

# When is Court Interference in Arbitration Proceedings Expropriatory?

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It is well accepted that state responsibility arises under international law for denial of justice. This might occur, for example, where a state court abuses its supervisory function over an international arbitration. In the investment treaty context, a denial of justice by host state courts would normally lead to a fairly straight forward breach of the fair and equitable treatment standard or other applicable minimum standards of treatment in the investment treaty. What if, however, the treaty's arbitration clause only provides jurisdiction for expropriation? Can state intervention in arbitral proceedings also result in expropriation? If so, under what circumstances will this occur? The 30 June 2009 award of the ICSID Tribunal in *Saipem S.p.A. v. Bangladesh* addresses these questions. In this brief comment, I query whether the tribunal's reasoning with respect to its finding of expropriation is sound.

The facts are relatively straight forward. A construction contract between Saipem and Petrobangla provided for arbitration under the ICC Rules with Dhaka, Bangladesh as the seat of arbitration. A dispute arose and Saipem began an arbitration. During the arbitration, the ICC Tribunal denied several procedural requests submitted by Petrobangla relating to witness statements and evidence. Petrobangla then challenged the ICC Tribunal's order in local courts and sought revocation of the ICC Tribunal's authority under the Bangladeshi Arbitration Act of 1940. A local court in the so-called "Revocation Decision" revoked the authority of the ICC Tribunal on the basis that the ICC Tribunal had conducted the arbitral proceedings improperly. The ICC Tribunal continued proceedings despite the local court decision and eventually rendered an award in Saipem's favour. Petrobangla then applied to set aside the ICC award. The High Court Division of the Supreme Court of Bangladesh denied the application on the basis that, since the ICC Tribunal's authority had been revoked, the ICC Award was a nullity in the eye of the law: "A non-existent award can neither be set aside nor can it be enforced."

Saipem then commenced a claim under the Bangladesh-Italy bilateral investment treaty for the expropriation of its investment (the BIT only provided jurisdiction with respect to expropriation claims). In its pleadings, Saipem stated that its claim:

relates to the expropriation by Bangladesh of (i) its right to arbitration of its disputes with Petrobangla; (ii) the right to payment of the amounts due under the Contract as ascertained in the ICC Award; (iii) the rights arising under the ICC Award, including the right to obtain its recognition and enforcement in Bangladesh and abroad; and therefore (iv) the residual value of its investment in Bangladesh at the time of the ICC Award,

consisting of its credits under the Contract. All these matters are facets of the same issue. The focus of the Claimant's case is that its right to payment under the Contract as ascertained by, and incorporated in, the ICC Award has been expropriated by the unlawful decisions of the Bangladeshi courts that revoked the authority of the ICC arbitrators and declared the ICC Award null and void, thus precluding its enforcement in Bangladesh or elsewhere. The net result of all this was, obviously, to deprive the Claimant of the compensation for [the expropriation of] its investment. (Award, para 102).

The *Saipem* ICSID Tribunal stated that 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" (para. 116). The Saipem Tribunal found that there was an expropriation based on the following reasons:

- the Bangladeshi court actions resulted in substantially depriving Saipem of the benefit of the ICC Award (para. 129);
- the Supreme Court ruling that the ICC Award is a nullity is "tantamount to a taking of the residual contractual rights arising from the investments as crystallised in the ICC Award" (para. 129);
- given the unique circumstances of the case, "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" (para. 133);
- in order to be expropriatory, the court action must also have been illegal (para. 134);
- the Revocation Decision's finding that the ICC Tribunal proceedings were improper lacks justification, was grossly unfair and amounts to an abuse of the supervisory jurisdiction over the arbitration process (paras. 149-161);
- the intervention also amounted to a breach of Bangladesh's obligation to recognize arbitration agreements under Art. II(1) of the New York Convention because it completely frustrated the arbitration proceedings (para. 167); and
- the Supreme Court's declaration that the ICC Award was "non-existent" constituted the "coup de grace" given to the arbitral process (para. 173).

The Tribunal then addressed a number of subsidiary issues, including whether Saipem was required to exhaust local remedies. With respect to quantum, the ICSID Tribunal found that "the amount awarded by the ICC Award constitutes the best evaluation of the compensation due under the *Chorzów Factory* principle" given that "the expropriated rights at hand were Saipem's residual contractual rights under the investment as crystallised in the ICC Award" (para. 202).

I now turn to the heart of the tribunal's reasoning—that the interference in the arbitration proceedings resulted in the expropriation of Saipem's investment. Part of the challenge of analyzing the ICSID Tribunal's reasoning is the Tribunal's shifting description of the expropriated investment. As noted above, Saipem had argued that the expropriated investment was:

- (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
- (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 Tribunal, for its part, describes the expropriation in three different ways:

1. “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.” (para. 204)
2. “Such a ruling is tantamount to a taking of the residual contractual rights arising from the investments as crystallized in the ICC award.” (para. 129)
3. “Such actions resulted in substantially depriving Saipem of the benefit of the ICC Award.” (para. 129)

So what exactly was expropriated? The Tribunal appears to refer to three different possibilities: (1) the right to arbitrate the dispute; (2) the residual contract rights arising from the investment as crystallized in the ICC award; and (3) the ICC Award.

With respect to the right to arbitrate, there was no finding by the Bangladeshi courts that the agreement to arbitrate was invalid. Technically, the agreement to arbitrate continued to exist after the Revocation Decision. The Tribunal notes that Saipem admitted that a new ICC arbitration could have been pursued, but given the abusive conduct of the Bangladeshi courts, the Tribunal stated this option was unrealistic and a new ICC tribunal would have been exposed to similar risks (para. 169). Thus, it might be said that the right to arbitrate was rendered so in effectual that it was worthless (expropriated). Interestingly, the tribunal equates the value of the procedural right to arbitrate with the value of the ICC Award. The tribunal appears to have assumed that Saipem would have been unsuccessful in any local court action to enforce its substantive contractual rights, or alternatively that mitigation (proceeding with local court action) was not reasonable in the circumstances.

The second formulation “residual contract rights arising from the investment as crystallized in the ICC award” is awkward. Presumably, the residual contract rights refer to the substantive claims under the contract and also the right to arbitrate. But Bangladeshi executive, legislative or judicial authorities never expropriated the substantive contract rights. Thus, we are left with the right to arbitrate. What about the crystallization of Saipem’s rights? In the ICSID Tribunal’s earlier Decision on Jurisdiction, it noted that:

This said, the rights embodied in the ICC Award were not created by the Award, but arise out of the Contract. The ICC Award crystallized the parties’ rights and obligations under the original contract. It can thus be left open whether the Award itself qualifies as an investment, since the contract rights which are crystallized by the Award constitute an

investment within Article 1(1)(c) of the BIT. (para. 127).

Crystallization, however, does not create new rights—the expropriated rights remain those under the Contract. The substantive contract rights were not expropriated, while the right to arbitrate was arguably made worthless.

Finally, what about the “substantial deprivation of Saipem’s ability to enjoy the benefits of the ICC Award”? Is this case really about the expropriation of an arbitral award? Neither the Tribunal’s Decision on Jurisdiction nor the Award expressly states that the ICC Award is an investment. The Tribunal leaves open the question whether an Award is ‘credit for sums of money [...] connected with investments’ for the purposes of Article 1(1)(c) of the BIT. However, it would appear that the Tribunal essentially treated the ICC Award as an investment. With respect to the ICC Award, the Tribunal considered that although in theory the ICC Award could be enforced outside Bangladesh, this was not realistic as Petrobangla has no assets outside Bangladesh (para. 130). The tribunal concludes that “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” (para. 130). The reference to “its rights” is unclear – is the Tribunal referring to the rights under the ICC Award or the underlying contract rights?

The ICSID Tribunal’s reasoning would have been improved by a clearer identification of the expropriated investment. Saipem was deprived of the benefits of the arbitration agreement and the resulting ICC Award. Both the arbitration agreement and the ICC Award would appear to fall within the broad definition of investment in the BIT.

With respect to the tribunal’s reasoning on expropriation, the requirement that the Bangladeshi court action be illegal is well grounded. Where a court engages in normal judicial activities such as adjudicating challenges to awards, forfeiture proceedings, or bankruptcy proceedings, the mere fact that an investor suffers a deprivation as a result of the court action will be insufficient to ground an expropriation claim. In these types of proceedings, some form of deprivation may well be a normal part of the proceedings. Expropriation requires that court proceedings breach due process or other applicable international law standards. And, as I have argued elsewhere (§6.6, Law and Practice of Investment Treaties: Standards of Treatment), unlike for claims of denial of justice, there is no requirement to exhaust local remedies where there is a breach of an independent investment treaty standard, such as expropriation.