

# **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/05/7**

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**AWARD**

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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. Eloïse Obadia, Secretary to the Arbitral Tribunal

Date of dispatch to the parties: 30 June 2009

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## TABLE OF ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BAA	Bangladeshi Arbitration Act of 1940
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
Contract	Agreement of 14 February 1990 between Bangladesh Oil Gas and Mineral Corporation and Saipem S.p.A. for construction of North-South Pipeline [Work Order PIU/INF/13.52]
Counter-Memorial	Bangladesh’s “Counter-Memorial” of 14 May 2006, containing its objections to jurisdiction
Exh. C-	Claimant [Saipem]’s Exhibits
Exh. R-	Respondent [Bangladesh]’s Exhibits
HPN	Pleading Notes of Dr. Hossain submitted at the Hearing on the Merits
ICC	International Chamber of Commerce
ICC Rules	ICC Arbitration Rules 1988 (as in force in 1997)
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
RA	Request for Arbitration
Rejoinder	Bangladesh Rejoinder on the Merits of 14 January 2008
Reply	Saipem’s “Memorial on the Merits” of 22 October 2007
Revocation Decision	Decision of the First Court of the Subordinate Judge of Dhaka of 5 April 2000
RPN I	Pleading notes of Prof. Radicati di Brozolo of 12 March 2008
RPN II	Pleading notes of Prof. Radicati di Brozolo of 14 March 2008
SoC.	Saipem’s Statement of Claim of 20 February 2006
Tr. [day] [page:line]	Transcript of the hearing on the merits
WS	Witness Statement

## **I. SUMMARY OF THE RELEVANT FACTS**

1. This chapter sets forth the main relevant facts of this arbitration. Additional facts may be referred to as and when appropriate in the course of the Tribunal's analysis.

### **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, Syed Afzal Hossain, Syed Ahrarul Hossain and Md. Sameer Sattar, A. HOSSAIN & ASSOCIATES LAW OFFICES, 3/B Outer Circular Road, Maghbazar, Dhaka-1217, Bangladesh as well as Mr. Richard Clegg, SELBORNE CHAMBERS, 10 Essex Street, London, WC2R 3AA.

### **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 an agreement n. PIU/INF/13.52 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 (Exh. C-4). The project was sponsored by the World Bank and financed to a large extent by the International Development Association (IDA)<sup>1</sup>.
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 (the “First Taking Over Certificate”) by Petrobangla, and the remaining half not later than 30 days from the issuance of the final acceptance certificate (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 (Clause 1.1.38):

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-22)

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<sup>1</sup> Under a credit agreement between IDA and Bangladesh and a project agreement between IDA and Petrobangla both dated 2 May 1985. There was also a subsidiary loan agreement dated 3 October 1985 between Bangladesh and Petrobangla. It is Bangladesh’s assertion that the Contract arises out of the agreements with IDA, without which the Contract would not have come into existence (Rejoinder, p. 4 at ¶ 11).

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

### **2.2.1 The delay in the project**

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.
12. The parties disagree on the reasons for such delay. According to Saipem, the delay was mainly due to problems with the local population which rebelled against the project. By contrast, Bangladesh argues that the problems with the population were caused by Saipem itself (Quamaruzzaman First WS, pp. 4-5) and that Saipem was already behind schedule before these problems began (Quamaruzzaman Second WS pp. 2-3).

### **2.2.2 The agreement to extend the completion date**

13. By letter of 6 April 1991, Saipem requested an extension of the completion date by one year and claimed USD 21,231,115 as compensation for delay (Exh. R-8). A few weeks later, on 19 May 1991, Petrobangla claimed compensation for Saipem's failure to complete the project in time in an amount of USD 91 million (Exh. R-12).
14. 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. Thereafter, they started negotiations on the compensation payable as a result of the delay (see below ¶¶ 23 *et seq.*).

### **2.2.3 The completion of the project, the Retention Money and the Warranty Bond**

15. The project was completed and the pipeline taken over by Petrobangla with effect from 14 June 1992. Petrobangla issued the Final Taking Over Certificate on 17 June 1992 (Exh. R-29).
16. Shortly thereafter, Petrobangla returned the first half of the Retention Money.
17. The second half of the Retention Money was to be released by Petrobangla against a warranty bond in the same amount, *i.e.*, USD 869,903.50 and BDT 10,391,605.00. The bond was provided on behalf of Saipem on 27 June 1992 (Warranty Bond No.

PG/USD/12/92 issued by Banque Indosuez; hereinafter, the “Warranty Bond”) (Exh. R-33). Petrobangla agreed that such bond would be released no later than 30 days from the issuance of the Final Acceptance Certificate (see Counter-Memorial, p. 26).

18. On 23 June 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)

19. 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)<sup>2</sup>.
20. By letter of 23 June 2003, Petrobangla requested Banque Indosuez Pakistan to pay out on the Warranty Bond. In these proceedings, Bangladesh has alleged that Petrobangla later withdrew that request. Saipem has not disputed such allegation.
21. 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 favour of Petrobangla under the Warranty Bond until the injunction of the courts 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.

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<sup>2</sup> This injunction was confirmed on 19 July 1993 and subsequently affirmed by the Court of Appeal of Milan on 12 August 1993. 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 (Transcripts of the Hearing on Jurisdiction, 22 September 2006, Day II, 63:22-64:3).

Saipem was not a party to it.<sup>3</sup> The Tribunal received no further information on such proceedings in the further course of the arbitration.

22. It is undisputed that Petrobangla did not repay the second half of the Retention Money in spite of the issuance of the Warranty Bond.

#### **2.2.4 Compensation for delay**

23. Following the agreement to extend the time for completion of the project, the parties started negotiations on the amount of compensation due on account of the delays. Between January and May 1992, Petrobangla paid significant amounts to Saipem, allegedly “under pressure from the World Bank” (Quamaruzzaman First WS, ¶ 8, p. 3). A dispute arose between the parties with respect to Petrobangla’s failure to pay the additional costs allegedly agreed. The parties have conflicting views on whether they agreed on such compensation or not. Bangladesh contends that they did not agree and that the issue of the responsibility for the delay was to be decided by a single arbitrator, who was never appointed. Specifically, Bangladesh raised the following arguments:

A conditional settlement on the issue of compensation was eventually reached on the 9 July 1992 by exchange of telexes after the extension of time for completion was granted (“the Compromise”). Petrobangla stated in its letter dated 17 June 1992 that a committee specifically constituted by its Board had assessed Saipem’s claim for compensation at US\$11.438 million. [...]

The Compromise to pay US\$ 11.438 million was thus made conditional upon two matters: first, the verification and examination of the genuineness of Saipem’s claims by Government of Bangladesh / Petrobangla [which never occurred] [...].

Secondly, the issue of whether Saipem or Petrobangla was liable for the delay that had occurred in the construction of the Pipeline had to be determined subsequently and such determination would be made by a single arbitrator suitable to both parties [who was never appointed] [...].

Although US\$10 million was paid by Petrobangla on account of compensation under the Compromise, there remained a disagreement as to the total amount of compensation to be paid and also as to whether Petrobangla should pay compensation. It is asserted that, contrary to the finding by the ICC Tribunal, there was never any agreement between the parties that Petrobangla should pay compensation to Saipem (whether conditionally or unconditionally) in the sum of US\$14 million. In any event, it is contended that such a finding was perverse in the light of the material facts available before the ICC Tribunal.

(Rejoinder, pp. 6-12, in particular ¶¶ 16, 20, 21 and 34)

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<sup>3</sup> See Transcripts of the Hearing on Jurisdiction, 22 September 2006, Day I, 57:14-21.

24. Saipem agrees that an agreement was reached, which coincides with the findings of the arbitral tribunal constituted under the arbitration clause embodied in the Contract. According to the Claimant, the so-called Compromise was unconditional and the only reason why the payment was not made was a change in the Bangladeshi Government.

### **2.3 The ICC Arbitration and the intervention of the courts of Bangladesh**

25. In accordance with the dispute resolution procedure set forth in the Contract, Saipem referred the dispute so arisen to ICC arbitration by filing a request for arbitration on 7 June 1993. An arbitral tribunal composed of Dr. Werner Melis (Chairman), Prof. Riccardo Luzzatto and Prof. Ian Brownlie, QC, (the “ICC Tribunal” or the “ICC arbitrators”) was constituted on 4 May 1994.
26. Petrobangla challenged the jurisdiction of the ICC Tribunal on several grounds, none of which related to the appointment of a sole arbitrator pursuant to the Compromise (Exh. C-6)<sup>4</sup>.
27. On 27 November 1995, the ICC Tribunal issued an award on jurisdiction dismissing Petrobangla’s challenge to its jurisdiction (Exh. C-7). It then addressed the merits of the case.
28. 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.
29. After the exchange of the written submissions in the ICC Arbitration, a witness hearing was held on 22-27 July 1997 in Dhaka (the ICC Hearing). It is the contention of Mr. Nassuato of Saipem that the situation in Bangladesh at the time of the hearing was hostile towards Saipem. In particular, the Italian ambassador wished to meet the

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<sup>4</sup> Petrobangla’s jurisdictional objection in relation to the additional compensation for time extension was that such claim “is outside the scope of the Arbitration Clause and beyond the jurisdiction of the Tribunal since it does not relate to rights or obligations under the Agreement as therein no clause in the Agreement which provides for such additional compensation for time extension” (Petrobangla’s submissions in the ICC Arbitration as quoted in the ICC Terms of reference [Exh. R-70, p. 8] and the ICC Award [Exh. C-6, p. 6]). Petrobangla also opposed the admissibility of Saipem’s claim on the ground that they were premature as they “[we]re not matters which ‘cannot be settled amicably’ [as provided for by the arbitration agreement]” (Exh. R-70, p. 8 and Exh C-6, pp. 6-7).

members of Saipem's team before the hearing to warn them that the local press was portraying Saipem as an exploiter of Bangladeshi resources, to express worries about their safety, and to offer them protection during their stay in the country (WS Nassuato, pp. 4-5).

30. According to Mr. Nassuato, Bangladesh took action to prevent Mr. Clark, a key witness on behalf of Saipem, to give testimony at the ICC hearing:

Mr. Clark was the Senior Engineer of Pencil Engineering Consultant in Bangladesh from March 1990 to April 1993. Pencil had been selected by the World Bank as the independent and impartial Engineer to supervise the performance of the North South Pipeline Project.

Mr. Clark monitored the performance of the contract between Saipem and Petrobangla and periodically reported to the World Bank on the major events relating to the Project, with particular reference to those which could have an impact on timing and costs. At the end of the Project, Mr. Clark left Bangladesh.

Because of Mr. Clark's thorough knowledge of all the events relating to the Project, he was named as a witness by Saipem in the ICC Arbitration. [...]

[...] When Saipem's counsel informed him that his oral examination would be held in Dhaka, he told Saipem that he was unable to come to Bangladesh.

There followed many telephone conversations between myself and Mr. Clark to persuade him to attend the hearing in Dhaka. Mr. Clark declared his availability to be heard by the Tribunal anywhere except in Bangladesh. In particular, he offered to be heard in London, Vienna or Bombay. Since Petrobangla refused to accept that hearings be held anywhere other than in Dhaka, Mr. Clark could never be heard by the Arbitral Tribunal.

In one of our conversations, Mr. Clark revealed to me that the reason why he could not come to Bangladesh was that he feared being arrested immediately upon his arrival in the country.

He explained that at the end of the works in 1993 he was ordered by local officials not to issue opinions or to render testimony or other local officials not to issue opinions or to render testimony or other evidence in support of Saipem's claims, either in the arbitration or in direct negotiations with the Government. They knew that he had full knowledge of the file and that he had already advised Petrobangla to accept Saipem's request for monetary compensation and restitution of retention money and bonds. These officials let Mr. Clark clearly understand that, in the contrary case, he was exposed to the severe risk of being arrested for collusion with Saipem.

It is because of these threats that, as he reported to me, he was forced to leave the country soon after completion of the project in 1993.

(WS Nassuato, pp. 4-5)

31. During the ICC hearing, the ICC Arbitral Tribunal denied several procedural requests submitted by Petrobangla, in particular (i) a request to strike from the record the

witness statement of Mr. Clark, (ii) a request that all witnesses be allowed to be present in the hearing room during the entire hearing, (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 cost calculations prepared by Saipem, and (v) a request that transcripts be made of the tape recordings of the hearing.

32. Following the ICC hearing, Petrobangla formally reiterated its requests on 26 August 1997. The ICC Tribunal denied Petrobangla's applications once again on 21 September 1997.
33. In August 1997, Petrobangla wrote to the ICC Arbitral Tribunal to request information regarding Saipem's insurance policy and claims made under it, which Saipem had refused to provide. The ICC Arbitral Tribunal issued an order that Saipem's refusal to provide the requested information would be assessed when appropriate at a later stage of the proceedings.
34. Following these adverse procedural decisions, Petrobangla sought the support of the local courts. In Mr. Ahmad's words:

During the ICC proceedings, Petrobangla raised certain objections before the ICC Tribunal regarding the conduct of the proceedings. These objections being largely unsuccessful and fearing injustice, Petrobangla then approached the courts of Bangladesh seeking revocation of the ICC Tribunal's authority under Section 5 of the Arbitration Act 1940. [...]

Plainly, it was Petrobangla's fear and grievance that the ICC Tribunal had or would commit a substantial miscarriage of justice and it had a reasonable apprehension that it would not get a fair trial before the ICC Tribunal.

(Ahmad Second WS, ¶¶ 7 and 10, p. 3)

35. On 16 November 1997, Petrobangla filed an action seeking the revocation of the authority of the ICC Arbitral Tribunal's in the First Court of the Subordinate Judge of Dhaka (Exh. R-83)<sup>5</sup>. The action was based on the ICC arbitrators' alleged misconduct

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<sup>5</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.

and breach of the parties' procedural rights when rejecting Petrobangla's procedural requests during the hearing of 22-27 July 1997<sup>6</sup>.

36. On 17 November 1997, Petrobangla applied to the High Court Division of the Supreme Court of Bangladesh "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).
37. A week later, 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>7</sup>:

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

(Exh. C-10.3, p. 2)

38. Because of the measures just referred to, which Saipem viewed as punitive actions taken against it by the new government (see above ¶ 24)<sup>8</sup>, Saipem felt that it was unsafe for its management to travel to Bangladesh (WS Galizzi, p. 2). It also feared that its acting through a Bangladeshi lawyer may put such a lawyer at risk. It thus decided to act in Bangladesh through an Indian law firm:

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<sup>6</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>7</sup> Saipem appealed from 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".

<sup>8</sup> According to Mr. Nassuato, "Saipem, considered the risky conditions in the country very seriously when the question arose of whether we were to appear before the Bangladeshi courts to contest the decisions interfering with the arbitration" (Nassuato WS, p. 6).

This way of proceeding was imposed by the fact that we, Saipem's employees or officials, were prevented from going to Bangladesh because our physical presence in the country was extremely dangerous to our personal safety. Moreover, we were worried that a direct mandate from us to a Bangladeshi lawyer would constitute a cause of concern and risk also for such local lawyer.

(WS Nassuato, p. 5)

39. Several other court 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).
40. 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). A few weeks later, on 5 April 2000, the First Court of the Subordinate Judge of Dhaka issued a decision revoking the authority of the ICC Arbitral Tribunal (the "Revocation Decision") on the following grounds:

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 SoC., p. 21, ¶ 92)

41. According to Mr. Galizzi of Saipem, the Revocation Decision came as a shock and brought the collusion between Petrobangla and the courts of Bangladesh to light:

It became clear to us why Petrobangla had insisted on Dhaka as the seat of the arbitration. They evidently intended to use this as a means to allow their courts to interfere with the arbitration and to bring matters before their local courts. Had we suspected that the local courts would accept to play Petrobangla's game, we would never have accepted Dhaka as the seat of the arbitration and would have refused to conclude the contract.

(WS Galizzi p. 3)

42. Two degrees of appeals were available from the Revocation Decision and Saipem asserts that it then "seriously weighed the option of contesting the [Revocation

Decision]” (Reply, p. 12, ¶ 43). It chose, however, not to do so. Indeed, as pointed out by Mr. Ahmad on behalf of Bangladesh:

Upon the revocation of the authority of the ICC Tribunal, it [Saipem] ceased to take any part in the Bangladeshi cases and simply ignored the decisions and went ahead with the ICC arbitration.

(Ahmad Second WS, ¶ 12, p. 4)

43. According to Mr. Galizzi of Saipem, the latter decided not to file an appeal because any expectation to succeed appeared unsustainable under the circumstances:

Because of the hostile climate in Bangladesh and because we were firmly convinced that the revocation of the authority of the Arbitral Tribunal was completely illegal by all standards, we knew that we had no alternative but to proceed with the arbitration. Our Indian counsel advised us that an appeal against the injunction against the continuation of the arbitration was possible in theory, but unsustainable in substance. It was clear that we would not be in a position to defend ourselves before the local courts and that the climate was incompatible with a fair trial. As is confirmed by the witness statement of Mr. Nassuato, our witnesses, including the members of the arbitral tribunal, would have risked being in physical danger had they come to testify in Dhaka. Clearly the members of the ICC Arbitral Tribunal would have been key witnesses in those proceedings. The testimony of the Arbitrators would have been crucial, since the only reason for the revocation of the authority of the ICC tribunal was the alleged misconduct of the proceedings imputed to the Arbitrators. They could have demonstrated that no misconduct had ever been committed by them and that they had properly conducted the arbitration proceedings pursuant to the ICC Rules and even to the provisions of the Bangladeshi Arbitration Act.

(WS Galizzi pp. 3-4)

44. According to Mr. Ahmad, who testified on behalf of Bangladesh, the fear that Saipem’s witnesses and members of the Tribunal would have been in physical danger had they come to testify in Dhaka “was baseless [and] not supported by evidence” (Ahmad Second WS, ¶ 19, p. 5). Moreover:

While Saipem was represented by Bangladeshi Counsel in the above cases no suggestion was ever made that there was any fear of bias or prejudice against Saipem or that the courts were leaning towards Petrobangla in order to let it “off the hook” in respect of a potential award in its favour.

(Ahmad Second WS, ¶ 15, p. 4)

45. 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 courts of Bangladesh” and that “the revocation of the authority of the ICC Arbitral Tribunal by the Bangladeshi courts was [thus] contrary to the general principles governing international arbitration” (Exh. C-8).

46. Shortly thereafter, 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 resuming the arbitration arguing *inter alia* that Saipem was “manifestly guilty of contempt of court” having participated in the arbitration despite the court injunction (Exh. C-12).
47. Two weeks later, on 24 May 2001, it also 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 operation of the decision of the Dhaka Subordinate Judge. It also applied for an interim and a permanent injunction against the continuation of the arbitration. On the same day, the court refused to grant the interim injunction. On 27 May 2001, Petrobangla appealed against this refusal before the High Court Division of the Supreme Court. On the same date, the High Court Division issued an injunction restraining Saipem from pursuing the ICC Arbitration. This decision was confirmed by the High Court Division on 23 October 2001, 16 January 2002, and 15 July 2002.
48. In the meantime, the ICC Arbitration proceeded and, on 9 May 2003, the ICC Arbitral Tribunal rendered an award holding that Petrobangla had breached its contractual obligations to compensate Saipem for the 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 ordered Petrobangla to return the Warranty Bond to Saipem (the “ICC Award”; Exh. C-6).
49. On 19 July 2003, Petrobangla applied to set aside the ICC Award before the High Court Division of the Supreme Court of Bangladesh under Sections 42(2) and 43 of the Arbitration Act 2001 (Exh. C-13).
50. The High Court Division of the Supreme Court of Bangladesh denied such application on 21 April 2004 because 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 had 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 enjoined 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 that the Bangladesh Court has the 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 law and this Award can not be treated as an Award in the eye of 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, pp. 8-11)

51. It is undisputed that Saipem did not appeal this decision.

## II. PROCEDURAL HISTORY

### 1. INITIAL PHASE

52. 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, ¶¶ 121-126, footnote omitted)

53. 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.
54. 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.
55. 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.

56. 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 replaced as the Secretary of the Tribunal by Mrs. Martina Polasek, ICSID Counsel, from 23 August 2006 to 31 May 2007.
57. 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”.
58. 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 JURISDICTIONAL PHASE**

### **2.1 The written phase on jurisdiction**

59. In accordance with the timetable agreed upon during the preliminary session, on 20 February 2006, Saipem submitted its Statement of Claim accompanied by two volumes of exhibits (Exh. C-21 to C-84). Saipem did not append any witness statement or expert opinion.
60. Following a short extension, on 14 May 2006, Bangladesh submitted its “Counter-Memorial” containing its objections to jurisdiction accompanied by five volumes of

exhibits (Exh. R-1 to R-113) and four witness statements by Mr. Mohammed Quamruzzaman (WS Quamruzzaman), Mr. Abdul Monsur Md. Azad (WS Azad), Mr. Salahuddin Ahmad (WS Ahmad) and Mr. Abdur Razzaq (WS Razzaq). Mr. Razzaq's witness statement introduced a legal opinion on issues of Bangladeshi law, which was accompanied by ten annexes.

61. In accordance with the timetable agreed upon during the preliminary session, on 14 July 2006, Saipem submitted its Response on Objections to Jurisdiction accompanied by one volume of exhibits (Exh. C-85 to C-99). Saipem did not append any witness statement or expert opinion.
62. In line with the extension of time allowed by the Tribunal, on 18 August 2006, Bangladesh submitted its Reply on Jurisdiction<sup>9</sup>.
63. On 14 September 2006, within the extension of time allowed by the Tribunal, Saipem submitted its Rejoinder on Objections to Jurisdiction accompanied by one volume of exhibits (Exh. C-100 to C-101), without witness statements or expert opinions.

## **2.2 The hearing on jurisdiction**

64. The Arbitral Tribunal held the hearing on jurisdiction from 21 to 22 September 2006 in London. It heard witness evidence from Messrs. Abdul Monsour Azad, Salahuddin Ahmad, Abdul Razzaq and Mohammed Quamruzzaman. In addition, 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.
65. At the close of the jurisdictional hearing, it was agreed that the Tribunal would issue a reasoned decision on jurisdiction. If the decision were to be 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).
66. On 21 March 2007, the Tribunal issued a Decision on Jurisdiction, according to which it:

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<sup>9</sup> In the cover letter, Bangladesh announced that a Supplemental WS by Mr. Razzaq would be filed "over the week-end".

- a) H[e]ld that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal;
- b) Dismiss[ed] 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, order[ed] the continuation of the procedure pursuant to Section 15.2 of the Minutes of the First Session;
- d) Reserve[d] all questions concerning the costs and expenses of the Tribunal and of the parties for subsequent determination.

67. In its Decision on Jurisdiction of 21 March 2007, the Tribunal "recommend[ed] 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" (*referred to above at ¶ 17*).

### **3. THE WRITTEN PHASE ON THE MERITS**

68. On 25 May 2007, the Tribunal held a procedural telephone conference to discuss the further steps to be taken in this arbitration. On the basis of this consultation, the Tribunal issued a procedural order containing the following directions:

- 3. Except where amended by this Order, the procedural directions contained in the Minutes of the First Session of the Arbitral Tribunal shall apply to this phase of the proceedings.
- 4. The calendar for this phase of the proceedings shall be as follows:
  - i. On 25 June 2007, each Party may request the production of documents from its opponent;
  - ii. On 16 July 2007, each Party shall respond to the request for document production, if any, by either producing the document sought or explaining the reasons for not producing such documents;
  - iii. The Arbitral Tribunal will endeavor to decide on the request(s) that remain outstanding around 10 August 2007;
  - iv. If the production of documents is ordered, then each Party shall produce such documents no later than 5 September 2007. The documents which the Arbitral Tribunal orders a party to produce, shall be communicated to the other party and will only be deemed part of the record if it is produced as an exhibit to the Reply or the Rejoinder;
  - v. On 22 October 2007, the Claimant shall file its Reply on the Merits [...];
  - vi. On 14 January 2008, the Respondent shall file its Rejoinder on the Merits [...];
  - vii. On 25 January 2008, the Parties shall specify which of the witnesses of its opponent it wishes to cross-examine at the hearing;

- viii. On 31 January 2008 [or on 1 February 2008], a telephone conference will be held for the organization of the hearing. Such telephone conference will take place at 7:30 a.m. Washington time; 12:30 p.m. London time; 1:30 p.m. Milan time; and 6:30 p.m. Dhaka time;
- ix. A hearing on the Merits for witness examinations and presentation of the Parties' oral arguments will be held on 11, 12 and 13 March 2008 and, if necessary, on 14 March 2008 in London.

[...]

- 69. On 2 June 2007, Respondent submitted a letter addressed on 13 May 2007 by Petrobangla to the Commercial Bank of Ceylon withdrawing the letter of demand dated 23 June 1993.
- 70. On 25 June 2007, each party filed a request for production of documents.
- 71. By procedural order of 9 August 2007, the Tribunal (i) noted that in response to the Respondent's request for document production Claimant produced Exhibits C-103 to C-109 and (ii) denied all other or further reaching requests.
- 72. On 22 October 2007, the Claimant filed its Reply on the Merits entitled "Claimant's Memorial on the Merits" (the "Reply"). The Reply was accompanied by 27 legal authorities (Exh. C-112 to C-139) and two witness statements by Mr. Lorenzo Nassuato (WS Nassuato; Exh. C-110) and Mr. Pietro Galizzi (WS Galizzi; Exh. C-111).
- 73. On 14 January 2008, the Respondent filed its Rejoinder on the Merits (the "Rejoinder"). The Rejoinder was accompanied and three additional witness statements by Mr. Mohammed Quamruzzaman (second WS Quamruzzaman), Mr. Abdul Monsur Md. Azad (second WS Azad) and Mr. Salahuddin Ahmad (second WS Ahmad) as well as 8 additional legal authorities.
- 74. In its Rejoinder and by letter of 25 January 2008, Bangladesh submitted that Saipem's witnesses should not be allowed to give evidence, which was immediately contested by Saipem. Upon a request by the Tribunal, by letter of 30 January 2008, Saipem filed an additional response to Bangladesh's objection as to the witnesses.
- 75. On 1 February 2008, the Tribunal held a telephone conference with counsel for the purpose of organizing the forthcoming hearing, the content of which was summarized

in a procedural order dated 8 February 2008. In its relevant part, the procedural order reads as follows:

WITNESSES [...]

9. At the telephone conference, the President of the Tribunal informed the parties that the Tribunal had deliberated on the admissibility of Saipem's witnesses and decided to allow such witnesses to give evidence at the hearing. She added that the main reasons for this decision were (i) that the testimonies appeared to be in response to the argument raised in the Respondent's Counter-Memorial that Saipem had failed to exhaust the local remedies, and (ii) that such response was made on the first available occasion within the merits phase, i.e. in the Reply.
10. As a result, the Tribunal will hear the following witnesses:
  - i. Mr. Nassuato
  - ii. Mr. Galizzi
  - iii. Mr. Azad
  - iv. Mr. Quamruzzaman
  - v. Mr. Ahmad.
11. The method of examination of the witnesses will follow the one adopted for the first hearing, i.e.:
  - i. The Party having produced the witness statement will proceed with a brief direct examination (approximately 5 to 10 minutes);
  - ii. The other Party will then cross-examine the witness;
  - iii. The Parties may then proceed with re-direct and re-cross examination. The re-direct examination shall be limited to matters arising out of the cross-examination, and re-cross examination shall be limited to matters arising out of the re-direct examination;
  - iv. The Arbitral Tribunal may ask its questions at any time, but will most likely do so at the end of the examination;
  - v. The Arbitral Tribunal will have control over the hearing and the witness examinations.
12. All witnesses will be sequestered prior to their providing testimony at the hearing. Thus, witnesses will not be able to attend the hearing until after they have provided their testimony.

ORAL ARGUMENTS

13. Following the examination of the witnesses, the Parties will present oral arguments. There will be a first round followed by a short second round.
14. The first round will last between 2.30 and 6 hours maximum for each Party. The second round will last approximately 0.30 minutes each.
15. If the Parties so wish, they may submit a skeleton of their oral arguments as well as any print out of PowerPoint slides, if any, at the time of starting their oral presentations.
16. As a rule and subject to the Tribunal asking for written submissions on specific issues, there will be no post-hearing briefs.

## SCHEDULE

17. March 11: all the witnesses will be heard on the first day. The hearing will start at 9:00 a.m. and last until the examinations are completed.
18. March 12: the hearing will start at 11:00 a.m. and be devoted to the first round of oral arguments by Claimant.
19. March 13: the hearing will start at 9:00 a.m. and be devoted to the first round of oral arguments by Respondent, and possible questions of the Tribunal to be addressed in the rebuttals.
20. March 14: the hearing will start at 9:00 a.m. and be devoted to rebuttal arguments, answers to Tribunal questions, and any outstanding procedural issues.
21. As a rule, the hearing will not end later than 5:30 p.m. on 12 and 13 March. It is anticipated that it will not end later than 12:00 on 14 March.

## MISCELLANEOUS

22. The hearing will be tape recorded and a court reporter will be retained to provide verbatim transcripts with same day delivery.
23. The parties agree that the secretary of the Tribunal need not be present during the hearing. They further agree that Mrs Silja Schaffstein, a doctoral student of the President residing in London, will be present during the hearing to give any practical assistance which may be needed. A CV of Mrs Schaffstein is attached.
24. The hearing will take place at the International Dispute Resolution Centre (IDRC), 70 Fleet Street, London, EC4Y 1EU.
25. The parties confirmed that they do not require interpretation for any of the witnesses.

## 4. THE HEARING ON THE MERITS

76. The hearing on the merits (the "Hearing") was held in London from 11 to 14 March 2008. The Hearing was tape-recorded and a *verbatim* transcript was taken and delivered to the parties and the Tribunal (Tr.).
77. At the outset of the Hearing, Bangladesh submitted a motion to exclude sections 1 to 6 of Mr. Nassuato's WS and paragraphs 2 to 5 of Mr. Galizzi's WS. Having considered the parties' positions, the Tribunal decided that, in conformity with Procedural Order No. 8, it would admit Messrs. Nassuato and Galizzi's evidence, oral and written

only to the extent it is dealing with any facts and circumstances linked to exhaustion of remedies, including any facts and circumstances showing the local climate and the alleged hostility towards Saipem.

(Tr. I 35:18-37:16)

78. During the first part of the Hearing (Days I and II), the Tribunal heard oral testimony from the following witnesses:

- On behalf of Saipem: (i) Mr. Nassuato and (ii) Mr. Galizzi;
- On behalf of Bangladesh: (i) Mr. Azad, (ii) Mr. Quamruzzaman and (iii) Mr. Ahmad.

79. During the second part of the Hearing, the Tribunal heard oral arguments and rebuttal oral arguments by Profs. Crivellaro and Radicati di Brozolo on behalf of Saipem and by Dr. Hossain on behalf of Bangladesh.

80. Throughout the Hearing, the parties filed written notes summarizing and/or completing their oral submissions and produced several documents which were admitted into evidence:

- On behalf of Saipem, the Tribunal received the following documents:
  - A powerpoint presentation in support of Prof. Crivellaro’s oral argument of 12 March 2008;
  - Pleading notes of Prof. Radicati di Brozolo of 12 March 2008 (“RPN I”);
  - Pleading notes of Prof. Radicati di Brozolo of 14 March 2008 (“RPN II”);
  - A copy of the Terms of Reference in the ICC arbitration dated 6th August 1994;
  - An article by Constantine PARTASIDES entitled “*Solutions offered by transnational rules in case of interference by the courts of the seat*”, TDM, Vol. 1- Issue 2- May 2004;
  - Pleading notes on rebuttal of Prof. Crivellaro of 14 March 2008.
- In addition to the request to exclude parts of the Claimant’s witness statements referred to above, Bangladesh handed over the following documents:
  - “Oral submissions” of Dr. Hossain (“HPN”);
  - A binder accompanying Dr. Hossain’s oral submissions including:

- Excerpts of legal materials concerning “Legal principles relied upon by Bangladesh” and
- Copies of “further authorities relied upon by Bangladesh”;
- Two binders containing Bangladesh’s exhibits concerning the Bangladeshi litigation.
- A binder containing Bangladesh’s exhibits concerning the parties contractual relationship.
- A general chronology of the dispute;
- A chronology of the Bangladeshi litigation;
- An excerpt from POUURET/BESSON's "Comparative Law of International Arbitration", 2nd ed, London [etc] 2007.

81. At the end of the Hearing, the parties expressed that they were satisfied with the manner in which the procedure had been conducted (Tr. IV 125:16-126:4). Saipem reserved the right to file a request that the Tribunal order the filing of post-hearing briefs (Tr. IV 125:8-11), but eventually did not do so.

82. The Tribunal has carefully reviewed the record and will now first examine the positions of the parties (III), then analyse the issues deriving from those positions (IV), and set forth the operative part of its decision (V).

83. On 3 June 2009, the Tribunal closed the proceedings.

### **III. PARTIES’ POSITIONS**

#### **1. SAIPEM’S POSITION**

84. In its written and oral submissions, Saipem has essentially put forward the following eight 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 to obtain satisfaction of its claims;

- (ii) 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;
- (iii) The courts of Bangladesh acted without jurisdiction and/or illegally when revoking the ICC Tribunal's authority while the parties had agreed on ICC arbitration and thereby entrusted such power to the ICC Court of Arbitration and excluded the authority of the courts at the seat of the arbitration.
- (iv) The courts of Bangladesh acted illegally when revoking the ICC Tribunal on spurious grounds.
- (v) The actions of Petrobangla and of the courts of Bangladesh are attributable to the Republic of Bangladesh.
- (vi) The disputed actions amount to an illegal expropriation without compensation of Saipem's rights to arbitration and under the Award, in violation of Article 5 of the BIT.
- (vii) The decision to revoke the ICC Tribunal's authority and the subsequent decision to declare the ICC Award non-existent precluded the enforcement of the award in Bangladesh or elsewhere and thus deprived Saipem of the compensation for the expropriation of its investment.
- (viii) Since the expropriation consisted foremost in rendering a perfectly valid arbitral award worthless and unenforceable, the loss suffered by the Claimant is the amount awarded in the ICC Award plus whatever additional cost or damage Saipem incurred as a consequence of the impossibility to enforce the Award immediately.

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

declare that the Respondent has violated its obligations under the BIT and international law;

order the Respondent to compensate the damage caused to the Claimant in the amount quantified in Part V, including compound interest; [that is:

- (i) the amount awarded to it in the ICC Award, i.e. USD 5,883,770.80, plus interest at the rate set out in the Award of 3.375% per annum,

- from 7 June 1993 until 9 May 2003, viz. the date at which the expropriation was committed;
- (ii) the amounts of USD 265,000.00 and € 110,995.92 awarded to the Claimant in the ICC Award in respect of the costs of the ICC Arbitration and the related legal expenses plus interest;
  - (iii) interest on the amounts in (i) and (ii) above at the rate provided for by Article 5 of the BIT, viz. six-month LIBOR. from 10 May 2003 to the date of payment;
  - (iv) the costs, legal fees and all related expenses incurred by Saipem (a) to defend itself in the spurious litigation commenced by Petrobangla before the Courts of Bangladesh to derail the ICC Arbitration and to sabotage the ICC Award; (b) the costs, legal fees and all related expenses incurred by Saipem to defend itself in the litigation in Italy in connection with Petrobangla's abusive attempt to call the Warranty Bond; and (c) the costs related to maintaining the Warranty Bond since the date when it should have been returned to Saipem, all amounting to USD 1,120,000 (Exhibit C-29);
  - (v) interest on the amount under (iv) above at the six-month LIBOR BIT rate from 31 December 2000. This date is the mid-point of the period starting from 24 November 1997 (the date of the first interference of the Bangladeshi judiciary) until today during which such costs were incurred,
- [...]
- ([v]i) the return or cancellation of the Warranty Bond dated 27 June 1992 issued by Banque Indosuez in the amount of USD 869,903.50 and Taka 10,391,605.00 as established in the ICC Award; or, in the event that Petrobangla obtains payment of the Warranty Bond, the amount of the Warranty Bond, plus interest at the BIT Libor Rate from the date at which Saipem will have to pay the amount thereof to the Bank.]

and

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

(Reply, p. 41, ¶ 151 and SoC., pp. 73-75, ¶¶ 272, 274 and 275)

## 2. BANGLADESH'S POSITION

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

- (i) Since the seat of the ICC Arbitration was Dhaka, the courts of Bangladesh had jurisdiction to revoke the authority of the ICC Arbitral Tribunal;

- (ii) The decision to revoke the authority of the ICC Tribunal was made in accordance with the applicable standards under Article 5 of the Arbitration Act 1940;
- (iii) Saipem elected not to lodge an appeal against the decision to revoke the authority of the ICC Tribunal. It has thus deprived Bangladesh of the opportunity to rectify alleged wrongdoings of its lower courts in connection with the ICC Arbitration, if any;
- (iv) The ICC Award was erroneous and could have been vacated on appeal;
- (v) By agreeing on ICC Arbitration in Dhaka, Saipem accepted any potential failure to enforce an ICC award in its favour in Bangladesh as a calculated business risk.

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

- (1) that Saipem had not made any investment in Bangladesh
- (2) alternatively, Saipem's alleged investment rights and in particular the ICC Award were not in fact expropriated
- (3) further or alternatively, those rights alleged to have been expropriated did not have any residual value at the date of expropriation
- (4) further or alternatively, no loss or damage was caused by any of the alleged actions of Petrobangla which can be attributed to Bangladesh or of the Courts of Bangladesh and for which compensation is payable

[...] Bangladesh invites the Tribunal to dismiss the claim in its entirety and render an award in its favour.

(Rejoinder, p. 44, ¶¶ 145-146)

## **IV. ANALYSIS**

### **1. INTRODUCTORY MATTERS**

88. As a threshold matter, the Tribunal wishes to address the relevance of prior decisions (1.1) and the significance of the Decision on Jurisdiction (1.2) as well as the applicable law (1.3). It will then address some further preliminary issues, in particular the relevance of mistakes allegedly made by the ICC Tribunal (1.4) and some evidentiary issues (1.5). Finally, for the sake of clarity, the Tribunal will set out some uncontroversial matters and list the issues to be analysed (1.6).

## 1.1 The relevance of previous decisions or awards

89. In support of their positions, both parties relied on previous 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.
90. The Tribunal considers that it is not bound by previous decisions<sup>10</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>11</sup>.

## 1.2 The relevance of the Decision on Jurisdiction

91. On 21 March 2007, the Tribunal issued its Decision on Jurisdiction, in which it held *inter alia* that the present dispute was within the jurisdiction of the Tribunal. The operative part of the Decision on Jurisdiction is quoted in the part of this award setting out the procedural history (see above ¶¶ 66). For the sake of clarity, the Tribunal wishes to emphasize that the findings and the analysis made in the Decision on Jurisdiction are hereby incorporated by reference into the present award.
92. In its Decision on Jurisdiction, the Tribunal held in particular on a *prima facie* basis that “the facts alleged by Saipem would be capable of constituting an expropriation under Article 5 of the BIT if they were established” during the merits phase of the arbitration. It expressly reserved its determination of the following matters for the present phase of the arbitration:
- (i) “whether the rights asserted by Saipem do exist” (Decision on Jurisdiction, ¶¶ 97);

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<sup>10</sup> See e.g., *AES Corporation v. the Argentine Republic*, ICSID Case No. ARB/02/17, Decision on jurisdiction of 13 July 2005, ¶¶ 30-32; available at [http://www.investmentclaims.com/decisions/AES-Argentina\\_Jurisdiction.pdf](http://www.investmentclaims.com/decisions/AES-Argentina_Jurisdiction.pdf).

<sup>11</sup> On the precedential value of ICSID decisions, see Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, Freshfields lecture 2006, *Arbitration International* 2007, pp. 368 *et seq.*

- (ii) “whether or not Petrobangla and the Courts of Bangladesh actually breached the guarantees of the BIT” (Decision on Jurisdiction, ¶ 134);
  - (iii) “[w]hether Saipem’s treaty claim is well-founded” (Decision on Jurisdiction, ¶ 142);
  - (iv) whether the disputed actions are attributable to Bangladesh (Decision on Jurisdiction, ¶ 148).
93. By contrast and contrary to Bangladesh’s contention at the Hearing, the Tribunal did finally determine in the Decision on Jurisdiction “1) that there was an investment by Saipem; and 2) that the present dispute arises directly out of such investment” (Tr. III 47:3-6). Indeed, these matters were determinative of the issue of jurisdiction.
94. With respect to the other challenges made by Bangladesh in respect to the Decision on Jurisdiction (see in particular Rejoinder ¶ 90), the Tribunal has found no indication on record likely to change the findings made and the conclusions reached in the Decision on Jurisdiction, assuming it had the power to make such a change.

### **1.3 Applicable law(s)**

95. 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).
96. Specifically, Saipem relies upon the protection afforded by Article 5 of the BIT, which reads as follows:

#### Article 5

##### Nationalization or Expropriation

- (1) The investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily 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.

(3) The just compensation shall be equivalent to the real market value of the investment immediately prior to the moment in which the decision to nationalize or expropriate is announced or made public, and shall be calculated according to internationally acknowledged evaluation standards. Whenever there are difficulties in ascertaining the market value, the compensation shall be calculated on the basis of a fair appraisal of the establishment's constitutive and distinctive elements as well as of the firm's activities components and results. Compensation shall include interest calculated on a six-month LIBOR basis accruing from the date of nationalization or expropriation to the date of payment. In the event of failure to reach an agreement between the investor and the Contracting Party having liability, the amount of the compensation shall be calculated following the settlement of dispute procedure provided by Article 9 of this Agreement. Once the compensation has been determined, it shall be paid promptly and authorization for its repatriation in convertible currency issued.

97. As already mentioned in the Decision of Jurisdiction, Article 9(1) of the BIT contemplates the possibility of recourse to the jurisdiction of ICSID with respect to

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 [...]

98. Article 42(1) of the ICSID Convention provides the following choice of law rules:

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

99. Since Saipem's claim is based on Article 5 of the BIT, the Tribunal will primarily apply the BIT as the applicable rule of international law. The Tribunal will also apply the general rules of international law that may be applicable, either because an issue of international law is not directly dealt with in the BIT or, if necessary, to interpret the BIT. Pursuant to Article 12(1) of the BIT, the Tribunal will also apply general international law where it may provide a more favourable solution than the one arising from the BIT:

Whenever any issue is governed both by this Agreement and by another International Agreement to which both the Contracting Parties are parties, or whenever it is

governed otherwise by general international law, the most favourable provisions, case by case, shall be applied to the Contracting Parties and to their investors.

100. Moreover, pursuant to Article 42(1) of the ICSID Convention, national Bangladeshi law may also come into play in the present arbitration, in particular when Article 5 of the BIT itself refers to national law.

101. Finally, for the sake of completeness, the Tribunal wishes to point out that it is undisputed that the ICC Arbitration was governed by the arbitration law of Bangladesh, the latter being the country of the seat of the arbitration.

#### **1.4 Are the alleged mistakes contained in the ICC Award relevant?**

102. Saipem summarizes its case by indicating that the dispute before this Tribunal

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.

(Reply, p. 8/9, ¶ 34)

103. It is Saipem's position that the dispute before this Tribunal is not concerned with the performance of the Contract nor with the conduct of the ICC Arbitration, but exclusively with the illegal interference of Petrobangla and of the courts of Bangladesh with the ICC Arbitration process and Award. Accordingly, Saipem argues that only the facts relating to this interference have a bearing in the present context and that "the Tribunal here is called upon simply to take the Award as a given" (RPN I, p. 4; Tr. II 87:11-13).

104. On the other hand, in its written and oral submissions, Bangladesh argues that the ICC Tribunal acted wrongfully and that the ICC Award is "clearly wrong" and/or "outside the tribunal's jurisdiction", in particular as it misunderstood the implications of the Compromise. In substance, Bangladesh contends that

[i]n respect of the claim for Additional Compensation, the ICC Tribunal [...] completely failed to properly consider the effect of this correspondence which established the Compromise as stated above. Further it failed to consider the impact of the Compromise upon the sums paid by Petrobangla to Saipem. Finally it failed in its deliberations to note and give effect to the *ad hoc* arbitration agreement contained therein. Indeed by so doing the ICC Tribunal went outside the scope of the arbitration agreement in the Pipeline Contract and had no jurisdiction to deal with the sum payable under the Compromise. This would have been another ground for revoking the authority of the arbitrators.

It should also be noted that as far as this claim is concerned the ICC Tribunal proceeded on the basis that there was an agreement between the parties in the sum of US\$14 million. As stated above this is clearly wrong. The Terms of Reference shows [*sic*] clearly that there was no issue to be decided by the Tribunal as to whether Saipem or Petrobangla were responsible for the delay and whether the compensation paid to Saipem was unconditionally due under the Compromise to Saipem.

In respect of the other three claims found by the ICC Tribunal, no issue was raised as to why they were not paid except that in respect of the claim for the progress payments, it mentioned the injunction granted by the Bangladeshi court. Further, no findings were made as to the reason why Petrobangla did not make those payments except, as stated above, the injunction was mentioned in passing in dealing with the progress payments. Therefore, the ICC Tribunal did not go into the issue of why the payments were not made by Petrobangla.

(Rejoinder, pp. 16-17, ¶¶ 51-53, references omitted)

105. As already mentioned, it clearly appears from the Terms of Reference (Exh. R-70) and the ICC Award (Exh. C-6) (see above ¶ 26), a copy of which was redistributed by Saipem at the Hearing, that the parties submitted the entire dispute to the ICC Tribunal, including the performance or non-performance of the so-called Compromise (Tr. II 14:10-15:15 and IV 6:7-7:16).

106. Moreover, and most importantly, Petrobangla did not request (and the courts of Bangladesh did not order) the revocation of the ICC Tribunal's authority on these grounds. The revocation took place well before the issuance of the ICC Award. According to Bangladesh's own position, the request for revocation was due to the alleged misconduct by the Tribunal in the course of the arbitration:

During the ICC proceedings, Petrobangla, raised certain objections before the ICC Tribunal regarding the conduct of the proceedings [...]. These objections being largely unsuccessful and fearing injustice, Petrobangla then approached the Courts of Bangladesh seeking revocation of the ICC Tribunal's authority under Section 5 of the Arbitration Act 1940.

(Rejoinder, p. 17, ¶ 54, emphasis added)

107. Indeed, the Revocation Decision, which was taken in the course of the arbitration well before the Award was rendered, was based on procedural grounds solely (see above, ¶ 40). Likewise, the decision of the High Court Division of the Supreme Court of Bangladesh of 21 April 2004 stated that “there is no Award in the eye of the law” was exclusively based on the ground that “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” (see above, ¶ 50). It did not make any reference to alleged deficiencies in the ICC Award in connection with the scope of its jurisdiction and the merits of the dispute.

108. For these reasons, the fact that some of the findings of the ICC Award “would have been another ground for revoking the authority of the arbitrators” (Rejoinder, p. 16, ¶ 51) as well as the facts developed in paragraphs 15 to 34 of the Rejoinder (see above ¶ 23) are not directly relevant to determine whether the intervention of the courts was lawful.

109. Bangladesh further argues that Saipem’s case “assumes the validity of the ICC Award, which the Respondent strongly disputes” (Rejoinder, p. 25, ¶ 82; Bangladesh had developed this argument in order to show that the ICC Award was not an investment). This argument echoes Bangladesh’s position at the jurisdictional stage that

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.

(Counter-Memorial, p. 59)

110. As already stated in the Decision on Jurisdiction, the Tribunal understands Saipem’s case to be that Bangladesh frustrated its rights by unlawfully interfering in the arbitration process. The fact that the reparation claimed in this arbitration is by and large equivalent to the amounts awarded in the ICC Arbitration, does not in and of itself mean that this Tribunal would “enforce” the ICC Award in the event of a treaty breach.

## 1.5 Evidentiary issues

### 1.5.1 Press clippings attached to Mr. Nassuato's WS

111. At the Hearing, the Tribunal decided that “the admissibility of the press clippings [attached to Mr. Nassuato's WS] [would] be dealt with in the award (Tr. IV 124:20-21). The issue will be addressed below when discussing Mr. Nassuato's testimony.

### 1.5.2 Burden and standard of proof

112. Pursuant to ICSID Arbitration Rule 34(1), the Tribunal has full discretion in assessing the probative value of the evidence before it.

113. The Tribunal accepts Bangladesh's position, based *inter alia* on *Tradex v. Albania*<sup>12</sup>, that “[t]he burden rests upon Saipem to prove the necessary elements of its claim” (Tr. III 50:11-12). It is a well-established rule in international adjudication that the burden of proof lies with the party alleging a fact, whether it is the claimant or the respondent<sup>13</sup>. Indeed, Saipem did not take issue with this rule.

114. With respect to the standard of proof, it is Bangladesh's submission “that the standard of proof is proof on a balance of probabilities” (Rejoinder p. 21, ¶ 69), being understood that “the standard for criminal acts, such as conspiracy and collusion of State judiciary, will be held to a higher standard [...] namely beyond reasonable doubt” (Id. p. 33 ¶ 107). Saipem did not dispute this submission. The Tribunal will dispense with making a final ruling on the allegedly more stringent standard to prove conspiracy and/or collusion, since such a finding is not necessary in the present context.

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<sup>12</sup> *Tradex Hellas SA v. Albania*, ICSID No. ARB/94/2 Award of 29 April 1999, at ¶¶ 75, 91, 112 and 197.

<sup>13</sup> *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 177; *Soufraki v. UAE*, ICSID Case No. ARB/02/7, Award, 7 July 2004, ¶¶ 58, 81; *Thunderbird v. Mexico* (UNCITRAL), Award, 26 January 2006, ¶ 95; *Saipem v. Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction, 21 March 2007, ¶ 83. See also the ICJ in: *Case concerning Avena and other Mexican Nationals*, (*Mexico v. United States of America*), Judgment, 31 March 2004, ICJ Reports 2004, p. 41, ¶¶ 55-57; *Military and Paramilitary Activities in and Against Nicaragua*, (*Nicaragua v. United States of America*), Judgment, 26 November 1984, ICJ Reports 1984, p. 437, ¶ 101, See also Article 24(1) of the 1976 UNCITRAL Arbitration Rules.

## 1.6 Uncontroversial matters and issues

115. It is undisputed, and rightly so, that (i) the parties have freely agreed to the choice of Dhaka as the seat of the ICC Arbitration, (ii) Bangladeshi arbitration law is thus applicable to the arbitration, and (iii) as a matter of principle, the courts of Bangladesh have supervisory jurisdiction over the arbitration.
116. The primary issue in the present arbitration is whether the intervention of the courts of Bangladesh remained within the limits of their supervisory jurisdiction and whether that intervention amounted to an expropriation (see below Section 2).
117. To answer this question in light of the parties' submissions, the Tribunal will have to address the following main sub-issues:
- (i) Did Bangladesh's actions meet the general conditions of an expropriation (see below Section 2.1)?
  - (ii) Are the disputed actions of the courts of Bangladesh illegal (see below Section 2.2)?
  - (iii) Did Saipem have to exhaust local remedies (see below Section 2.3)?
  - (iv) Did Saipem accept the risk of the revocation of the arbitrators' authority by agreeing to Dhaka as the seat of the arbitration (see below Section 2.4)?
  - (v) Are the disputed actions attributable to Bangladesh (see below Section 2.5)?
118. Should the Panel find that the actions of the courts of Bangladesh constitute an illegal expropriation, the Tribunal will have then to determine the following additional issues:
- (i) What is the amount of the compensation due (see below Section 3)?
  - (ii) Is there a causative link between the damages claimed by Saipem and the expropriation (see below Section 4)?
119. In any event, the Tribunal will have to rule on costs (see below Section 5).

**2. DO THE DISPUTED ACTIONS CONSTITUTE AN “EXPROPRIATION” WITHIN THE MEANING OF ARTICLE 5 OF THE BIT?**

120. It is Saipem’s case that the disputed actions amount to an expropriation without compensation of Saipem's rights to arbitration and to the Award, in violation of Article 5 of the BIT. More particularly Saipem contends that it is deprived 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 its investment.

121. Upon a direct question by the Tribunal at the Hearing, Saipem confirmed that its “claim is for expropriation” (Tr. II 136:12), although several references were made to fair and equitable treatment and denial of justice in the course of the proceedings. It explained that

Saipem does consider that the misconduct of the domestic courts did also amount to a denial of justice, at least in the form of a "Prevention from arbitrating", or, "Obstruction of the agreed mechanism for the settlement of the disputes arising from the contract".

However, Article 9.1 of the BIT does not confer to your Tribunal jurisdiction over a claim based on denial of justice, and restricts your jurisdiction to a claim for expropriation. This is why we did not bring a claim on the ground of denial of justice before you.

Second, Saipem does equally consider that through the misbehaviours of Petrobangla (a State organ) and its courts, Bangladesh has certainly, according to us, undoubtedly treated Saipem unfairly and inequitably, and in a manner that is below the standard required by international law. However, again, Article 9.1 of the BIT does not confer to your Tribunal jurisdiction over a claim based on breach of the standard of treatment, in particular of the fair and equitable treatment, restricts your jurisdiction to expropriation.

(Tr. IV 18:25-19:23)

122. In its Decision on Jurisdiction, the Tribunal has already held that the right to arbitrate and the rights determined by the Award are capable in theory of being expropriated. It

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”.

123. To answer this question, the Tribunal will first set out the general conditions of expropriation (2.1) and then discuss the problematic conditions in the present case, *i.e.*, the so-called illegality of the expropriation (2.2), the need to exhaust local remedies (2.3), and whether Saipem had accepted the risk of revocation of the arbitrators’ authority by agreeing to Dhaka as the seat of the arbitration (2.4). Finally, the Tribunal will discuss whether the expropriatory act can be attributed to Bangladesh and thus engage Bangladesh's responsibility under the BIT (2.5).

## **2.1 The general conditions of expropriation**

124. In its relevant parts, Article 5 of the BIT reads as follows:

### Article 5

#### Nationalization or Expropriation

- (1) The investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily 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.

125. In other words, the guarantee against expropriation of Article 5(2) only comes into play if (i) there is an expropriation and (ii) that expropriation is not justified by "public purposes" or "national interest", does not conform to "all legal provisions and procedures", is not adequately compensated, or is discriminatory.

126. In the present case, the debate has hinged upon the existence of an expropriation in the meaning of the BIT. It has not focused on the conditions of a lawful or admissible expropriation. In particular, Bangladesh did not claim that the intervention of the local courts was driven by public purposes or national interest, and it is common ground that no compensation was paid. Hence, the question that the Tribunal must answer is

whether the disputed actions constitute an expropriation within the meaning of Article 5 of the BIT. This presupposes that “property” has been “taken” by the State.

127. It is Saipem’s position that “an illegal action of the judiciary which has the effect of depriving an investor of its contractual or vested rights constitutes an expropriation which engages the State’s international responsibility” (SoC., p. 52, ¶ 196). This position relies on the presently prevailing view pursuant to which any interference with the exercise of property (or “expropriable” rights), however defined, can amount to an expropriation, including indirect and *de facto* expropriation, provided that the deprivation is irreversible (see the authorities quoted in SoC., pp. 61-65, ¶¶ 230-244).
128. Turning first to the identification of the property at stake, the Tribunal considers that the allegedly expropriated property is Saipem’s residual contractual rights under the investment as crystallised in the ICC Award (see Decision on Jurisdiction, ¶ 127). Bangladesh has not put forward convincing arguments that such rights should not be considered expropriable rights.
129. In respect of the taking, the actions of the Bangladeshi courts do not constitute an instance of direct expropriation, but rather of “measures having similar effects” within the meaning of Article 5(2) of the BIT. Such actions resulted in substantially depriving Saipem of the benefit of the ICC Award. This is plain in light of the decision of the Bangladeshi Supreme Court that the ICC Award is “a nullity”. Such a ruling is tantamount to a taking of the residual contractual rights arising from the investments as crystallised in the ICC Award. As such, it amounts to an expropriation within the meaning of Article 5 of the BIT.
130. It is true that one could object – Bangladesh did not – that in theory Saipem can still benefit from the ICC Award (or from the ICC arbitration agreement). Yet, Bangladesh itself acknowledges that Petrobangla has “no assets outside Bangladesh” (Counter-Memorial, ¶ 5.24, p. 65). Hence, the perspective that the ICC Award could possibly be enforced under the New York Convention outside Bangladesh despite having been declared “a nullity” by the Bangladeshi courts has no realistic basis. Because, by the Respondent’s own admission, the ICC Award could not be enforced outside Bangladesh, the intervention of the Bangladeshi courts culminating in the declaration of the Supreme Court that the ICC Award was “non-existent” substantially deprived Saipem of its rights and thus qualifies as a taking.

131. In contrast to the actions of the courts, the conduct of Petrobangla does not qualify as a "taking". Indeed, it is generally accepted that an act must be governmental in nature to constitute an expropriation. In other words, only acts of the government that cannot be performed by private parties can constitute an expropriation<sup>14</sup>. In the present case, it is undisputable that Petrobangla did not act in a governmental capacity in connection with the ICC proceedings. Therefore, Petrobangla's actions in the course of the ICC proceedings, whether justified or not, cannot amount to an expropriation.
132. As a result, the only actions at stake in the present arbitration are those of the courts of Bangladesh. The parties' main disagreement with respect to these actions revolves around two questions, *i.e.*, whether the disputed actions were "illegal" (2.2) and whether they were "irreversible" (2.3).

## **2.2 Are the disputed actions illegal?**

133. As a preliminary matter, the Tribunal wishes to emphasize that according to the so-called "sole effects doctrine", the most significant criterion to determine whether the disputed actions amount to indirect expropriation or are tantamount to expropriation is the impact of the measure. As a matter of principle, case law considers that there is expropriation if the deprivation is substantial<sup>15</sup>, as it is in the present case (see above ¶¶ 129). That said, given the very peculiar circumstances of the present interference, the Tribunal agrees with the parties that the substantial deprivation of Saipem's ability to enjoy the benefits of the ICC Award is not sufficient to conclude that the Bangladeshi courts' intervention is tantamount to an expropriation. If this were true, any setting aside of an award could then found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds.
134. In effect, both parties consider that the actions of (or the actions attributable to) Bangladesh must be "illegal" in order to give rise to a claim of expropriation. They have devoted a major part of their submissions to the issue of illegality. For the sake of

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<sup>14</sup> See for instance *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Award, 22 December 2003, available at [http://ita.law.uvic.ca/documents/ConsortiumRFCC-Award\\_000.pdf](http://ita.law.uvic.ca/documents/ConsortiumRFCC-Award_000.pdf); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518, ¶ 161; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, 43 ILM (2004) 967, ¶¶ 174-175; *Impregilo S.p.A. v. Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, 12 ICSID Reports 245, ¶ 281.

<sup>15</sup> See for instance *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica* ICSID Case No. ARB/96/1, Award of 17 February 2000, 5 ICSID Reports 153, at 77-78.

clarity, the Tribunal emphasizes that the following analysis should not be understood as a departure from the “sole effects doctrine”. It is due to the particular circumstances of this dispute and to the manner in which the parties have pleaded their case, both being in agreement that the unlawful character of the actions was a necessary condition.

135. It is Saipem’s case that several illegal acts were performed by Petrobangla, and/or by the courts of Bangladesh, and/or as the result of collusion between Petrobangla and the courts. Having held that Petrobangla’s actions did not involve the exercise of governmental authority, the Tribunal will limit its enquiry to the acts of the Bangladeshi courts.
136. Saipem submits that the intervention of the courts with respect to the revocation of the arbitrators, was unlawful for two main reasons: the courts lacked jurisdiction to revoke the authority of the ICC Tribunal (2.2.1), and they decided the revocation on spurious grounds (Tr. IV 45:13-18) (2.2.2). The decision of the Supreme Court declaring the award inexistent “built on an earlier patent and very serious illegality which would have been very easy to ascertain, thereby further compounding the illegality of the conduct of the judiciary as a whole” (SoC. p. 29, ¶ 117) (2.2.3).

### ***2.2.1 The courts’ jurisdiction to revoke the authority of the ICC Arbitral Tribunal***

137. According to Saipem, the first reason why the courts’ intervention leading to the revocation of the ICC Tribunal was illegal is that the courts of Bangladesh violated the fundamental principle of party autonomy by asserting jurisdiction over the revocation (Tr. II 96:25-97:1)<sup>16</sup>.
138. As already mentioned, it is undisputable that Article 2.8 of the ICC Rules required the parties to the arbitration to resort to the ICC for matters of revocation. That said, while binding on the parties, the ICC Rules are not binding upon national courts. Hence, the Tribunal fails to see how the assertion of jurisdiction by the courts of Bangladesh can be deemed illegal on this ground. Indeed, it is generally accepted that national arbitration law can provide for a solution which is different from the ICC Rules. For instance, as mentioned by both parties, Dutch arbitration law provides that the local

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<sup>16</sup> See also Reply, p. 12, ¶¶ 41-42: the “scandalous decision of 5 April 2000 which revoked the ICC Tribunal’s authority” is “plainly illegal under the principles of international arbitration, *the agreement of the parties* and Bangladeshi law itself” (emphasis added).

courts have mandatory jurisdiction over a challenge and revocation of the authority of arbitrators and no one would think of claiming that the courts of the Netherlands breach international law by asserting jurisdiction over a request to challenge or revoke an ICC arbitrator.

139. Another question is whether the intervention of the courts of Bangladesh may be regarded as illegal because the courts did not have jurisdiction under the Bangladeshi Arbitration Act of 1940 (BAA). Article 5 BAA, which is the pertinent provision, reads as follows:

The authority of the appointed Arbitrator or umpire shall not be revocable except by leave of the court, unless a contrary intention is expressed in the arbitration agreement.

140. The parties disagree on the interpretation of this provision and in particular on the meaning of the phrase “unless a contrary intention is expressed”. Saipem asserts that “a contrary intention is the one to confer jurisdiction on this matter to the body that the parties have chosen [here the ICC Court of arbitration]” (Tr. II 97:13-16). By contrast, Bangladesh posits that “the ‘unless’ provision would only apply to give the concurrent jurisdiction to someone else” but “would not exclude the jurisdiction of the Bangladesh courts” (Tr. III 165:3-8). In other words, Saipem views the authority of the ICC Court as exclusive, while Bangladesh considers it to be concurrent with the jurisdiction of the courts at the seat of the arbitration.
141. At the Hearing, Saipem argued that even if the jurisdiction of the local courts is concurrent with the one of the ICC Court, as submitted by Bangladesh, “the[ir] supervisory role is subsidiary, *i.e.*, it can be exercised only after the contractually agreed method has been exhausted”. According to Saipem, the exclusion of the recourse to the ICC Court of Arbitration – as it exists for instance under Dutch law – constitutes an exception to the paramount principle of party autonomy and thus needs to be “spelled out clearly by the law”, which is not the case of Bangladeshi law (RPN II, ¶¶ 13-14, Tr. IV 42:17-25)<sup>17</sup>.
142. The Tribunal is sympathetic towards Saipem’s position, in particular in light of the emphasis that the courts of Bangladesh usually put on party autonomy when dealing with arbitration in general and with challenges of arbitrators in particular. Indeed, as

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<sup>17</sup> See also SoC., p. 30, ¶ 123.

correctly pointed out by Saipem, the precedent quoted by Bangladesh in these proceedings seems to confirm that Bangladeshi courts acknowledge the principle of sanctity of contract including when it comes to disqualifying an arbitrator<sup>18</sup>.

143. That said, Bangladesh is right that the interpretation of Article 5 BAA is a matter of Bangladeshi law and that Saipem has produced no expert opinion to rebut Mr. Razzaq's expert evidence pursuant to which<sup>19</sup>:

The Arbitration Act 1940 applies when the seat of arbitration is in Bangladesh. [...]

[...] if in an arbitration proceeding taking place in Bangladesh under the ICC Rules, it appears to a party that the arbitrators are biased or otherwise guilty of misconduct, he may by an application under section 5 of the Arbitration Act, 1940 seek revocation of his authority. It does not matter whether the arbitration is being conducted according to the Rules of the ICC or any other law and whether parties had failed to specifically mention that the arbitration was to be conducted in accordance with the Act of 1940.

(Legal Opinion on Issues on Bangladeshi Law accompanying Mr. Razzaq's WS, pp. 16-17, ¶¶ 7.2 and 7.5)

144. For these reasons, the Tribunal considers that it is not established that the ICC Court's authority as regards revocation is exclusive under the applicable Bangladeshi law.

### **2.2.2 The "merits" of the courts' decision to revoke the authority of the arbitrators**

145. Saipem further contends that, irrespective of whether the courts of Bangladesh were right in asserting jurisdiction to hear the challenge brought by Petrobangla, they acted in severe contrast with all universally accepted rules regarding international arbitration, the New York Convention and other principles of international law as well as the law of Bangladesh itself. Both parties accept that it would have been illegal for the Bangladeshi courts to conspire and collude with Petrobangla to sabotage the ICC Arbitration against Saipem (a). The Tribunal considers that, among the general principles of law that come into play, the principle of the prohibition of abuse of rights deserves special attention in the present instance (b). It will also discuss the merits of

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<sup>18</sup> See for instance *Bhuwalaka v. Fathebobant*, attached to Mr. Razzaq's supplementary statement, in particular the passage at p. 294, also restated in Reply, ¶ 72, p. 20).

<sup>19</sup> Nor did Mr. Ahmad under cross-examination depart from his statement that there is an "option" to bring the question of the arbitrators' revocation either before the ICC or before the local courts (Tr. I 252:25-254:5).

the court's decision to revoke the authority of the ICC Tribunal under the general principles of international arbitration (c) and the New York Convention (d).

**a) *Conspiracy and collusion***

146. As a preliminary matter, the Tribunal needs to deal with Saipem's allegation that Petrobangla acted in collusion with the Bangladeshi courts and/or conspired with them. The Tribunal notes that Saipem does not point to any specific evidence establishing such conspiracy or collusion. Ultimately, Saipem relies exclusively<sup>20</sup> on the following chronology of events (Tr. I 43:6-44:11):

- Petrobangla raised its procedural motions at a very precise moment in time, namely between 22 and 25 July 1997. Following the ICC Tribunal's refusal, Petrobangla reiterated its applications on 26 August 1997.
- The ICC Tribunal rejected these once again on 21 September 1997.
- Less than two months later, on 16 November 1997, Petrobangla resorted to the local courts claiming misconduct and requesting a stay of the arbitration and/or the revocation of the arbitrators.
- About one week later, Petrobangla obtained an injunction based on arbitral misconduct.

147. In the Tribunal's view, this chronology only indicates that there is an obvious nexus between Petrobangla's dissatisfaction with the ICC Arbitration and its actions before the Bangladeshi courts. The fact that the Bangladeshi courts eventually ruled in favour of Petrobangla does not in and of itself constitute evidence of conspiracy or collusion. After all, as convincingly pointed out by Bangladesh, the courts refused the orders sought by Petrobangla on at least two occasions (Counter-Memorial, ¶ 2.81, p. 39). In fact, at the end of the Hearing, Saipem was merely "inclined to believe that there were both conspiracy and collusion" (Tr. IV 27:13-15).

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<sup>20</sup> At the beginning of the Hearing, Saipem stated that it had "several proofs, or at least strong indications [of collusion and conspiracy between Petrobangla and the courts]". In addition to the "chronology and timing" discussed in this paragraph, Saipem evoked "the absolute innocence of the Tribunal, [...] the lack of jurisdiction of the local judiciary [and] the[ir] biased conduct" (Tr. I 43:20-44:5). It is unclear how these allegations can establish more than the mere fact that the courts were wrong.

148. In conclusion, irrespective of the applicable standard of proof (see above ¶ 114), the Tribunal is not satisfied that the Bangladeshi courts acted in collusion or conspired with Petrobangla.

**b) Abuse of right**

149. Saipem argues that international law requires state courts to abide by “generally accepted standards of the administration of justice” and that “grossly unfair [...] arbitrary, unjust or idiosyncratic” court rulings constitute a violation of international law (SoC. pp. 54-55, ¶¶ 207-209). Saipem has referred to a convincing line of cases and doctrinal opinions<sup>21</sup> that confirm the emergence of such a general principle.

150. Bangladesh did not contest being under such an international obligation but rather asserted that “Saipem must prove on the facts that there was a ‘clear and malicious misapplication of the law’” by the Bangladeshi courts (see for instance HPN ¶ 33) or, in other words, that Saipem has the burden “to prove that the decision was manifestly abusive” (Tr. III 83:14-15) “to achieve an internationally unlawful end, such that the courts themselves are to be disavowed at international level” (Tr. III 103:12-20).

151. It is Saipem’s submission that the Revocation Decision violates international law as it applied a spurious standard (Tr. IV 121:11-122:2) and was rendered “without making any proper investigation whether Petrobangla’s accusation were founded” (Tr. IV 24:18-22).

152. The analysis of the Revocation Decision shows that Petrobangla’s counsel argued that the ICC Tribunal had “committed manifest error of law” that “would detract from the fairness of the procedure” (Exh. C-11. p. 22) and that the judge explicitly held that the ICC Tribunal had “manifestly committed in disregard to [*sic*] the law and as such the tribunal committed misconduct” (Exh. C-11. p. 23). Specifically, the High Court of Dhaka was based on the ICC Tribunal’s rejection of four of the procedural motions of Petrobangla referred to above (see above ¶ 31):

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<sup>21</sup> Including in particular 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; also E. GAILLARD, *L’interférence des juridictions du siège dans le déroulement de l’arbitrage*, in *Liber Amicorum Claude Raymond*, Paris 2004, p. 91; *Salini Costruttori Sp.A v. The Federal Republic of Ethiopia* (ICC Case No. 10623/AER/ACS), Award regarding the suspension of the proceedings and jurisdiction of 7 December 2001, 42 ILM 609 (2003) and 21 ASA Bulletin 82 (2003), ¶¶ 130-131.

- (i) Petrobangla's request "for excluding from the record the witness statement of [Mr.] J.R. Clark on the ground that he would not be produced before the Tribunal for cross-examination" (Exh. C-11, p. 6), which request was rejected by the ICC Tribunal's Procedural Order of 22 July 1997 (reproduced at ¶ 48 of the ICC Award, Exh C-6, pp. 19-20).
  - (ii) Petrobangla's request "that the Draft Aide Memoire of the World Bank and the appropriate calculations of costs and expenses [contained therein] may not be treated as part of the evidence in the proceeding" because it was not "proved by any witness" and did not fall "within the category of documentary evidence which does not require for a man proof" (Exh. C-11, pp. 7-8), which request was denied by the ICC Tribunal's Procedural Order of 26 July 1997 (reproduced at ¶ 49 of the ICC Award, Exh C-6, p. 20).
  - (iii) Petrobangla's request to hear some questions regarding the insurance policy (Exh. C-11, p. 8), which request was denied by the ICC Tribunal's Procedural Order of 21 September 1997 (reproduced at ¶ 53 of the ICC Award, Exh. C-6, p. 22).
  - (iv) Petrobangla's request that "written transcripts of the evidence" be taken during the hearing (Exh. C-11, pp. 8-9), which request was denied by the ICC Tribunal's Procedural Order of 28 July 1997 (reproduced at ¶ 50 of the ICC Award, Exh. C-6, pp. 21-22).
153. It is Saipem's position that the Revocation Decision is unacceptable under international law since the ICC Tribunal's procedural orders denying Petrobangla's objections "were perfectly well reasoned and entirely justified in the light of the facts of the case and of international arbitration rules and practice" (Reply, p. 10, ¶ 39).
154. It is clear from the wording of the Revocation Decision that Saipem made extensive submissions to the Bangladeshi court to show that the ICC "arbitrators have acted within their jurisdiction and also in a correct manner" (Exh. C-11, pp. 10-15 and 19-21, in particular 11).
155. Having carefully reviewed the procedural orders referred to in the Revocation Decision as the cause of the ICC Tribunal's misconduct, the Tribunal did not find the slightest trace of error or wrongdoing. Under these circumstances, the finding of the Court that

the arbitrators “committed misconduct” lacks any justification. As emphasized by Saipem at the Hearing, if one carefully studies the Revocation Decision of 2 April 2000, one fails to see any reference whatsoever to the law that was allegedly “manifest[ly] disregard[ed]”. By way of consequence, it is unfounded to then infer from such an ill-founded finding of misconduct that “there is a likelihood of miscarriage of justice”. Equally unfounded is the consequence drawn by the Court when declaring the revocation of the authority of the ICC Tribunal. This declaration can only be viewed as a grossly unfair ruling.

156. The Tribunal is reinforced in that conclusion by the fact that Bangladesh does not criticize in these proceedings the conduct of the ICC Arbitral Tribunal. As convincingly stressed by Saipem at the Hearing, Bangladesh does not even try to show that the ICC Arbitrators’ conduct was somehow inappropriate, illegitimate or unfair. To the contrary, Bangladesh tries to justify the decision to revoke the authority of the ICC Tribunal exclusively on the ground that the test set forth in Article 5 of the BAA is not stringent and leaves the authority free to extrapolate that the arbitrators may be likely to commit a miscarriage of justice. In none of its submissions in the present arbitration did Bangladesh even attempt to show that the ICC Tribunal committed misconduct and that such alleged misconduct could reasonably justify the revocation of the arbitrators.
157. Furthermore, inasmuch as the limited contents of the Revocation Decision allow to draw any conclusion as to the reasons of the Court, the Tribunal cannot but agree with Saipem that the judge “simply took as granted what Petrobangla falsely presented” (Tr. II 57:12-13).
158. Finally, the Tribunal notes that there is no indication in the record that the ICC Arbitrators were at any time consulted, let alone heard, by the courts of Bangladesh during the process leading to the decision revoking their authority.
159. For all these reasons, the Tribunal considers that the Bangladeshi courts abused their supervisory jurisdiction over the arbitration process. It is true that the revocation of an arbitrator’s authority can legitimately be ordered in case of misconduct. It is further true that in making such order national courts do have substantial discretion. However, they cannot use their jurisdiction to revoke arbitrators for reasons wholly unrelated with such misconduct and the risks it carries for the fair resolution of the dispute. Taken

together, the standard for revocation used by the Bangladesh courts and the manner in which the judge applied that standard to the facts indeed constituted an abuse of right.

160. It is generally acknowledged in international law that a State exercising a right for a purpose that is different from that for which that right was created commits an abuse of rights<sup>22</sup>. The same principle is expressed in another way by prominent commentators referred to by both parties (Reply, p. 25, ¶ 89 and Rejoinder p. 27, ¶ 88):

We believe that the *lex arbitri* constitutes the primary legal basis for the effectiveness of the arbitration agreement and the arbitrators do not have a discretionary power to disregard injunctions issued by the courts at the seat of the arbitration. To the contrary, they should obey such decision, *unless they are manifestly abusive*<sup>23</sup>.

161. In conclusion, the Tribunal is of the opinion that the Bangladeshi courts exercised their supervisory jurisdiction for an end which was different from that for which it was instituted and thus violated the internationally accepted principle of prohibition of abuse of rights.

**c) *Violation of the principles of international arbitration***

162. Saipem contends that “[t]he illegal decisions of the Bangladeshi judiciary are the most serious violations of general principles of international arbitration” (Reply, p. 24, ¶ 86). That contention is based in particular on the doctrinal writings referred to above, according to which arbitrators are allowed to disregard decisions by the courts having supervisory jurisdiction if their intervention is “manifestly abusive”<sup>24</sup>. Hence, the Tribunal considers that Saipem’s argument does not have an independent bearing in the present arbitration and has already been taken into account in the framework of the prohibition of the abuse of rights.

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<sup>22</sup> See for instance ALEXANDRE KISS, "Abuse of Rights", in Berhardt (Ed), *Encyclopedia of Public International Law*, Vol 1. at 5.

<sup>23</sup> POUURET/BESSON, *op. cit.* at ¶ 80, p. 117 [Exhibit C-116], emphasis added.

<sup>24</sup> *Id.*

**d) *Violation of the New York Convention?***

163. According to Saipem, the intervention of the courts of Bangladesh “amounted purely and simply to a flouting of the arbitration agreement in violation of Bangladesh’s obligation under Article II of the New York Convention” (SoC. p. 53, ¶ 200).
164. In response, Bangladesh essentially considers that the New York Convention is not applicable since the arbitration agreement is governed by the Arbitration Act 1940 (Rejoinder, p. 37, ¶ 122). At the Hearing, Bangladesh expanded on its argument and posited that the New York Convention does not directly apply to the arbitration since Bangladesh has not yet adopted national legislation incorporating the Convention into national law. Hence, according to Bangladesh, the New York Convention “just remains a Treaty obligation between States” (Tr. IV 90:10-13). The Respondent also stated that the New York Convention only deals with the intervention of the courts in respect of the merits of the dispute and expressly reserves the supervisory jurisdiction of Bangladeshi courts (Tr. IV 96:10-17; see also ¶ 172 below).
165. Be this as it may, the Tribunal understands that Bangladesh does not dispute being bound by the New York Convention. The fact that the latter may not be applicable in domestic courts as a matter of national law is irrelevant. Indeed, a breach of the Convention would still engage Bangladesh’s international responsibility. This is clear from Article 27 of the Vienna Convention on the Law of Treaties, which provides that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. It also follows from Article 3 of the International Law Commission’s Articles on State Responsibility for Internationally Wrongful Acts (the “ILC Articles”), pursuant to which “[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law”. Both provisions are declaratory of customary international law.
166. Bangladesh is right that Article II(3) of the New York Convention requires courts of member states to refer the parties to arbitration “when seized of an action in a matter in respect of which the parties have made an [arbitration] agreement”. However, Article II(1) of the New York Convention imposes on Bangladesh a wider obligation to “recognize” arbitration agreements.

167. Based on that obligation, it is for instance generally acknowledged that the issuance of an anti-arbitration injunction can amount to a violation of the principle embedded in Article II of the New York Convention. One could think that the present case is different, however, from an anti-arbitration injunction<sup>25</sup>. Technically, the courts of Bangladesh did not target the arbitration or the arbitration agreement in itself, but revoked the authority of the arbitrators. However, it is the Tribunal's opinion that a decision to revoke the arbitrators' authority can amount to a violation of Article II of the New York Convention whenever it *de facto* "prevents or immobilizes the arbitration that seeks to implement that [arbitration] agreement" thus completely frustrating if not the wording at least the spirit of the Convention<sup>26</sup>. This is indeed what happened here.
168. This conclusion is supported by the fact that in this case several Bangladeshi courts issued injunctions against the continuation of the ICC Arbitration (see above ¶¶ 46-47), thus *de facto* frustrating the arbitration agreement.
169. Finally, one should mention that, as Saipem explicitly admits (RA, p. 10 ¶ 44), the arbitration could in theory have been pursued with a new arbitral tribunal. Given the abusive way in which the courts of Bangladesh exercised their supervisory jurisdiction (see above ¶¶ 149 *et seq.*) over the first ICC Tribunal, the Tribunal finds this perspective unrealistic. There is every likelihood that Saipem would have been exposed to similar risks with a new arbitral tribunal.

**e) Conclusion**

170. In the light of these developments, the Tribunal concludes that the revocation of the arbitrators' authority was contrary to international law, in particular to the principle of abuse of rights and the New York Convention.

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<sup>25</sup> Along the same lines, one should point out that the Award in *Salini v. Ethiopia* [cited above Fn. 21] relied upon by Saipem relates to a different situation as it concerned an injunction by the local court to stay the arbitration itself (and not a revocation of the arbitrators) and relied only marginally on Article II of the New York Convention.

<sup>26</sup> S. M. SCHWEBEL, *Anti-Suit Injunctions in International Arbitration: An Overview*, [cited above Fn. 21], pp. 3-4.

### **2.2.3 The Supreme Court decision declaring the ICC Award “non-existent”**

171. It is Saipem’s contention that the Supreme Court’s decision of 21 April 2004 holding that the ICC Award was “non-existent” was “devoid of any legal foundation” (SoC., 28, ¶ 115).
172. In reply, Bangladesh argues that “the Supreme Court had no duty or power under Bangladeshi law [...] to question the correctness of the Revocation case, nor had Saipem invited it to do so” (Rejoinder, p. 37, ¶ 123). Since it is undisputed that Saipem did not appeal from the decision revoking the arbitrators’ authority, one could argue that the Supreme Court could not disregard that decision. The Tribunal cannot follow this argument. As it stated above, the New York Convention is binding upon Bangladesh as a State and Bangladesh would be responsible for any breach of that treaty.
173. While the decision of the Supreme Court may appear understandable under domestic law, the fact remains that under international law it is flawed. Moreover, the fact that Petrobangla felt compelled to bring an action to set aside the ICC Award tends to demonstrate that the Revocation Decision did not finally dispose of the matter. As a matter of common sense, the Tribunal cannot but agree with Saipem that the Supreme Court’s decision declaring the ICC Award “non-existent” constituted the “coup de grâce” given to the arbitral process, thus removing any doubt that might have remained about the effect of the courts’ intervention.

### **2.3 Did Saipem have to exhaust local remedies?**

174. It is undisputed that Saipem did not make use of its right to appeal the two key decisions, *i.e.*, the Revocation Decision (see above ¶ 42) and the decision of the Supreme Court that the ICC Award was “non-existent” (see above ¶ 51).
175. As a preliminary matter, the Tribunal wishes to emphasize that Article 26 of the ICSID Convention reverses the position existing under traditional international law in that it presumes that States parties to the Convention waive the requirement of exhaustion of local remedies as a condition of consent to international adjudication. Yet, States are entitled to reintroduce such requirement when ratifying the ICSID Convention. In the present case, there is no indication that Bangladesh has elected to require prior

exhaustion of local remedies as a precondition to the admissibility of claims according to Article 26 of the ICSID Convention.

176. Hence, the question that arises is whether the requirement of exhaustion of local remedies which applies as a matter of substance and not procedure in the context of claims for denial of justice, may be applicable here by analogy. In other words, is exhaustion of remedies a substantive requirement of a valid claim for expropriation by actions of the judiciary? If the answer is affirmative, then the further question arises whether the conditions for exhaustion of local remedies are fulfilled in the present case. Because they deal with a substantive component of a treaty breach, these questions must be addressed as part of the merits of the dispute.
177. It is Bangladesh's submission, that "the only applicable or appropriate test for determining 'wrongful interference' by State courts is whether there has been a denial of justice" (Rejoinder, p. 33, ¶ 104). By contrast, Saipem contends that (i) the rule on exhaustion of local remedies does not apply here, and (ii) in any event the requirements of that rule are satisfied since Saipem made all reasonable attempts to obtain redress of the illegal decisions before the courts of Bangladesh.
178. Referring to the decision of the *Loewen* tribunal, Bangladesh contends that local remedies shall be exhausted in any event:

whether characterized as a denial of justice or as an expropriation where the act which forms the basis of that complaint is a court decision, [...] the local remedies rule undoubtedly applies as a substantive requirement.

(Tr. III 138:11-16)

179. By contrast, it is Saipem's primary<sup>27</sup> argument that exhaustion of local remedies does not apply at all in investor-State arbitration. Referring to leading commentators, Saipem argues that this requirement is "inconsistent with the creation of a right to

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<sup>27</sup> In support of its position that the requirement does not apply, Saipem contends that the requirement of exhaustion of local remedies should be disregarded in the present proceedings "because the highest court of Bangladesh had several opportunities to deal with this case, and to set right the wrongs which were committed by the lower courts, in particular in the decision of April 21, 2004" (Tr. II 113:4-14). The Tribunal disagrees for the already indicated reasons that one fails to see how the Supreme court could act on its own motion failing any appeal/submission by Saipem (see above ¶ 172).

arbitration by investors directly”, even in cases of denial of justice (Reply, pp. 30-31, ¶¶ 108-109)<sup>28</sup>.

180. In support of its position that the requirement does not apply, Saipem contends that “as a matter of principle, exhaustion of local remedies does not apply in expropriation law” (Reply, pp. 28-29, ¶ 102, quoting *Generation Ukraine* at ¶ 20.30) and stating that the present case is precisely about expropriation:

For the Respondent's argument on local remedies to be pertinent, one would therefore have to postulate that an expropriation, albeit one carried out by the courts, and a denial of justice are one and the same illegality. This is clearly not the case.

At least according to the more traditional notions (and leaving aside whether these are pertinent in an investment arbitration context), denial of justice relates as much to the process by which a certain result is reached as to the actual outcome. This explains why it is held by some that regard must be had to the overall functioning of the legal system and to a broad obligation of the State to maintain a functioning system of justice, without focussing on the requirement that justice, and a correct decision, be handed down in each individual case.

The situation is completely different for expropriation. Here the only issue is the final outcome, i.e. the illegal deprivation of the foreign investor's property, and not the way this was achieved. There is no requirement that the expropriation be carried out in a given way to qualify as illegal. There is no set moment when the expropriation becomes illegal. In particular, the BIT does not set any temporal or procedural requirement for there to be an expropriation. Therefore, regard must be had only to the net result, i.e. the taking of property.

(Reply, p. 33, ¶¶ 116-118)

181. The Tribunal agrees in substance with Saipem’s analysis. Saipem’s case is one of expropriation (see above ¶ 121). While the Tribunal concurs with the parties that expropriation by the courts presupposes that the courts' intervention was illegal, this does not mean that expropriation by a court necessarily presupposes a denial of justice. Accordingly, it tends to consider that exhaustion of local remedies does not constitute a substantive requirement of a finding of expropriation by a court.
182. Be this as it may, the Tribunal does not need to make a determination on this issue since it considers that, if the requirement applied, Saipem would be deemed to have satisfied it under the circumstances. The requirement of exhaustion of local remedies

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<sup>28</sup> Referring to MCLACHLAN/SHORE/WEINIGER, *International Investment Arbitration*, Oxford University Press, 2007, pp. 232-233, submitted as Exh. C-128.

imposes on a party to resort only to such remedies as are effective. Parties are not held to "improbable remedies"<sup>29</sup>.

183. It is undisputed that Saipem had already litigated the issue of the arbitral misconduct for more than two and a half years in front of different courts in Bangladesh before being served with the decision revoking the power of the ICC Tribunal. It can thus be held to have exerted reasonable local remedies, having spent considerable time and money seeking to obtain redress without success although the allegation of misconduct was clearly ill-founded. Requiring it to do more and file appeals would amount to holding it to "improbable" remedies. This is even more true knowing that Saipem's case was precisely that the local courts should never have become involved in the dispute, since the parties had entrusted the ICC Court of Arbitration with the power to revoke the arbitrators' authority.

184. Under these circumstances, there is no need for the Tribunal to assess whether Saipem could reasonably have relied on its perception of hostility to justify its failure to exhaust the local remedies (Tr. III 142:6-14). This said, the Tribunal notes that, even without reference to the disputed press clippings, Mr. Galizzi's testimony on this question at the Hearing was indeed convincing (Tr. I 124:10 et seq.). On this basis, had it been relevant, it would have been legitimate for Saipem to take any threats to its security into account when deciding whether or not to appeal from the two disputed court decisions.

#### **2.4 Did Saipem accept the risk of the revocation of the arbitrator by agreeing to Dhaka as the seat of the arbitration?**

185. In its initial submission, Bangladesh seemed to argue that the interference of the local courts was not illegal because, as a result of the parties' choice of Dhaka as the seat of the ICC Arbitration, Saipem had accepted the risk of interference by the local courts.

186. As Saipem stressed, such an argument is self-serving. It can not be disputed that "the supervision of the courts of the seat must be exercised in good faith, in accordance with the rule of law, and with generally accepted principles of international arbitration" (Tr. II 89:9-12).

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<sup>29</sup> *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award of 18 August 2008, ¶¶ 399-400 quoting Jan Paulsson, *Denial of Justice in International Law*, Cambridge, 2006, p.153-154.

187. There is no question that, under most legal systems including the Bangladeshi one, by choosing the seat of the arbitration the parties submit to the jurisdiction of the courts at the seat, which jurisdiction can be exercised in aid and in control of the arbitration process. That submission obviously implies that the courts exercise their jurisdiction to the ends for which it is created and do not abuse their powers. In the present case, it has been established above that the court's intervention was abusive (see above ¶¶ 149 *et seq.*). Hence, the choice of Dhaka as a seat cannot change the conclusions drawn earlier by the Tribunal.

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

188. Saipem submits that the expropriation was caused by the combined actions of Petrobangla and the courts of Bangladesh.

189. In its Decision on Jurisdiction, the Tribunal held that (i) it "cannot be seriously challenged" that the Bangladeshi judiciary is part of the State and that the acts committed by it are directly attributable to the State and (ii) the attributability of Petrobangla's acts to the State would be assessed in the merits phase by reference principally to Articles 4, 5 and 8 of the ILC.

190. It is self-evident and Bangladesh does not dispute that the courts are "part of the State", *i.e.*, an organ of the State in the meaning of Article 4 of the ILC Articles (see Decision on Jurisdiction, ¶ 143).

191. With respect to Petrobangla's actions, the Tribunal has found no treaty breach. Its actions in the context of the ICC Arbitration were not official acts of the government and hence could not have amounted to an expropriation. As a result, the issue of attribution does not arise in connection with Petrobangla.

## **3. QUANTUM**

192. Saipem argues that the Revocation Decision (and the subsequent decision to declare the ICC Award non-existent) precluded the enforcement of the ICC Award in Bangladesh or elsewhere, thus depriving it of any compensation (see above ¶ 120). In essence, it thus claims in these proceedings the amount awarded by the ICC Tribunal (3.1 to 3.3) plus interest (3.4).

193. In support of its claim, Saipem relies on the standards to determine the amount of compensation set forth in Article 5(1)(3) of the BIT. It is undisputed that according to this provision:

- (i) The victim of an expropriation is entitled to a "just compensation" equal to "the real market value of the investment" and calculated "according to internationally acknowledged evaluation standards".
- (ii) The date of reference to assess the value of the expropriated investment is the date "immediately prior to the moment in which the decision to nationalize or expropriate is announced or made public";
- (iii) In the absence of an agreement between the parties, the compensation must be paid "in convertible currency"; and
- (iv) Payment must be made immediately and any delay entails payment of "interest calculated on a six-month LIBOR basis accruing from the date of nationalization or expropriation to the date of payment".

(SoC., p. 68, ¶ 254)

194. In particular, the parties agree on the applicability of "internationally acknowledged evaluation standards" (Rejoinder, p. 42, ¶ 139).

### 3.1 The amount of compensation according to Saipem

195. Saipem asserts that it is entitled to "full compensation", *i.e.*, to compensation "for all damages suffered [...] in order to restore the situation which would have existed in the absence of the illicit act". Relying on previous expropriation cases<sup>30</sup>, Saipem further contends that:

[w]hen the expropriation affects intangible property, the standard for compensation is the general principle of *restitutio in integrum*, *i.e.* an amount of compensation capable of restoring the injured party to the economic situation which this party enjoyed before or in the absence of the injury or expropriation.

(SoC., p. 71, ¶ 264)

196. Applying these principles to the present case, Saipem considers that:

the calculation of the amount due to the investor is straightforward. Since the expropriation consisted foremost in rendering a perfectly valid arbitral award worthless and unenforceable, the loss suffered by the Claimant at the hands of Bangladesh the measure of the compensation is the amount

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<sup>30</sup> See in particular *Antoine Biloune and Marine Drive Complex v. Ghana Investments Centre and Ghana Government*, Award on Damages, Interests and Costs of 30 June 1990, Yearbook of Commercial Arbitration, Vol. XIX (1994), pp. 11-32 and the quoted references.

awarded in the ICC Award plus whatever additional cost or damage incurred as a consequence of the impossibility to enforce the Award immediately.

(SoC., p. 72, ¶ 269)

And:

The Tribunal [in the OPIC case *MidAmerican Energy Holdings Company*<sup>31</sup>] went so far as to decide that “*non-payment of the arbitral award is a violation of international law*”. It did so relying on the Harvard Draft and on Article II of the New York Convention. This [...] confirms that the award has to be respected by the State and that therefore the quantum of the damage is the entire amount of the Award.

(RPN II, ¶ 4)

197. On this basis, as mentioned earlier, Saipem claims the amount awarded by the ICC Tribunal<sup>32</sup> plus interest<sup>33</sup>.

### 3.2 The amount of compensation according to Bangladesh

198. It is Bangladesh's submission that:

the date for assessing compensation (and from which interest will accrue) is the date of the alleged expropriatory act. The real or effective expropriatory act relied upon [by] the Claimant is the revocation of the authority of the arbitrators. The Claimant admitted this position in the Hearing on Jurisdiction. It should be noted that at this time there was no ICC Award. Therefore it follows that the evaluation of compensation should be made on the basis of what sums remained due under the Pipeline Contract and the Compromise at the date of revocation, 5 April 2000.

(Rejoinder, p. 42, ¶ 140)

199. Reverting to its arguments on the merits of the contractual dispute, and in particular on the interpretation of the so-called Compromise, Bangladesh submits that the outstanding amount would have to be determined by the sole arbitrator provided in the

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<sup>31</sup> *MidAmerican Energy Holdings Company (formerly CalEnergy Company, Inc) v. Indonesia*. Decision of 1 November 1999, reported in Investment Claims – IIC 168 (1999). The Tribunal asked the Parties to comment on, and handed out copies of this case at the hearing.

<sup>32</sup> Saipem claims that the date of the ICC Award, i.e. 9 May 2003, is relevant for the calculation according to Article 5(3) of the BIT: “Prior to this date the amount of the investor's credit had not yet been quantified. At the date of the Award the arbitration had already been frustrated by Bangladesh and the Award had been rendered unenforceable by previous judicial decisions even before it was handed down. It is at this moment on that the State measure having the effect of expropriating the investment produced its effects” (SoC, p. 68, p. 256).

<sup>33</sup> In its last written submission, Saipem stated that it “will provide the Tribunal with a detailed and updated calculation of interest and costs soon after the March 2008 hearing” (Reply, p. 41, ¶ 150), which it did not do.

Compromise, not by the ICC Tribunal. It also argues that the amount so determined could be in favour of Petrobangla rather than Saipem.

200. Moreover, Bangladesh contends that

Indeed, the exhaustion of local remedies would, if not decisive on the question of a breach of the Treaty itself, later arise for consideration again as part of the causation and mitigation of loss.

(Tr. III 139:8-12)

### 3.3 The Tribunal's determination

201. Article 5(1)(3) of the BIT which describes the just compensation due in case of an expropriation refers to "the real market value of the investment [...] according to internationally acknowledged evaluation standards". This provision is not applicable to determine the amount of compensation in the present instance because it sets out the measure of compensation for lawful expropriation which this one is not. Hence, the Tribunal will resort to the relevant principles of customary international law and in particular to the principle set out by the Permanent Court of Justice in the *Chorzów Factory* case:

The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it<sup>34</sup>.

202. After having carefully reviewed the arguments of the parties and having taken into account all the circumstances of the case, and in particular the fact that the expropriated rights at hand were Saipem's residual contractual rights under the investment as crystallised in the ICC Award (see above ¶ 128), the Tribunal considers that in the present case the amount awarded by the ICC Award constitutes the best evaluation of the compensation due under the *Chorzów Factory* principle.

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<sup>34</sup> *Chorzów Factory case (Merits), Germany v. Poland*, Judgment of the PCIJ of 13 September 1928, PCIJ Series A. Vol 17 at 47 (Exh. C-69).

203. From this point of view, Bangladesh’s contention that “[e]ven if the ICC Award had not been declared to be *non est* on the grounds of revocation of the authority of the ICC Tribunal, there were other valid reasons for annulling the award or for refusing enforcement under Bangladeshi arbitration law and the New York Convention” (Rejoinder, p. 39, ¶ 132) is unsubstantiated. The same applies to Bangladesh’s arguments concerning the so-called “Compromise” (see above ¶ 23), which, according to Bangladesh, might well have played a role in an application to set aside the award.
204. In conclusion, the Tribunal considers that the expropriation of the right to arbitrate the dispute in Bangladesh under the ICC Arbitration Rules corresponds to the value of the award rendered without the undue intervention of the court of Bangladesh.
205. On the other hand, the Tribunal considers that the amounts claimed in paragraph (iv) and (v) of Saipem’s prayers for relief (*i.e.*, the costs, legal fees and all related expenses incurred by Saipem in relation to the intervention of the Bangladeshi courts and other related costs, as well as interest thereon) are not part of Saipem’s initial investment. Moreover, it is impossible to conclude that Saipem’s costs, legal fees and other expenses in relation to the intervention of the Bangladeshi courts have been the object of an expropriation. It follows that these expenses cannot be part of the reparation for the illegal expropriation for which the Tribunal has jurisdiction.
206. With respect to Saipem’s prayers for relief regarding the Warranty Bond, the Tribunal notes that Saipem did not dispute the fact that Petrobangla has withdrawn its letter of 23 June 2003, by which it requested Banque Indosuez Pakistan to pay out on the Warranty Bond. On the face of it, the Warranty Bond was to expire on 30 June 1993. It is not established that it was extended nor, if it was, for how long. Neither is there evidence on record that Petrobangla has or may still obtain payment under the Warranty Bond. Under these circumstances, the Tribunal must conclude that Saipem has not met its burden of proof with respect to this claim.
207. Hence, the Tribunal dismisses the first limb of Saipem’s final request for relief claiming the return and cancellation of the Warranty Bond as well as the second limb of that prayer seeking “in the event that Petrobangla obtains payment of the Warranty Bond, the amount of the Warranty Bond, plus interest at the BIT Libor Rate from the date at which Saipem will have to pay the amount thereof to the Bank”.

208. Accordingly, the recommendation issued by the Tribunal on 21 March 2007 (see ¶¶ 67 above) will cease to be in effect upon notification of this Award.

### **3.4 Interest**

209. Saipem claims interest on the awarded amounts “at the rate provided for by Article 5 of the BIT, viz. six-month LIBOR from 10 May 2003 to the date of payment”.

210. In its final submission, Saipem added that, “as consistently recognized by ICSID case-law, interest must be compounded to respect the principle of “full recovery” set out in Article 38(1) of the ILC Articles” (Reply, ¶ 148, pp. 40-41 referring in particular to ICSID Case No. ARB/97/3, *Vivendi Universal v. Argentina*, Award of 20 August 2007) and announced that it “w[ould] provide the Tribunal with a detailed and updated calculation of interest and costs soon after the March 2008 hearing” (Reply, ¶ 150, p. 41), which it did not do.

211. The Tribunal does not need Saipem’s calculations since the ICC Tribunal has already awarded interest at a rate of 3.375% per annum from 7 June 1993. In the Tribunal’s opinion, Saipem cannot at the same time ask the amount awarded by the ICC Award and interest going beyond that allocated by the ICC arbitrators.

212. Hence, the Tribunal will award simple interest at a rate of 3.375% per annum from 7 June 1993.

## **4. CAUSATION**

213. There is no disagreement between the parties that compensation can only cover losses caused by the acts attributed to the State (see also Article 31(2) of the ILC Draft Articles on State Responsibility).

214. It cannot seriously be challenged that the actions of the Bangladeshi courts are the direct cause of the expropriation at issue. Hence, the Tribunal considers that there is a sufficient causative link between the loss assessed above and the breach of Article 5.1 of the BIT by Bangladesh. The same applies to the interest claim.

## **5. COSTS**

215. Taking into consideration all the circumstances of the case and in the exercise of its discretion in cost matters, the Tribunal decides that each party shall bear the expenses which it incurred in connection with the arbitration. The parties shall also bear the costs of the proceeding, including the fees and expenses of the members of the Tribunal and the fees of ICSID, in equal shares.

## **V. AWARD**

216. On the basis of the foregoing reasons, the Tribunal renders the following award:

1. The Respondent shall pay to the Claimant the sums of USD 5,883,770.80, and USD 265,000.00 and € 110,995.92 plus interest at a rate of 3.375% per annum from 7 June 1993;
2. The recommendation issued by the Tribunal on 21 March 2007 in connection with the Warranty Bond No. 86/USD/12/92 shall cease to be in effect as of the notification of this Award.
3. The costs of the proceedings, including the fees and expenses of the Tribunal and the fees of ICSID shall be borne by the parties in equal shares;
4. Each party shall bear the expenses it incurred in connection with the arbitration;
5. All other requests for relief are dismissed.



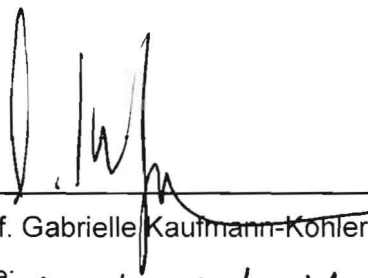
Prof. Christoph Schreuer

Date: 13 June 2009



Sir Philip Otton

Date: 16.06.09



Prof. Gabrielle Kaufmann-Köhler

Date: 20/06/09