submits that “[t]he source of the funds whereby the investor funded the works is not of itself relevant” to the Salini test for determining whether there is an investment (see also Tr. J. II 59:2-7).

105. In this debate, the Tribunal identifies two distinct issues, one about the origin of the funds and one about the commercial risk incurred by the investor.
106. With respect to the first one, it is true that the host State may impose a requirement that an amount of capital in foreign currency be imported into the country<sup>25</sup>. However, in the absence of such a requirement, investments made by foreign investors from local funds or from loans raised in the host State are treated in the same manner as investments funded with imported capital. In other words, the origin of the funds is irrelevant. This results from the drafting history of the ICSID Convention and is confirmed by several arbitral decisions relating to BITs.
107. During the elaboration of the Convention, an argument was made that the nationality of the investment was more important than the one of the investor. The Chairman, Dr. Broches, answered that he did not see how the Convention could make a distinction based on the origin of funds (History of the Convention, Vol. II, pp. 261, paras. 397-398). As a consequence, the idea of looking to the origin of funds was abandoned.
108. Cases do not consider the origin of the funds either. As an illustration in lieu of several others<sup>26</sup> one may refer to *Wena Hotels v. Egypt*, where both the Tribunal and the *ad hoc* Committee found the alleged origin of the funds from other investors who were not entitled to benefit from the applicable BIT irrelevant<sup>27</sup>.
109. Bangladesh’s argument appears to refer more to the second issue identified above, *i.e.*, to the fact that the investor did not incur any commercial risk because it received

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<sup>25</sup> See *Amco v. Indonesia*, Award, 20 November 1984, 1 ICSID Reports 413, paras. 481-489.

<sup>26</sup> See *Tradex v. Albania*, Award, 29 April 1999, 5 ICSID Reports 70, at paras. 105, 108-111; *Oliguín v. Paraguay*, Award, 26 July 2001, 6 ICSID Reports 164, at para. 66, Fn. 9. See also *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, 29 April 2004, at para. 80, available at <http://www.investmentclaims.com/decisions/Tokios-Ukraine-Jurisdiction-29Apr2004.pdf>.

<sup>27</sup> *Wena Hotels v. Egypt*, Award, 8 December 2000, 41 ILM 896 (2002) at para. 126, Decision on Annulment, 28 January 2002, 41 ILM 933 (2002) at para. 54.

an advance payment. The Tribunal cannot agree with this argument. In the present case, the undisputed stopping of the works which took place in 1991 and the necessity to renegotiate the completion date constitute examples of inherent risks in long-term contracts. Moreover, the contractual mechanism providing for Retention Money created an obvious risk for Saipem, which in fact materialised.

110. Finally, the Tribunal wishes to emphasize that for the purpose of determining whether there is an investment under Article 25 of the ICSID Convention, it will consider the entire operation<sup>28</sup>. In the present case, the entire or overall operation includes the Contract, the construction itself, the Retention Money, the warranty and the related ICC Arbitration.
111. Applying the Salini test to this comprehensive operation, the Tribunal comes to the conclusion that Saipem has made an investment within the meaning of Article 25 of the ICSID Convention.

#### **4.3 Does the dispute arise directly out of the investment?**

112. Bangladesh claims that a dispute arising out of the ICC Award is not a dispute arising directly from the original investment, *i.e.*, from the Contract (Tr. J. II 28:21-29:2):

any rights arising out of the contractual dispute [...] would not survive an award. So, if the award is a valid award, those rights would be replaced by rights arising out of the award itself.

113. This argument refers to the requirement of Article 25(1) of the ICSID Convention that the dispute “aris[e] directly out of an investment”. The Tribunal agrees with Bangladesh that the rights arising out of the ICC Award arise only *indirectly* from the investment. Indeed, the opposite view would mean that the Award itself does constitute an investment under Article 25(1) of the ICSID Convention, which the Tribunal is not prepared to accept.
114. However, as already mentioned, the notion of investment pursuant to Article 25 of the ICSID must be understood as covering all the elements of the operation, that is not only the ICC Arbitration, but also *inter alia* the Contract, the construction itself and the Retention Money (see above No. 110). Hence, in accordance with previous case

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<sup>28</sup> See, from the very beginning of ICSID practice, *Holiday Inns v. Morocco*, Decision of jurisdiction of 12 May 1974, reported in Pierre Lalive, *The First World Bank Arbitration (Holiday Inns v. Morocco) – Some Legal Problems*, British Yearbook of International Law 1980, p. 159.

law<sup>29</sup>, the Tribunal holds that the present dispute arises directly out of the overall investment.

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115. Finally, the Tribunal notes Bangladesh's point "that Article 26 of the Washington Convention does not allow that these proceedings be run [...] accept[ing] the findings from the ICC Tribunal and us[ing] that for [this Tribunal's] findings" (Tr. II, 82:15-18). To the extent that this may be interpreted as a jurisdictional objection, the Tribunal stresses that it is not requested to "accept and use" the ICC Tribunal's findings. It is requested to review whether the ICC Award was frustrated contrary to the protection provided in the BIT.

## 5. JURISDICTIONAL OBJECTIONS UNDER THE BIT

116. It is undisputed that the jurisdiction of the Tribunal under the BIT is limited to the scope of the dispute resolution clause contained in Article 9 of the BIT. Under the heading "Settlement of Disputes between Investors and the Contracting Parties", this provision states:

1. Any disputes arising between a Contracting Party and the investors of the other, relating to compensation for expropriation, nationalization, requisition or similar measures, including disputes relating to the amount of the relevant payments shall be settled amicably, as far as possible.
2. In the event that such a dispute cannot be settled amicably within six months of the date of a written application. The investor in question may submit the dispute, at his discretion, for settlement to:
  - a) the Contracting Party's Court, at all instances, having territorial jurisdiction;
  - b) an ad hoc Arbitration Tribunal, in accordance with the Arbitration Rules of the "UN Commission on International Trade Law" (UNCITRAL),
  - c) the "International Centre for the Settlement of Investment Disputes" for the application of the arbitration procedure provided by the Washington Convention of 18<sup>th</sup> March 1965 on the "Settlement of Investment Disputes between States and nationals of other States", whenever, or as soon as both Contracting Parties have validly acceded to it.

(Emphasis added)

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<sup>29</sup> See, for instance, *CSOB v. The Slovak Republic* (ICSID Case No. ARB/97/4), Decision on Jurisdiction of 24 May 1999, ICSID Review 1999, p. 275.

117. This provision implicitly refers to Article 5 of the BIT, which speaks of expropriation of “investments”. Under the heading “Nationalization or Expropriation”, this provision reads in pertinent part as follows:

1. (1) The investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily their joined rights of ownership, possession, control or enjoyment, save where specifically provided by law and by judgments or orders issued by Courts or Tribunals having jurisdiction.
- (2) Investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects in the territory of the other Contracting Party, except for public purposes, or national interest, against immediate full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures.

118. In turn, investments are defined in Article 1(1) of the BIT as follows:

[1.] The term “investment” shall be construed to mean any kind of property invested before or after the entry into force of this Agreement by a natural or legal person being a national of one Contracting Party in the territory of the other in conformity with the laws and regulations of the latter.

Without limiting the generality of the foregoing, the term “investment” comprises:

- a) movable and immovable property, and any other rights in rem including, insofar as they may be used for investment purposes, real guarantees on other property;
- b) shares, debentures, equity holdings and any other negotiable instrument or document of credit, as well as Government and public securities in general;
- c) credit for sums of money or any right for pledges or services having an economic value connected with investments, as well as reinvested income as defined in paragraph 5 hereafter; [...]
- e) any right of a financial nature accruing by law or by contract and any licence, concession or franchise issued in accordance with current provisions governing the exercise of business activities, including prospecting for, cultivating, extracting and exploiting natural resources.

### **5.1 Has Saipem made an investment under Article 1(1) of the BIT?**

119. It is common ground between the parties that the Tribunal’s jurisdiction is conditioned upon Saipem having made an investment within the meaning of the BIT (RA, p. 27, para. 118).

120. As already mentioned, the Tribunal is not prepared to consider that the term “investment” in Article 1(1) of the BIT is defined according to the law of the host State (see above IV, B). Accordingly, the question is whether Saipem made an investment within the meaning of Article 1(1) of the BIT, without reference to the law of Bangladesh.

#### **5.1.1 The general definition of investment in Article 1(1) of the BIT**

121. Article 1(1) of the BIT gives a general definition of investment as “any kind of property”. On its face, this general definition is very broad<sup>30</sup>.

122. In the light of the conclusion reached above according to which Saipem made an investment within the meaning of Article 25 of the ICSID Convention, the Tribunal fails to see how the operation at issue could not be considered as a “kind of property” protected by the BIT.

123. At the hearing, Bangladesh modified its argumentation on the law governing the term ‘property’ which was referred to earlier (see above No. 81) as follows:

We do not say directly that Bangladesh law must apply to determine the meaning, we do not say that; but we say you get some help from the fact that this [i.e. “property”] is a concept well known in Bangladesh and it is probably the reason why this has happened.

(Tr. J. II 18-22-25)<sup>31</sup>

124. The Tribunal is not convinced by this amended argument either. To discard it, it suffices to imagine that the term ‘property’ (or its translation in Italian) could have a specific meaning under Italian law. If one were to follow Bangladesh’s approach, this would lead to a different interpretation and thus a different scope of protection under the BIT depending on the country in which the investment is made. This cannot be the meaning of the BIT.

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<sup>30</sup> The terms “any kind of property” correspond to “every kind of asset”, which is generally acknowledged as “[p]ossibly the broadest [...] general definition” contained in a BIT (see Noah RUBINS, *International Investment, Political Risk and Dispute Resolution*, 2005, p. 291).

<sup>31</sup> In its last written submission, Bangladesh already put forward a similar argument: “the types of property said to be included in the list must be considered in the light of the word ‘property’ itself” and of its alleged narrow meaning under Bangladeshi law (Reply J., p. 14, para. 3.10).

### **5.1.2 A “credit for sums of money” within Article 1(1)(c) of the BIT**

125. It is Saipem’s primary case that the Contract is an investment as defined in Article 1(1) of the BIT and that “the rights accruing from the ICC Award fall squarely within the notion of ‘credit for sums of money [...] connected with investments’ set out in Article 1(1)(c) of the BIT” (Response J., p. 10, para. 46).
126. Bangladesh objects that “[t]hese words would normally include bank deposits or book debts on a running account” (Rejoinder J., p. 14, para. 3.11). This may well be so. However, in their ordinary meaning, the words ‘credit for sums of money’ also cover rights under an award ordering a party to pay an amount of money: the prevailing party undoubtedly has a credit for a sum of money in the amount of the award.
127. This said, the rights embodied in the ICC Award were not created by the Award, but arise out of the Contract. The ICC Award crystallized the parties’ rights and obligations under the original contract. It can thus be left open whether the Award itself qualifies as an investment, since the contract rights which are crystallized by the Award constitute an investment within Article 1(1)(c) of the BIT.
128. Having reached this conclusion, the Tribunal does not need to make a final ruling on Saipem’s additional argument that the arbitration agreement contained in the Contract constitutes a “right of a financial nature accruing by law or by contract” within Article 1(1)(e) of the BIT (Tr. J. II 58:20-23).

### **5.2 Are the facts alleged by Saipem capable of constituting an expropriation under Article 5 of the BIT?**

129. According to Saipem, its case is based on Petrobangla’s alleged unlawful disruption of the ICC Arbitration, on the alleged interference by the domestic courts with the Arbitration, and on the *de facto* annulment of the ICC Award. These acts allegedly deprived Saipem of the sums awarded to it by the ICC Award, and thus amount to an illegal expropriation in breach of Article 5 of the BIT (Response J., p. 4, para. 15). At the hearing, Saipem further submitted that a State’s disavowal of its undertaking to arbitrate a contractual dispute may have a “confiscatory effect” (Tr. J. II, 50:16-23<sup>32</sup>) and summarized its case as follows:

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<sup>32</sup> Referring to the developments in Saipem’s letter to ICSID of 5 April 2005

[T]he claims which are brought before the tribunal are a claim for expropriation in violation of Article 5 of the BIT. It is an expropriation which has resulted from a complex behaviour of the whole state, which reneged on its obligations to enforce the arbitration award and to respect the proper conduct of the arbitration proceedings [...].

(Tr. J. II 52:12-18)

130. Saipem brings a claim for expropriation and the BIT provides for ICSID jurisdiction in case of expropriation. Bangladesh does not claim that the ICC Award and/or the rights determined by the Award are not capable of being expropriated. Rightly so, as it is widely accepted under general international law that immaterial rights can be the subject of expropriation<sup>33</sup>. Moreover, as the European Court of Human Rights unequivocally held, rights under judicial decisions are protected property that can be the object of an expropriation:

In order to determine whether the applicants had a "possession" for the purposes of Article 1 of Protocol No. 1 (P1-1), the Court must ascertain whether judgment no. 13910/79 of the Athens Court of First Instance and the arbitration award had given rise to a debt in their favour that was sufficiently established to be enforceable. [...] [T]he arbitration award, which clearly recognised the State's liability up to a maximum of specified amounts in three different currencies [...].

According to its wording, the award was final and binding; it did not require any further enforcement measure and no ordinary or special appeal lay against it [...]. Under Greek legislation arbitration awards have the force of final decisions and are deemed to be enforceable. The grounds for appealing against them are exhaustively listed in Article 897 of the Code of Civil Procedure [...]; no provision is made for an appeal on the merits.

At the moment when Law no. 1701/1987 was passed the arbitration award of 27 February 1984 therefore conferred on the applicants a right in the sums awarded. Admittedly, that right was revocable, since the award could still be annulled, but the ordinary courts had by then already twice held - at first instance and on appeal - that there was no ground for such annulment. Accordingly, in the Court's view, that right constituted a "possession" within the meaning of Article 1 of Protocol No. 1 (P1-1)<sup>34</sup>.

131. A further question relates not to the object, but to the subject or the author of the expropriation. Indeed, more often than not the expropriation results from an act of the

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<sup>33</sup> See for instance *Phillips Petroleum Iran v. Islamic Republic of Iran et National Iranian Oil Company*, Iran-US Claims Tribunal, Case No. 39, Chamber Two, Award No. 425-39-2 of 29 June 1989, Yearbook of Commercial Arbitration, Vol. XVI (1991), pp. 298-321, para. 75.

<sup>34</sup> *Stran Greek Refineries and Stratis Andreadis v. Greece* – 13427/87 [1994] ECHR 48 (9 December 1994), paras. 59-62, cross-references omitted; also available at <http://worldlii.org/eu/cases/ECHR/1994/48.html>. See also *Brumarescu v. Romania* Source: Human Rights Case Digest, Volume 10, Numbers 10-12, 1999, pp. 237-241, also available at <http://worldlii.org/eu/cases/ECHR/1999/105.html>.

executive power. By contrast, Saipem submitted at the hearing that the acts of a court, *i.e.* of the judiciary power, can effect an expropriation:

It is undeniable [...] that the interference by a State (including by the action of its courts) with an arbitration agreement with a foreign national constitutes a violation of international law. [...] [i]f such interference has the effect of confiscating the foreign national's investment as it does in the present case, it also constitutes an expropriation under the BIT and international law.

This is perfectly demonstrated in a very recent publication by Judge Schwebel dealing with the confiscatory effects of the interference by State courts with arbitration. Judge Schwebel makes it quite clear that "[t]he contractual right of an alien to arbitration of disputes arising under a contract to which it is party is a valuable right, which often is of importance to the very conclusion of the contract." Therefore, any "[v]itiation of that right" through court interference "attracts the international responsibility of the State of which the issuing court is an organ". Judge Schwebel refers to anti-suit injunctions, but this statement clearly applies more broadly to all court interference, including that of the Bangladeshi courts in the present case, the effect of which is obviously identical. Such interference constitutes a "ground of violation of customary international law", and more specifically of

"the principle that a State is not entitled to take the property or contractual rights of an alien within its jurisdiction by actions that are arbitrary, tortious and confiscatory" [Emphasis added].

(Saipem's letter of 24 March 2005 submitted at the hearing, with the agreement of Bangladesh [Tr. J. II 88:8-13], as Exh. C-102<sup>35</sup>)

132. Irrespective of whether Judge Schwebel's opinion can be applied in the present context, the Tribunal considers that there is no reason why a judicial act could not result in an expropriation. Nothing in the BIT indicates such a limitation. Moreover, Bangladesh did not cite any decision supporting the opposite view. Quite to the contrary, the Tribunal notes that the European Court of Human Rights had no hesitation to hold that court decisions can amount to an expropriation<sup>36</sup>. Indeed, this is at least implicitly conceded by Bangladesh when it insists on the fact that consent to jurisdiction over the purported expropriation by acts of the judiciary is excluded by Article 5.1 of the BIT (Tr. J. II, 33:6-9; see section 5.3 below).
133. For these reasons, the Tribunal considers that the facts alleged by Saipem would be capable of constituting an expropriation under Article 5 of the BIT if they were established.

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<sup>35</sup> Referring to S. M. Schwebel, *Anti-Suit Injunctions in International Arbitration: An Overview*, in *Anti-Suit Injunctions in International Arbitration* (E. Gaillard, editor), IAI (International Arbitration Institute) Series on International Arbitration, no. 2, Juris Publishing, 2004, p. 13.

<sup>36</sup> *Allard v. Sweden*, no. 35179/97 (Sect. 4) (bil.), ECHR 2003-VII – (24.6.03), available at <http://worldlii.org/eu/cases/ECHR/2003/310.html>.

134. For the sake of clarity it should be added that whether or not Petrobangla and the courts of Bangladesh actually breached the guarantees of the BIT is a question to be determined with the merits of the dispute. On the merits, Saipem will have to produce evidence and legal arguments to establish the alleged breach and Bangladesh will have the right to challenge such evidence and legal arguments.

### **5.3 Did Bangladesh consent to ICSID arbitration for claims based on decisions by its courts?**

135. Bangladesh further asserts that even if *quod non* the Contract and the ICC Award were to qualify as investment, Saipem's claims would not fall within the scope of Bangladesh's consent to ICSID arbitration:

Since Saipem claims that its right to the ICC Award has been affected by the judicial acts in Bangladesh, as a matter of interpretation of the BIT, such rights cannot have any protection under Art. 5(1)(1) of the BIT. Bangladesh has expressly excluded consent in respect of "*judgments or orders issued by Courts or Tribunals having jurisdiction*".

(C-Mem, p. 53, para. 4.11)

136. According to Saipem, interpreting the last phrase of this provision as an exclusion of the consent to arbitrate with respect to judicial acts would result in negating the protection which the BIT grants investors. It stresses that "in almost all instances expropriations occur as a result of actions which directly or indirectly derive from an action contemplated in a law or a judgment" and that accepting the Respondent's position would render the State's actions immune from the rules of the BIT (Rejoinder J., pp. 21-22, para. 86).

137. In the Tribunal's opinion, Article 5(1)(1) *in fine*, which was quoted above (see above No. 117) cannot be understood as creating immunity in favour of the judiciary power. This provision merely affirms the principle that, "in order to escape being considered an internationally wrongful act, a State measure limiting or excluding an investor's rights of ownership, control or enjoyment can only be considered legal if it has been adopted by law or by a judicial decision" (Response J. p. 17, paras. 74-75, see also Tr. J. II, 61:10-12).

138. Under these circumstances, the Tribunal does not have to make a ruling at this stage on whether in the present instance the courts of Bangladesh "ha[d] jurisdiction" within the meaning of Article 5(1)(1) *in fine* of the BIT.

#### **5.4 Are Saipem's treaty claims in reality contract claims?**

139. In its Counter-Memorial, Bangladesh submitted that Saipem's "claim is in reality a contractual claim dressed up as a treaty claim" (C-Mem., p. 14, para. 1.43).

140. Saipem opposes this submission with the following argument:

The focus of the Claimant's case is that its right to payment under the Contract as ascertained by, and incorporated in, the ICC Award has been expropriated by the unlawful decisions of the Bangladeshi courts that revoked the authority of the ICC arbitrators and declared the ICC Award null and void, thus precluding its enforcement in Bangladesh or elsewhere. The net result of all this was, obviously, to deprive the Claimant of the compensation for its investment.

(Response J., p. 3, para. 13)

141. In the Tribunal's view, the essence of Saipem's case is that the courts of Bangladesh acted in violation of the New York Convention and in an "illegal, arbitrary and idiosyncratic" manner amounting to a violation of the protection afforded to foreign investors under Article 5 of the BIT. Saipem does not request relief under the Contract; it does not raise contract claims over which the Tribunal would have no jurisdiction.

142. Whether Saipem's treaty claim is well-founded is a different issue which will be decided when dealing with the merits of the dispute. For instance, it is not for the Tribunal to rule at this stage on Bangladesh's submission that "the Claimant is in essence asserting that the Bangladeshi court acted in a way to deny it justice" and that such a breach of international law presupposes the exhaustion of local remedies (Reply J., pp. 17-18, para. 12), or on the allegation that the courts of Bangladesh actually breached the New York Convention or other principles of international law. These are matters which will have to be reviewed during the merits phase of this arbitration.

#### **5.5 Are the disputed actions attributable to Bangladesh?**

143. Saipem submits that the expropriation was caused by the combined actions of Petrobangla and the courts of Bangladesh. Bangladesh does not dispute that the courts are "part of the State" (Tr. J. II 32:6) and, thus, that their actions are attributable to Bangladesh. Indeed, this cannot be seriously challenged in light of previous ICSID

cases<sup>37</sup>. Hence, the only disputed question is whether Petrobangla's acts can be attributed to Bangladesh.

144. According to the test set forth above (see above No. 84 *et seq.*), it is not for the Tribunal at the jurisdictional stage to examine whether the acts complained of give rise to the State's responsibility, except if it were manifest that the entity involved had no link whatsoever with the State. This is plainly not the case in the present dispute.
145. In fact, at first sight at least, Petrobangla appears to be part of the State under Bangladeshi law. Indeed, upon a specific question from the Tribunal at the hearing, Mr. Razzaq confirmed that "Petrobangla is a statutory public authority" within the meaning of the Constitution of Bangladesh and is thus "included in the definition of the state, the same as Parliament" (Tr. J. I 66:19-20 [Razzaq]).
146. In this context and still at first sight, the Tribunal fails to see the relevance of Bangladesh's emphasis on the fact that Petrobangla, as a part of the State, "has its own legal personality" (Tr. J. I 61:20-21 [Razzaq]) distinct and allegedly independent from the Government of Bangladesh (Tr. J. I. 60:1 *et seq.*; 66:20-21 [Razzaq]). In any event, these circumstances do not imply that Petrobangla has no link whatsoever with the State.
147. Similarly, the allegation that Petrobangla's actions were "not acts of the State in a sovereign capacity" (Tr. J. II 31:21-22) and that Petrobangla acted in front of the courts of Bangladesh "as a contracting party which feared bias of the arbitrators they were facing at the time" (Tr. J. II 31:25-32:1) does not make a difference at this jurisdictional stage.
148. When assessing the merits of the dispute, the Tribunal will rule on the issue of attribution under international law, especially by reference to the Articles on State Responsibility as adopted in 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Resolution 56/83 of 12 December 2001 (the ILC Articles) as a codification of

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<sup>37</sup> See, for instance, *The Loewen Group Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on Jurisdiction of 5 January 2001, paras. 39 *et seq.*, also available at <http://www.investmentclaims.com/decisions/Loewen-US-Jurisdiction-5Jan2001.pdf>; *Waste Management Inc. v. United Mexican States*, ICSID No. ARB(AF)/00/3, Award of 30 April 2004, available at <http://www.investmentclaims.com/decisions/WasteMgmt-Mexico-2-FinalAward-30Apr2004.pdf>.

customary international law. The Tribunal will in particular consider the following provisions:

- Art. 4 of the ILC Articles which codifies the well-established rule that the conduct of any State organ, according to the internal law of the State, shall be considered an act of that State under international law. This rule addresses the attribution of acts of so-called *de jure* organs which are empowered to act for the State within the limits of their competence.
- Art. 5 of the ILC Articles which goes on to attribute to a State the conduct of a person or entity which is not a *de jure* organ but which is empowered by the law of that State to exercise elements of governmental authority provided that person or entity is acting in that capacity in the particular instance.
- Art. 8 of the ILC Articles which states that the conduct of a person or group of persons acting under the instructions of or under the direction or control of the State shall be considered an act of that State under international law.

149. At this jurisdictional stage, there is no indication that either the courts of Bangladesh or Petrobangla could manifestly not qualify as state organs at least *de facto*.

## **6. OBJECTIONS RELATED TO THE ADMISSIBILITY OF SAIPEM'S CLAIM**

### **6.1 Does the requirement to exhaust local remedies apply?**

150. It is Bangladesh's submission that Saipem did not exhaust all the local remedies available against the court decisions issued in relation to the arbitration, in particular the decision to revoke the arbitrators' authority (see in particular Tr. J. II 32:11 *et seq.*). Moreover, Bangladesh submits that there is no evidence before the Tribunal that it would have been futile for Saipem to take such further judicial steps (Tr. J. II 32:22 *et seq.*).

151. To the extent that this submission is regarded as a bar to the admissibility of the claim and/or to the jurisdiction of the Tribunal (Reply J., para. 3.25), the Tribunal cannot follow it. Article 26 of the ICSID Convention dispenses with the requirement to exhaust local remedies. It is true that such requirement does apply to claims based on denial of justice, but this is not a matter of the claim's admissibility but a substantive

requirement<sup>38</sup>. As a matter of principle, exhaustion of local remedies does not apply in expropriation law<sup>39</sup>. Since Saipem's claim is brought on the ground of expropriation, there appears to be no ground to deny jurisdiction for the reason that Saipem did not exhaust the judicial remedies available in Bangladesh.

152. That said, it is true that in the present case the alleged expropriating authority is a judicial body. This raises the question whether an analogy should be made between expropriation and denial of justice when it comes to exhaustion of local remedies. Bangladesh actually argues that Saipem "is in essence asserting that the Bangladeshi courts acted in a way to deny it justice" (Reply J., p. 17, para. 3.21).
153. Whether the requirement of exhaustion of local remedies may be applicable by analogy to an expropriation by the acts of a court and whether, in the affirmative, the available remedies were effective are questions to be addressed with the merits of the dispute. The relevant test for jurisdictional purposes requires that the facts alleged may constitute a breach of Article 5 of the BIT. Saipem's contention that the courts of Bangladesh expropriated its investment and that the available remedies were futile meets this test. If they were proven, they may constitute breaches of Article 5 of the BIT.

## **6.2 Does Saipem's claim constitute an abuse of process?**

154. Bangladesh's second objection concerning admissibility is that Saipem's claim constitutes an abuse of process as it seeks in substance to "enforce an invalid ICC award using the ICSID jurisdiction" (Tr. J. II, 34:17-23). More specifically, according to Bangladesh:

Saipem is asking the ICSID tribunal to rubberstamp the ICC award, thereby converting it into an ICSID award, in order to bypass the correct method of enforcement of an ICC award. Saipem is thereby trying to take advantage of:

- (1) the more favourable means of enforcement of an ICSID award;
- (2) trying to have a second attempt at enforcing the ICC award;
- (3) trying to mutate the Dhaka-ICC arbitration mechanism into a delocalised one to avoid any potential domestic Bangladesh annulment proceedings.

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<sup>38</sup> Jan Paulsson, *Denial of Justice in International Law*, pp. 100 *et seq.* (2005). See also *The Loewen Group, Inc. and Raymond Loewen v. United States of America*, Award, 26 June 2003, para. 153, 42 ILM 811, 836 (2003).

<sup>39</sup> *Generation Ukraine, Inc. v. Ukraine*, Award, 16 September 2003, paras. 20.30 and 20.33.

It is submitted that this would constitute an abuse of the ICSID Convention, the Arbitration Act 1940 of Bangladesh and the express will of the parties. In addition, this would be an abuse of the process of this Tribunal as the arbitral tribunal's duty is to adjudicate upon all issues before it for itself.

Further, ICSID is not an appeals facility: the appropriate appeals mechanism against the Bangladesh judgment was an appeal to the next court within the Bangladesh court hierarchy. This was not done on the express choice and election of Saipem.

(C-Mem., p. 59, references omitted)

155. In the Tribunal's opinion, the present proceedings are not aimed at enforcing an award which is inexistent according to the courts of Bangladesh. The Tribunal understands Saipem's case to claim that Bangladesh has frustrated its rights by unlawfully interfering in the arbitration process. The fact that the indemnity claimed in this arbitration matches the amounts awarded in the ICC arbitration at least to some extent, does not mean in and of itself that this Tribunal would "enforce" the ICC Award in the event of a treaty breach. To avoid any ambiguity, the Tribunal stresses that Saipem's claim does not deal with the courts' regular exercise of their power to rule over annulment or setting aside proceedings of an award rendered within their jurisdiction. It deals with the court's alleged wrongful interference.
156. Finally, Bangladesh invokes "an abuse of process [...] because this whole claim goes against party autonomy" (Tr. J. II, 34:17). In substance, Bangladesh insists that, by choosing a seat of the arbitration in Dhaka, Saipem has accepted the supervisory powers of the local courts and thus assumed the risk of such courts interfering. It argues that a determination by this Tribunal not recognizing the nullity of the ICC Award would be contrary to party autonomy.
157. In the Tribunal's opinion, it is true that the choice of Dhaka as seat of the arbitration implied the acceptance of the jurisdiction of the local courts in aid and control of the ICC Arbitration and the acceptance of the related litigation risk (Tr. J. II 27:18-19). It is also true that – contrary to Saipem's submissions (Tr. J. II, 36:25-37:2) – the latter was not compelled to accept that risk (Tr. J. II 76:1 *et seq.*).
158. But this is not the question here. By accepting jurisdiction, this Tribunal does not institute itself as control body over the ICC Arbitration, nor as enforcement court, nor as supranational appellate body for local court decisions. This Tribunal is a treaty judge. It is called upon to rule exclusively on treaty breaches, whatever the context in which such treaty breaches arise.

## **7. COSTS**

159. Having concluded that it has jurisdiction over the present dispute, the Tribunal reserves all questions concerning the costs and expenses of the Tribunal and of the parties for subsequent determination.

160. This being said, the Tribunal has taken due note of Bangladesh's complaint that Saipem did not provide all the copies of the cited authorities thus creating additional costs for Bangladesh (Tr. J. II 1:11 *et seq.*).

## **V. DECISION ON JURISDICTION**

161. For the reasons set forth above, the Tribunal:

- a)** Holds that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal;
- b)** Dismisses all of the Respondent's objections to the admissibility of the claims, the jurisdiction of ICSID, and the competence of this Tribunal;
- c)** By virtue of Rule 41(4) of the Arbitration Rules will make the necessary order for the continuation of the proceedings on the merits;
- d)** Reserves all questions concerning the costs and expenses of the Tribunal and of the parties for subsequent determination.

## **VI. DETERMINATION ON PROVISIONAL MEASURES**

### **1. RELEVANT FACTS AND SAIPEM'S REQUEST**

162. It is common ground that Petrobangla did not repay the Retention Money after the issuance of the Warranty Bond.

163. In the Request for Arbitration and Statement of Claim, Saipem asked for provisional measures aiming at restraining Bangladesh and at preventing Petrobangla from pursuing any payment demand based on the Warranty Bond until the outcome of the present arbitration (see above No. 62).

164. The parties subsequently agreed to the Tribunal's proposal that a decision be deferred until after the submission of the Counter-Memorial.

165. Pointing out that Bangladesh acknowledged that "it should have released the Retention Money against Receipt of the Bond" (C-Mem., p. 27, para. 33), Saipem submitted that "the natural follow-up of [this statement] would have been that the Respondent formally state its intention not to seek payment of, and to return, the Bond and to return the Retention Money and to take all the necessary steps needed to end the litigation in Bangladesh and in Italy relating to the Bond". It then invited Bangladesh to "provide a formal declaration to this effect by June 30, 2006" (Response J., p. 31, para. 141). Saipem confirmed by letter of 31 May 2006 that its request for provisional measures was thus suspended.

166. During the telephone conference held on 26 July 2006, the parties and the Tribunal agreed as follows in respect of Saipem's request for provisional measures:

The parties can further address the question of the Claimant's request for interim relief in their respective briefs and at the hearing. The Tribunal will decide this issue after the hearing.

(PO#2, Section VII)

167. In its Reply on Jurisdiction, Bangladesh submitted *inter alia* that the Tribunal lacked jurisdiction to order any interim relief, since the Retention Money and the Warranty Bond were "contractual breaches not amounting to a BIT claim" (Reply J., p. 19, para. 4.4).

168. In its Rejoinder on Jurisdiction, Saipem reiterated the request formulated in the Request for Arbitration and asked the Tribunal to

issue a provisional measure recommending that Bangladesh refrain from calling on the Warranty Bond and return it to the Claimant together with the Retention Money without further delay.

(Rejoinder, p. 28, para. 107(ii))

169. At the end of the hearing, Saipem amended its original request for provisional measures as follows:

Claimant respectfully submits the following requests for provisional measures under Article 47 of the ICSID Convention and Rule 39 of the ICSID Rules:

- to recommend that the Respondent cause (i) the return of the Bond to Claimant for cancellation and (ii) the immediate termination of the

litigation pending in Bangladesh against former Banque Indosuez; in the subordinate, to cause the suspension of said litigation and to prevent or avoid encashment of the Bond by Petrobangla until final adjudication of these proceedings;

- to recommend that the Respondent cause the Retention Money, in the amount of USD 869,903 plus Taka 10,391,605 plus interest at the rate of 3.375% per annum from 17 June 1992 to be paid to Claimant right away; in the subordinate, to recommend that the Retention Money be put in an escrow account in the name of ICSID or another neutral party with instructions that payment thereunder be made upon issuance of the ICSID award adjudicating in favour of Claimant.

## **2. RELEVANT PROVISIONS**

170. Provisional measures are governed by the ICSID Convention and the ICSID Arbitration Rules.

171. Article 47 of the ICSID Convention reads as follows:

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective interests of either party.

172. Rule 39 of the ICSID Arbitration Rules provides in relevant part as follows:

- (1) At any time during the proceedings a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
- (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
- (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

## **3. TRIBUNAL'S POWER TO RECOMMEND PROVISIONAL MEASURES**

173. Having concluded that it has jurisdiction to hear the present dispute, there can be no doubt that this Tribunal has the power to recommend provisional measures.

## **4. RELEVANT STANDARD**

174. It is generally acknowledged that, by providing that the Tribunal may recommend any provisional measures "if it considers that the circumstances so require", Article 47 of

the ICSID Convention requires that the requested measure be both necessary and urgent.

175. Following *Pey Casado*, *Maffezini* and *CSOB*, the Tribunal considers that under Article 47 of the Convention a tribunal enjoys broad discretion when ruling on provisional measures, but should not recommend provisional measures lightly and should weigh the parties' divergent interests in the light of all the circumstances of the case<sup>40</sup>.

## 5. PARTIES' POSITIONS

176. In support of its request, Saipem puts forward the following main arguments:

- (i) By sabotaging the ICC Arbitration and by rendering the ICC Award unenforceable, Bangladesh has deprived Saipem of its right to the Retention Money and to the restitution of the Warranty Bond which were both awarded by the ICC Award.
- (ii) Saipem is thus exposed to the risk of a call under the Bond (which was declared inadmissible by the ICC Tribunal) which would lead to a further expropriation.
- (iii) Bangladesh's actions in relation to the Bond and to the Retention Money are therefore in themselves direct breaches of the prohibition on expropriation.

177. Given that the proceedings in Italy and Bangladesh are still pending, Saipem claims to face the risk

that if Petrobangla succeeds in the action in Bangladesh, the Bangladesh bank will have to pay and the Bangladesh bank obviously will ask the Italian

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<sup>40</sup> "[...] provisional measures authorized by Article 47 of the ICSID Convention and Rule 39 of the Arbitration Rules-provisions which contain no indication or exact statement in this regard-can be extremely diverse and are left to the appreciation of each Arbitration Tribunal." *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/25), Decision on Provisional Measures (25 September 2001), para. 15, English translation of French and Spanish originals in 6 ICSID Reports 375 (2004), "The imposition of provisional measures is an extraordinary measure which should not be granted lightly by the Arbitral Tribunal" and that the party requesting the measures "has the burden to demonstrate why the Tribunal should grant its application" (*Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Decision on Request for Provisional Measures (October 28, 1999), p. 3, para. 10) and in *CSOB* that "the provisional measures envisaged under Article 47 of the ICSID Convention are not exceptional measures in the sense that they require more than a showing that they are necessary to preserve the rights of the parties" (*Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic* (ICSID Case No. ARB/97/4), Procedural Order No. 3 (November 5, 1998), p. 2)

bank to be paid by the Italian bank and the Italian bank will ask Saipem in the current proceedings already instituted in Italy to be paid the amount of money.

(Tr. J. II 62:17-21).

178. In its Reply on Jurisdiction, Bangladesh submits in substance that its admissions on the Retention Money and on the Warranty Bond were based on an analysis of the parties' obligations under the Contract and have thus no bearing in an action for violation of the BIT (Reply J., p. 19, para. 19). Moreover, Bangladesh claims that it never called upon the Warranty Bond.

## **6. TRIBUNAL'S DETERMINATION**

179. Bangladesh's argument that its admissions on the Retention Money have no bearing in an action for violation of the BIT overlooks the fact that the ICC Award disposed of the Retention Money and of the Warranty Bond and that the claims in this treaty arbitration relate at least in part to the ICC Award.

180. Similarly, Bangladesh's assertion that Petrobangla never requested the payment of the Bond is difficult to reconcile with the content of the "extend or pay" letter of 18 April 1993 and with the fact that such a payment remains an issue in the pending litigation in Bangladesh.

181. Moreover, at the hearing Saipem convincingly showed that there is a risk that it may be required to pay to the Italian bank the amount that the Bangladeshi bank may have to pay to Petrobangla.

182. Hence, in view of the pending litigation in Bangladesh, the Tribunal considers that there is both necessity and urgency. This finding is reinforced by the facts that, apart from denying that it called the Warranty Bond, Bangladesh does not contest Saipem's contentions and that there is a risk of irreparable harm if Saipem has to pay the amount of the Warranty Bond.

## **7. CONCLUSION**

183. Considering that under the current circumstances there is a risk that Petrobangla may draw on the Warranty Bond while keeping the Retention Money, that Bangladesh admitted that either the Retention Money should have been released or the Warranty

Bond returned, and taking into account the parties' respective interests, the Tribunal is of the opinion that Bangladesh should take the necessary steps to ensure that Petrobangla does not proceed to encash the Warranty Bond.

184. Such a recommendation strikes a fair balance between the parties' interests. Saipem is protected from the risk of being required to effect payment to the Italian bank; Petrobangla is protected from the risks that are inherent in Saipem's requests to return the Warranty Bond for cancellation and to terminate or suspend immediately the litigation pending in Bangladesh.
185. By contrast, the Tribunal is of the opinion that Saipem's second request, *i.e.* the request for the return of the Retention Money, must be dismissed. Indeed, it is difficult to see how an immediate payment is necessary and urgent today. While the Tribunal is prepared to recommend measures preventing an increase of the harm allegedly suffered by one of the parties, the Tribunal is not inclined to recommend measures guaranteeing an award in favour of Saipem. Indeed, as correctly put by Bangladesh, this could be viewed as a *de facto* enforcement of part of the ICC Award.

## 8. RECOMMENDATION

On the basis of the reasons set forth above, the Tribunal hereby recommends that Bangladesh take the steps necessary to ensure that Petrobangla refrain from encashing the Warranty Bond No. PG/USD/12/92 issued by Banque Indosuez.

Done on March 21, 2007,

*signed*

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Prof. Christoph Schreuer

*signed*

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Sir Philip Otton

*signed*

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Prof. Gabrielle Kaufmann-Kohler