

International Dispute Resolution

***Saipem v. Bangladesh* – Part of a Trend on Consent?**

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On June 30, 2009, the ICSID tribunal in *Saipem S.p.A. v. The People's Republic of Bangladesh* (ICSID Case No. ARB/05/7) issued its award on the merits of the case. The award is noteworthy for the following reasons:

- (a) The applicable bilateral investment treaty provided that any dispute relating to compensation for expropriation that cannot be settled amicably can be referred to ICSID arbitration. Nevertheless, the ICSID tribunal examined the *a priori* question of whether there was, in fact, an expropriation before considering the question of compensation.
- (b) The ICSID tribunal found that (1) the judgments and orders of a state court can have expropriatory effect, and (2) a contractual right to arbitration and the orders contained in an arbitration award are rights that are capable of being expropriated.
- (c) The ICSID tribunal criticized the Bangladeshi courts for abusing its supervisory jurisdiction over arbitrations conducted within Bangladesh.

Background

The case arose out of a gas pipeline construction contract. Saipem, an Italian entity and the claimant, was engaged by the Bangladesh Oil Gas and Mineral Corporation (Petrobangla), a Bangladeshi state-owned entity, to construct a pipeline to carry condensate and gas to various locations within Northeast Bangladesh. The contract was governed by the laws of Bangladesh and it provided for disputes to be resolved by arbitration under the ICC Rules to be held in Dhaka, Bangladesh.

The completion of the project was delayed by over a year, and a dispute arose between Saipem and Petrobangla over the compensation payable due to such delay. Eventually, Saipem referred the dispute to ICC arbitration. Shortly after the ICC tribunal denied several of Petrobangla's procedural requests, Petrobangla sought the assistance of the Bangladeshi courts.

Following applications by Petrobangla, the Bangladeshi courts first stayed the arbitration proceedings. Finally, the First Court of the Subordinate Judge of Dhaka revoked the authority of the ICC tribunal (comprising Dr. Werner Melis, Prof. Riccardo Luzzatto, and Prof. Ian Brownlie). The Bangladeshi court issued its order on the basis that the ICC tribunal had "committed misconduct" by denying Petrobangla's procedural requests.

Despite the orders of the Bangladeshi courts, the ICC tribunal continued with the case on the basis that the Bangladeshi courts did not have jurisdiction to decide on a challenge

or replacement of arbitrators in an ICC arbitration; such matters, with respect to an ICC-appointed arbitral tribunal, fell within the exclusive jurisdiction of the ICC International Court of Arbitration. The ICC tribunal rendered an award holding that Petrobangla had breached its contractual obligations to compensate Saipem for the delays on the project. Following an application by Petrobangla, the High Court Division of the Supreme Court of Bangladesh held that the ICC award was a nullity on the basis that the tribunal's authority had been earlier revoked by the Bangladeshi courts.

Saipem did not appeal against either the Bangladeshi courts' decisions to revoke the authority of the ICC tribunal or that the ICC award was a nullity. Shortly after the Supreme Court's decision that the ICC award was a nullity, Saipem filed a request for arbitration with ICSID pursuant to the terms 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" dated March 20, 1990 (the Bangladesh-Italy BIT).

Saipem's case before the ICSID tribunal, comprising Prof. Gabrielle Kaufmann-Kohler, Prof. Christoph Schreuer, and Sir Philip Otton, essentially focused on arguing that the actions of the Bangladeshi courts amounted to an illegal expropriation without compensation of its rights to arbitration and under the ICC award, in violation of Article 5 of the Bangladesh-Italy BIT. It should be noted that Saipem was compelled to frame its ICSID claim as a claim of expropriation, and not under other substantive investment protections such as fair and equitable treatment. This was because the Bangladesh-Italy BIT only allowed claims relating to compensation for expropriation to be referred to arbitration.

Scope of ICSID Tribunal's Jurisdiction

The Bangladesh-Italy BIT's narrow scope of arbitrable disputes, limited to only disputes over compensation for expropriation, is not uncommon in older bilateral investment treaties. This provision has given rise to an interpretative issue in several cases as to whether the arbitration tribunal can also determine whether or not an expropriation has occurred, in addition to issues of quantum. Predictably, arbitration tribunals have been split on this issue.

The *Saipem* ICSID tribunal is part of a growing trend of arbitration tribunals to interpret broadly such a consent-to-arbitration provision so as to allow them to consider the issue of whether an expropriation has in fact occurred, as well as issues of compensability for expropriation. Cases that have shared this broader approach include *Renta 4 S.V.S.A et al v. Russian Federation* (SCC Case No. 024/2007), and *Tza Yap Shum v. Republic of Peru* (ICSID Case No. ARB/07/6). In both these cases, the applicable bilateral investment treaties (the Spain-Russia BIT and the China-Peru BIT, respectively) contained consent-to-arbitration provisions similar to that contained in the Bangladesh-Italy BIT. Nevertheless, the tribunals in both these cases determined that such a provision permitted them to examine the question of whether an expropriation had occurred.

Court Decisions as Expropriatory Actions

The *Saipem* ICSID award is probably the first ICSID award to find that the actions of a state's courts can have expropriatory effect. The *Saipem* ICSID tribunal clarified that the actions of the Bangladeshi courts in revoking the ICC tribunal's authority and declaring the ICC award a nullity did not constitute a direct expropriation. Instead, such actions constituted "measures having similar effects." Specifically, the *Saipem* ICSID tribunal found that the declaration that the ICC award was a nullity was tantamount to a taking of the residual contractual rights arising from the claimant's investment as crystallized in the ICC award.

The *Saipem* ICSID tribunal did recognize the very peculiar circumstances of the case in which the expropriating agency was found to be the state judiciary. In these circumstances, the tribunal found that the declaration of nullity by the Bangladeshi courts could not in itself form the basis of expropriation. Instead, it is only if the court's declaration of nullity was illegal that a claim of expropriation can be sustained.

In this context, the *Saipem* ICSID tribunal recognized that international law requires state courts to act according to "generally accepted standards of the administration of justice" and that grossly unfair or arbitrary court rulings violate international law. Additionally, the *Saipem* ICSID tribunal recognized that if a state is bound by the New York Convention, then any action by its courts that is contrary to the convention would also constitute an illegality.

Criticism of the Bangladeshi Courts

Against this theoretical framework, the *Saipem* ICSID tribunal found that the Bangladeshi courts had "abused their supervisory jurisdiction over the arbitration process." It examined both the procedural orders made by the ICC tribunal that formed the basis of the revocation order, as well as the revocation order itself. The *Saipem* ICSID tribunal found that the ICC tribunal did not commit any error, and found that there was no basis whatsoever for the Bangladeshi court to revoke the ICC tribunal's authority. Additionally, it noted that the Bangladeshi courts did not consult with or hear the members of the ICC tribunal, and that during the ICSID proceedings, Bangladesh did not attempt to criticize the conduct of the ICC tribunal.

Apart from finding that the Bangladeshi courts violated the internationally accepted principle of prohibition of abuse of rights, the *Saipem* ICSID tribunal further found that they had violated Bangladesh's obligations under the New York Convention. The decision to revoke the ICC tribunal's authority was a violation of Article II of the New York Convention in that it prevented the continuance of an arbitration that seeks to implement the arbitration agreement.

Other Comments

It is noteworthy that the *Saipem* ICSID tribunal held that the "exhaustion of local remedies" rule does not apply in a claim of expropriation, at least where the expropriating agency is the state's judiciary. The tribunal distinguished expropriation from denial of justice, noting that



these are two different illegal actions. Exhaustion of remedies is a substantive requirement of a claim for denial of justice, as exemplified by the decision in *Loewen v. United States* (ICSID Case No. ARB(AF)/98/3). However, the *Saipem* ICSID tribunal stated that “exhaustion of remedies does not constitute a substantive requirement of a finding of expropriation by a court.”

The other striking feature of the *Saipem* ICSID tribunal is its willingness to take a robustly practical view of matters. For example, it disregarded the possibility that the ICC award could have been enforced outside of Bangladesh (and therefore not rendered worthless to the claimant) on the basis that Petrobangla did not have assets outside of Bangladesh. It also discounted the possibility that the claimant could have reconstituted the ICC tribunal by noting that a new tribunal would likely face the same difficulties. Finally, the *Saipem* ICSID tribunal also noted that even if the claimant was required to exhaust local remedies, it only needed to resort to effective remedies, and need not have to waste time and resources on “improbable remedies.”

Conclusion

Foreign investors who are required to accept arbitration within the jurisdiction of their host state should be able to draw comfort from the *Saipem* ICSID award. Following from this award, a foreign investor would have an additional potential cause of action if the judiciary within the host state intervenes capriciously in any arbitration to support a state entity.

For more information on this topic, please contact V&E International Dispute Resolution lawyer [Nicholas Song](#) in Beijing, or one of our IDR contact lawyers [here](#).

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