INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

NIKO RESOURCES (BANGLADESH) LTD.

(Respondent on Annulment)

v.

BANGLADESH OIL GAS AND MINERAL CORPORATION (PETROBANGLA) AND BANGLADESH PETROLEUM EXPLORATION AND PRODUCTION COMPANY LIMITED (BAPEX)

(Applicants on Annulment)

ICSID Case No. ARB/10/18
Annulment Proceeding

DISSENTING OPINION BY COMMITTEE MEMBER MAKHDOOM ALI KHAN

I. INTRODUCTION

1. I have had the benefit of reading the opinion authored by my distinguished colleagues, in majority. I agree with the conclusions reached in Part IV (A) to (E) of their opinion.

2. While I have the highest regard for my learned colleagues in majority and immense respect for their views, I am unable to agree with the reasons given and conclusions reached in Part IV (F) of their opinion. I have, therefore, written this separate opinion regarding that Part.

3. My learned colleagues have set out the procedural history, facts, and the respective submissions of the parties regarding Part IV (F). Repetition is unnecessary. Certain facts are, however, stated here for emphasis.

Parties and the Governing Agreements

4. Bangladesh Oil Gas and Mineral Corporation ("**Petrobangla**") is a statutory corporation created by the Bangladesh Oil, Gas and Mineral Corporation Ordinance, 1985.[1] Bangladesh Petroleum Exploration and Production Company Limited ("**BAPEX**") is a wholly owned subsidiary of Petrobangla, incorporated under the Bangladesh Companies Act, 1994.[2]

5. BAPEX and the Respondent on Annulment entered into a Joint Venture Agreement ("**JVA**") on October 16, 2003, to produce gas from two gas fields in Bangladesh: Feni and Chattak. The gas produced was to be bought by Petrobangla under the Gas Purchase and Sale Agreement ("**GPSA**") entered into on December 27, 2006, between Petrobangla, BAPEX, and the Respondent on Annulment.

6. The JVA and the GPSA are the two agreements governing the relationship between the Parties (JVA and GPSA together are referred to as "**Agreements**"). They both contain agreements to arbitrate.

ICSID Arbitration Agreement

7. The arbitration agreement in the GPSA reads:

> 13.1 The Parties shall make their best efforts to settle amicably through consultation any dispute arising in connection with the performance or interpretation of any provision of this Agreement.
>
> 13.2 If any dispute, mentioned in Article 13.1, has not been settled through such consultation within ninety (90) days after the dispute arises, either Party may, by

[1] Decision on Jurisdiction, para. 16.
[2] *Ibid*, para. 17.

notice to the other Party, propose that the dispute be referred either for determination by a sole expert or to arbitration in accordance with the provisions of this Article.

13.3 Following the giving of notice under Article 13.2, the Parties may, by mutual Agreement, refer the dispute for determination by a sole expert to be appointed by Agreement between the Parties.

13.4 As an alternative to the procedure described in Article 13.3 and if agreed upon by the Parties, such dispute shall be referred to arbitration by an agreed sole arbitrator.

13.5 If the Parties fail to refer such dispute to a sole expert under Article 13.3 or to a Sole Arbitrator under Article 13.4, within sixty (60) days of the giving of notice, such dispute shall be referred to the International Centre for Settlement of Investment Disputes ("ICSID") and the Parties hereby consent to arbitration under the Treaty establishing ICSID. If for any reason, ICSID fails or refuses to take jurisdiction over such dispute, the dispute shall be finally settled by International Chamber of Commerce.

13.8 Arbitration pursuant to Article 13.4 shall be by an arbitration tribunal consisting of three (3) arbitrators. The Parties shall each appoint an arbitrator and the two (2) arbitrators so appointed shall designate a third arbitrator. If one of the Parties does not appoint its arbitrator within sixty (60) days after the first appointment or if two (2) arbitrators, once appointed, fail to appoint the third within sixty (60) days after the appointment of the second arbitrator, the relevant appointment shall be made in accordance with the rules of ICSID or the International Chamber of Commerce, as the case may be.

13.7 The arbitrators shall be citizens of countries that have formal diplomatic relations with both Bangladesh and Canada and any home country of the entities comprising the Seller, and shall not have any economic interest in or economic relationship with the Parties.

13.8 The Sole Arbitrator or the arbitration tribunal shall conduct the arbitration in accordance with the arbitration rules of ICSID. However, if the above-mentioned arbitration rules are in conflict with the provisions of this Article 13, including the provisions concerning appointment of arbitrators, the provisions of this Article 13 shall prevail.

13.9 The English language shall be the language used in arbitral proceedings. All hearing materials, statements of claim or defense, award and the reasons supporting them shall be in English.

13.10 The place of arbitration shall be Dhaka or elsewhere as mutually agreed by the Parties.

> 13.11 Any arbitration award given pursuant to this Article 13 shall be final and binding upon the Parties and shall be enforceable by a court of competent jurisdiction on the same basis as obligations between private parties, and any reference in this Agreement to such an award shall include any determination by a sole expert.
>
> 13.12 The right to arbitrate disputes under this Agreement shall survive the termination of this Agreement.[3]

8. The JVA has a similar arbitration agreement.

9. Through these Agreements the Parties gave consent to ICSID arbitration and in the alternative to ICC arbitration.

II. PROCEEDINGS BEFORE TRIBUNAL

10. The proceedings originate from the Request for Arbitration ("**RFA**") filed with ICSID on June 16, 2010, by the Respondent on Annulment.

The Dispute

11. The dispute between the Parties concerns the Respondent on Annulment's claim for payment for its share of the price for gas from the Feni field under the GPSA. This was sold and delivered to Petrobangla pursuant to the "GPSA and related matters".[4] The Proceedings culminated in an award in favor of the Respondent on Annulment. Through the Decision on Jurisdiction of August 19, 2013 ("**Decision on Jurisdiction**"), the objections of the Applicants to the jurisdiction of the Tribunal were rejected. The Decision on Jurisdiction being a part of the Award is before this Committee in annulment proceedings.

12. There is another arbitration. This arises out of the JVA and relates to the Compensation Claim. The Compensation Claim concerns a dispute arising from two gas blowouts at the Chattak field where Respondent on Annulment was drilling for gas.[5] The Respondent on Annulment has requested the Tribunal to declare that it has no liability for the blowouts and, if liability is found, an award be made determining the amount of compensation due. These proceedings are ongoing and are not the subject of these annulment proceedings.[6]

---

[3] Exhibit R-169, GPSA.
[4] Exhibit R-487, Award, para. 1.
[5] *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited* (ICSID Case No. ARB/10/11).
[6] It is, therefore, not necessary to refer to the arbitration agreement in the JVA.

Issue of Jurisdiction

13. Article 25 in Chapter II of the ICSID Convention relates to the "Jurisdiction of the Centre". Paragraphs (1) and (3) of this Article read:

> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) …
>
> (3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

14. It is undisputed that the Applicants are agencies of the Republic of Bangladesh ("**Bangladesh**"). Under Article 25 of the ICSID Convention, an ICSID tribunal can exercise jurisdiction in a dispute between an agency of a Contracting State and an investor where the agency has been "*designated to the Centre by that State*."[7] The Parties also have to give their "*consent in writing to submit to the Centre*."[8] The consent of the agency further requires the approval of the Contracting State "*unless that State notifies the Centre that no such consent is required*."[9] The Parties do not dispute that the requirements of consent in writing of the agencies and approval by the Contracting State of such consent are explicitly met in this case.[10] The dispute is whether the agencies were "*designated to the Centre by that State*".

Decision on Jurisdiction

15. The Tribunal in its Decision on Jurisdiction observes that:

> The GPSA was approved by the Government, acting through the Ministry of Power, Energy and Mineral Resources. On 20 December 2006 it addressed a letter to the Chairman of Petrobangla in the following terms:
>
> > "*You are informed on the above subject and reference that the draft Purchase and Sale Agreement (GPSA) for the produced gas from the Feni Gas Field as per agreement of Bapex with NAICO* [sic] *sent through*

[7] Article 25(1) of the ICSID Convention.
[8] *Ibid*.
[9] Article 25(3) of the ICSID Convention.
[10] Decision on Jurisdiction, para. 259.

> *abovementioned memo under reference has been approved by the government.*
>
> *2. Under the circumstances the undersigned is directed to request you to take necessary action in the due pursuance of the existing rules and regulations on the above-mentioned subject*."[11]

On the following day, 21 October 2006, Petrobangla wrote to Niko and BAPEX, informing them that the Government of Bangladesh had "*approved the initialled (31.07.2006) Gas Purchase and Sale Agreement of Marginal Gas Field Feni*".[12]

16. The Tribunal notes that:

> The Tribunal discussed at length with Mr Adolf the origin of the draft containing this arbitration clause and the negotiations about the clause. According to his testimony, the clause was not subject to negotiations and remained as it had been in the draft of March 2006, originating from Petrobangla. At the end of the discussion the Chairman of the Tribunal drew the following conclusion:
>
> > "*From this evidence we must conclude that the clause, as it was in the final agreement, was put by Petrobangla.*
> >
> > *We put it to both parties, if there is evidence to counter this assumption which we must draw from the evidence before us, both parties are invited to produce this evidence so that if we are wrong in this conclusion that we can correct our conclusion."*[13]
>
> No contrary evidence was produced. The Tribunal concludes that the clause providing for ICSID arbitration was as originally put forward by Petrobangla which acted in close consultation with and under instructions of the Government.[14]

17. On this basis, the Tribunal held that Petrobangla and BAPEX "*validly consented to ICSID arbitration*";[15] that both agencies had been "*designated, implicitly but necessarily*";[16] when the State approved the consent to ICSID arbitration, and such designation was communicated to the Centre by the Respondent on Annulment through its Request for Arbitration.[17]

[11] Decision on Jurisdiction, para. 82.
[12] *Ibid*, para. 83.
[13] *Ibid*, para. 89.
[14] *Ibid*, para. 90.
[15] *Ibid*, para. 348.
[16] *Ibid*, para. 345.
[17] *Ibid*, para. 345

III. ISSUES FOR THIS COMMITTEE

18. These conclusions give rise to the following questions:

(i) whether approval by the Contracting State of an agency's consent satisfies the requirements of both paragraphs (1) and (3) of Article 25 or is it limited to paragraph (3) alone;

(ii) whether designation must be communicated to the Centre by the Contracting State or the requirement is satisfied by the Claimant attaching a copy of an investment agreement, containing an ICSID arbitration clause, approved by the Contracting State, with its RFA to the Centre;

(iii) whether in reaching its conclusions the Tribunal acted within or in excess of its powers; and

(iv) whether such excess of power is manifest.

IV. JURISDICTIONAL REQUIREMENTS

19. Read together, paragraphs (1) and (3) of Article 25 contain four requirements for the exercise of jurisdiction by an ICSID tribunal: (i) designation of the agency of a Contracting State; (ii) to the Centre by that State; (iii) consent in writing of the parties to ICSID arbitration; and (iv) approval of such consent by the Contracting State.

20. The first three requirements are set out in paragraph (1) of Article 25 and the fourth in paragraph (3).

21. Neither Party disputes that the two requirements of consent in writing by the Parties (Article 25(1)) and approval of such consent by the Contracting State (Article 25(3)) are met by the execution of the GPSA containing an ICSID arbitration clause and its approval by Bangladesh.

22. The Applicants submit that neither of the two agencies i.e., Petrobangla or BAPEX was designated by Bangladesh[18] and that designation "*to the Centre by that State*" (Article 25(1)) requires the intervention of the Contracting State.[19] They submit that in reaching the opposite conclusion, the Tribunal manifestly exceeded its powers.[20]

23. The Committee must examine whether these requirements of Article 25(1) of the ICSID Convention are met. The issue is not one of mere interpretation of law or the

[18] Memorial, para. 51. Also Reply, paras. 81 and 91.
[19] Reply, para. 102.
[20] *Ibid*, para. 103.

determination of a question of fact, where even an erroneous finding by the Tribunal may be beyond the remit of this Committee under Article 52(1)(b) of the ICSID Convention. The issue is whether, in rejecting the objections to its jurisdiction, the Tribunal disregarded two jurisdictional requirements of Article 25(1) of the Convention.

24. The title of Chapter II of the ICSID Convention, "Jurisdiction of the Centre" under which Article 25(1) is placed and the cases and commentaries on the record are clear.[21] A finding by the Tribunal on whether the requirements of Article 25(1) are complied with or not is a jurisdictional issue. An ICSID tribunal has no jurisdiction if the requirements of Article 25(1) are not met. Before the Decision on Jurisdiction three ICSID tribunals dismissed claims for want of jurisdiction when they found no designation.[22] If it is established that the agency was not "*designated to the Centre by that State*," then the Tribunal would have to be found to be acting in excess of its powers. If such excess of powers is also found to be manifest, a case under Article 52(1)(b) for annulment of the Award would be made out.

Interpreting Article 25

25. As required by Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**"), Article 25 of the Convention must be interpreted "*in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*."[23]

[21] See Exhibit RLA-482, *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. The Federation of St. Kitts and Nevis*, ICSID Case No. ARB/95/2, Award, January 13, 1997, paras. 2.28 and 2.33; Exhibit RLA-484, *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*, ICSID Case No. ARB/07/3, Award on Jurisdiction, December 28, 2009, para. 201; Exhibit RLA-483, *Cambodia Power Company v. Kingdom of Cambodia,* ICSID Case No. ARB/09/18, Decision on Jurisdiction, March 22, 2011, paras. 215 and 224; and C. Schreuer et al., Schreuer's Commentary on the ICSID Convention – Volume I, 3rd ed., (2022), Cambridge University Press, pp. 274-275, para. 524. The same view is also found in earlier editions of the Commentary at p. 149, para. 142 (1st ed.) and p. 150, para. 232 (2nd ed.). The editors of the Third Edition note that "both provisions introduce additional jurisdictional requirements for the involvement of agencies as disputing parties in ICSID proceedings." Also see, Djanic, Vladimir and Schill, Stephan, "Chapter 4, Arbitration" in Fouret, Julien et. al., The ICSID Convention, Regulations and Rules: A Practical Commentary, (2019), Edward Elgar, Cheltenham, p. 593, para. 4.992.

[22] See Exhibit RLA-482, *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. The Federation of St. Kitts and Nevis*, ICSID Case No. ARB/95/2, Award, January 13, 1997, paras. 2.28 and 2.33; Exhibit RLA-484, *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*, ICSID Case No. ARB/07/3, Award on Jurisdiction, December 28, 2009, para. 201; Exhibit RLA-483, *Cambodia Power Company v. Kingdom of Cambodia,* ICSID Case No. ARB/09/18, Decision on Jurisdiction, March 22, 2011, paras. 215 and 224.

[23] Article 31 of the Vienna Convention of the Law of Treaties: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

26. The *Cambodia Power* tribunal observed that the ICSID Convention be interpreted in accordance with its ordinary meaning, as provided by Article 31(1) of the VCLT.[24] According to that tribunal, the text of Article 25(1) of the Convention is so "*clear*,"[25] that "*no recourse to supplementary means of interpretation [under Article 32 of VCLT] is necessary.*"[26]

27. The plain language of paragraphs (1) and (3) of Article 25 makes it clear that they impose distinct and conceptually different jurisdictional requirements. This distinction is also evident from the fact that while the agency must be "designated to the Centre" by that Contracting State there is no such requirement for approval to be so made. These requirements can neither be conflated nor can one be regarded as substituting or dispensing with the other. Satisfying the requirements of one sub-article cannot be said to automatically meet the requirements of the other. The requirements of both must be met for the exercise of jurisdiction by an ICSID tribunal.

28. As noted by Schreuer in his Commentary, the requirements of both paragraphs (1) and (3) of Article 25 must be met for the exercise of jurisdiction by an ICSID tribunal:

> For a conciliation commission or arbitral tribunal to exercise jurisdiction over a constituent subdivision or agency, the conditions of both Art. 25(1) and (3) must be met.[27]

V. IMPLICIT DESIGNATION

29. The Respondent on Annulment submitted before the Tribunal that by directing and authorizing the agencies to execute the agreement "*containing consent to arbitrate under the Convention, Bangladesh has designated BAPEX and Petrobangla to the Centre pursuant to Article 25 of the Convention*."[28]

30. The Tribunal found that:

> Bangladesh has not only approved the consent of the two agencies and indeed directed the execution of the agreements, but was also directly involved in the introduction of the arbitration clause in the Agreements: on the basis of the evidence produced with respect to the negotiations of the agreements, the Tribunal concluded that the arbitration clause was introduced by Petrobangla

[24] Exhibit RLA-483, *Cambodia Power Company v. Kingdom of Cambodia,* ICSID Case No. ARB/09/18, Decision on Jurisdiction, March 22, 2011, paras. 222-223.
[25] *Ibid,* para. 224.
[26] *Ibid*, para. 233.
[27] C. Schreuer et al., Schreuer's Commentary on the ICSID Convention – Volume I, 3rd ed., (2022) Cambridge University Press, p. 274-275, para. 524.
[28] Decision on Jurisdiction, para. 330. Also Request for Arbitration, April 12, 2010, p. 3, and Request for Arbitration, June 16, 2010, p. 33.

> and BAPEX; given the close control of the Government over the negotiations of the agreements, the introduction of the ICSID arbitration clause was intended if not initiated by the State.[29]

31. The Tribunal further noted that:

> a particularly strong case of implicit designation occurs when the State expressly and formally approves in writing that one of its agencies enters into an investment agreement containing an ICSID clause. Since designation has as its purpose and objective to confer on the agency the competence or capacity to become party to an ICSID arbitration, the approval by the State of an ICSID arbitration commitment by one of its agencies presupposes that this agency has the capacity to conclude such a commitment, which means that it must be capable to be a party to an ICSID arbitration.[30]

32. On the basis of its finding that the arbitration clause was introduced by the agencies "*with the approval, if not at the instructions, of the Government*"[31] The Tribunal was of the view that:

> by authorizing BAPEX and Petrobangla to conclude the agreements containing the ICSID arbitration clauses, in terms previously proposed by the Bangladeshi agencies, the State of Bangladesh not only approved consent to ICSID arbitration by these two agencies in terms of Article 25(3) but also **designated, implicitly but necessarily**, BAPEX and Petrobangla as agencies in the sense of Article 25(1), **if such designation had not occurred earlier**.[32] [Emphasis supplied].

33. The Tribunal went further. Without referring to any document it suggested that:

> **Petrobangla and BAPEX might have been designated at some earlier time by a separate act or in the context of some other agreement**, the Tribunal concludes that, in the circumstances of the present case, designation occurred at the latest when the Government approved the consent of the agencies to arbitration under the JVA and the GPSA.[33] [Emphasis supplied].

34. The Tribunal held that:

> There is no indication that the Government of Bangladesh, during the negotiations or at any time prior to the conclusion of the agreements or prior to

[29] Decision on Jurisdiction, para. 335.
[30] *Ibid*, para. 301.
[31] *Ibid*, para. 336.
[32] *Ibid*, para. 345.
[33] *Ibid*, para, para. 341. See also para. 345: "…if such designation had not occurred earlier…"

> the commencement of these arbitrations, objected to the designation of these two agencies or to their consent to ICSID arbitration.[34]

35. The Tribunal, thus, concluded that:

> The designation was communicated to the Centre by the Claimant's Requests for Arbitration. The Respondents' objections relying on the alleged failure of Bangladesh to designate BAPEX and Petrobangla must, therefore, be dismissed.[35]

36. On designation to the Centre,[36] the Tribunal inquired, "*who must communicate the designation to the Centre/.*"[37] It answered:

> One must conclude that the words "*designated to the Centre*" do not prescribe the method of implementation, i.e. the manner in which the designation is communicated to the Centre and in particular by whom this is done.[38]
>
> In other words, the intervention of the State is required for the designation but is not necessarily required for the communication to the Centre. Understood in this sense, the designation requirement in Article 25(1) is complied with if the agency in question is "designated by the State and such designation is communicated to the Centre".[39]

37. In view of the above, the Committee must examine whether the consent in writing of Petrobangla and BAPEX to ICSID arbitration, under Article 25(1) and the approval of GPSA by Bangladesh under Article 25 (3) are sufficient to meet the requirements under Article 25(1) of the agency being "designated to the Centre by that State."

No Evidence

38. Neither the Decision of the Tribunal nor the submissions of the Parties, before this Committee, establish that the findings of the Tribunal regarding the agencies being implicitly "*designated to the Centre by that State*" are supported by any document other than the consent to ICSID arbitration by the agencies, its approval by Bangladesh and their communication to the Centre, by the Respondent on Annulment, through the RFA.[40]

---

[34] *Ibid.*
[35] Decision on Jurisdiction, para. 345. See also paras. 332, 344, 345.
[36] The requirement of communication of designation of an agency to the Centre by that State is dealt with separately, later on, under a separate head. Given how closely designation and communication to the Centre are related it is, however, unavoidable that the discussion overlaps at places.
[37] *Ibid*, para. 315.
[38] *Ibid*, para. 317.
[39] *Ibid*, para. 318.
[40] The approval was communicated in writing by Bangladesh to the agency but there is no evidence that this

Objection to Designation by the State

39. The Tribunal holds that "*the intention to designate clearly appears under the circumstances and is not contradicted by other indications*"[41] but does not state when and how that happened. It does not refer to any document to point out such non-contradictory "*other indications.*" The Tribunal also does not specify what other indications to the contrary it sought and found missing.

40. In any event, what indication is a Contracting State, which has not made a designation, supposed to give to persuade a tribunal that it has not made the designation? The fact that no such designation was made should be indication enough. To require more is to turn Article 25(1) on its head, and to assume implicit designation, from approval of consent, where no designation has been made *unless* a Contracting State specifically declares otherwise.

41. A Contracting State, at the time of granting its approval to the agency, may make a declaration that its approval does not constitute designation. That would be a contrary indication indeed. But there is no reason for a Contracting State to do so. It is not so required by Article 25(1). A State is entitled to conclude, from the plain language of Article 25, that the Convention requires both designation to the Centre by the Contracting State, and approval of an agency's consent, by that State.

42. It is an admitted position that there was no explicit designation by Bangladesh to the Centre. Bangladesh never having made the designation to the Centre there was no occasion for it to raise the issue during negotiations. The Tribunal does not refer to any evidence that the Respondent on Annulment inquired about designation during negotiations, and in response Bangladesh gave a positive response. Likewise, the Tribunal does not refer to any evidence that prior to the conclusion of the Agreements or the commencement of these arbitrations such a query was raised by the Respondent in Annulment, and that any assurance was given by the Applicants that Bangladesh has made the designation.

43. That Bangladesh did not send a separate notification of designation to the Centre is not disputed. In these circumstances, the burden lay on the Respondent on Annulment to obtain confirmation from Bangladesh or the Applicants that a designation had in fact been made.[42] In the absence of any inquiry by the Respondent on Annulment, there was no reason for Bangladesh to give a contrary indication.

---

approval was conveyed by Bangladesh either to the Respondent on Annulment or what is consequential, to the Centre.

[41] Decision on Jurisdiction, para. 299.

[42] C. Schreuer et al., Schreuer's Commentary on the ICSID Convention – Volume I, 3rd ed., (2022) Cambridge University Press, p. 287, para. 563.

44. An adverse inference may of course be drawn against a party which fails to raise an objection in a timely manner. The first occasion for Bangladesh to raise such an objection was before the Tribunal. It did so. No adverse inference could, therefore, be drawn against it on this basis.

45. Prior to that, the burden, if any, to obtain confirmation that the agencies had been designated to the Centre by Bangladesh was on the Respondent on Annulment. It never did so. If an adverse inference had to be drawn from the facts, then that inference ought necessarily to have been drawn against the Respondents in Annulment. It could not be drawn against the State which had never designated the agencies to the Centre.

Consent, Approval and Designation

46. No document other than the execution of the ICSID arbitration agreement and its approval by Bangladesh is referred to by the Tribunal. These two respectively establish the consent in writing, by the Applicants, to ICSID arbitration and its approval by the Contracting State. Without these documents the Tribunal would have lacked jurisdiction over the investment dispute for want of consent by the Applicants, under Article 25(1) and/or its approval by Bangladesh under Article 25(3). Likewise, in the absence of the agency being "*designated to the Centre by that State*," the ICSID Tribunal lacked jurisdiction over the agency.

47. It is essential for an ICSID tribunal to have jurisdiction over both the agency and the concrete investment dispute. The documents that establish consent and approval of the investment agreement do not establish, however, that the agency was "*designated to the Centre by that State*" or that the tribunal had jurisdiction to arbitrate a dispute concerning the agency.

48. The Tribunal refers to the List of Designations to determine when "*implicit designation*" takes place. The list includes designations made by Contracting States regarding constituent subdivisions or agencies.[43] The Tribunal observes that the List of Designations includes a note stating "*Ad hoc designation and notification made by Contracting States pursuant to Article 25(1) and 25(3) are excluded from this listing*."[44] From this, the Tribunal extrapolates that a State may in "*an ad hoc manner*," designate "*an agency for a specific project or in an otherwise limited manner, such as a particular dispute or a particular contract*."[45]

[43] The list is in the public domain and is accessible through the following link: https://icsid.worldbank.org/sites/default/files/documents/2022_Oct%2028_ICSID.ENG.pdf#page=9 Petrobangla and BAPEX do not appear on the list of designated agencies.
[44] Decision on Jurisdiction, para. 287.
[45] *Ibid*, para. 288.

Ad hoc Designation

49. This leads the Tribunal to conclude:

> If the State has not already conferred this capacity on the agency by an earlier (general) designation, the approval necessarily must include the intention to confer this capacity on the agency by an *ad hoc* designation. Assuming the contrary would mean that the State, when granting its approval of the agency's consent, intended to leave this approval without effect. It would require very strong evidence to establish that a State intended to act in such contradictory fashion. Even then, it is doubtful that such a contrary intention should be given effect in view of the overriding principle requiring good faith conduct.[46]

50. A Contracting State may designate, one of its agencies, to the Centre under Article 25(1) of the ICSID Convention. Such a designation may be general in nature, or it may be limited to a particular investment agreement, project, or dispute. The latter is referred to as "ad hoc" designation. Schreuer notes:

> Designations can be made either in general form, that is, for any future dispute with foreign nationals, or *ad hoc*, that is, for a specific project, agreement or even dispute.[47]
>
> In ICSID practice, designations encompass both general designations made by Contracting States in the form of notifications, which the Centre includes in a list published as document ICSID/8-C, and *ad hoc* designations made on the occasion of specific investment projects, for specific investment agreements, or even for the purpose of a concrete dispute….[48]

51. Whether the designation be general or *ad hoc* the requirement that the agency be "*designated to the Centre by that State*" remains. Only its scope is altered.

52. To conclude that an *ad hoc* designation to the Centre by the Contracting State, under Article 25(1), is implicit in the approval by the Contracting State, under Article 25(3), of the consent, given by one of its agencies to ICSID arbitration makes the designation requirement under Article 25(1) otiose. To further hold that when the investor brings this agreement to the attention of the Centre, through the RFA, the requirement of designation to the Centre by the Contracting State is met, dispenses with yet another jurisdictional requirement of Article 25(1).

---

[46] *Ibid*, para. 302.
[47] C. Schreuer et al., Schreuer's Commentary on the ICSID Convention – Volume I, 3rd ed., (2022) Cambridge University Press, p. 284, para. 553
[48] C. Schreuer et al., Schreuer's Commentary on the ICSID Convention – Volume I, 3rd ed., (2022) Cambridge University Press, p. 284, para. 554.

53. A legal dispute is brought to the attention of the Centre by an investor through an RFA. To it is attached the agreement to ICSID arbitration (consent) executed by an agency (under Article 25(1)) and its approval by the Contracting State (under Article 25(3)). This is essential to meet the jurisdictional requirements under Article 25. To hold that meeting these requirements would, without more, also meet the requirements of the agency being (i) designated (ii) to the Centre by that State, under Article 25(1), would render both these jurisdictional requirements redundant. In every case, consent to ICSID arbitration by the agency and its approval by the State would result in implicit designation.

54. By holding that an *ad hoc* designation is implied when a State approves the consent to ICSID arbitration of one of its agencies, the Tribunal has reversed the burden of proof necessary to meet the requirements of Article 25(1). It is not necessary for a claimant to establish that the agency was (i) "*designated*" (ii) "*to the Centre by that State*". It is now for the State to establish that consent in writing to ICSID arbitration by the agency and its approval by the State does not result in implicit designation to the Centre by that State because it is "*contradicted by other indications.*"

55. The Decision on Jurisdiction does not specify what those other indications are. It also does not specify when and how a State must give such contrary indications to the investor. The Decision on Jurisdiction creates a burden which is both fluid and almost impossible to discharge. Under this interpretation, an approval by the State of an agency's consent under Article 25(3) will, *ipso facto* in all cases, result in implicit designation except where some unspecified indications to the contrary are given. On the Tribunal's reasoning, it appears that the only way to prevent such an inference from being drawn is for a State to inform the Centre, in advance, of agencies which it has not designated. In short, the inference of implied designation turns the requirement under Article 25(1) that an agency be designated to the Centre by the State into a requirement that the State must inform the Centre about agencies which have not been designated.

56. This reasoning leads to a further complication. *Ad hoc* designation by the Contracting State, according to the Tribunal, is to be implied, from the State granting its approval of the agency's consent for assuming "*the contrary would mean that the State, when granting its approval of the agency's consent, intended to leave this approval without effect.*" By the same logic, designation by the Contracting State to the Centre ought also to imply approval by that State of the agency's consent for assuming the contrary would mean that the State intended to leave its designation and the agency's consent to be without effect. In the former case consent and approval would result in implicit designation to the Centre. In the latter case, designation and consent would result in implicit approval. In both cases one or more of the requirements of Article 25(1) and (3) would be read out of the Convention. No ICSID tribunal has the jurisdiction to do that.

57. Further, an agency of the Contracting State is often under the superintendence or control of the State. The State will, therefore, either be involved in or have oversight of the negotiations of an investment agreement by that agency. Every time the State grants approval to an investment agreement with an ICSID arbitration clause, that would result in not only the requirement of approval by the State but also the requirements of "*designation to the Centre*" being met.

58. As a result, the jurisdictional requirements in Article 25(1) collapse into Article 25(3). Every approval of an agency's consent to ICSID arbitration, by the State, implicitly designates the agency to the Centre by the State – unless a Contracting State expressly gives indications to the contrary. The words requiring (i) designation (ii) to the Centre by that State in Article 25(1) are made meaningless.

59. The plain language of paragraphs (1) and (3) of Article 25 confer on the State the authority to designate to the Centre an agency and also the authority to approve the consent by an agency to ICSID arbitration. To decide a dispute, an ICSID tribunal needs authority over both the agency and the agreement. When it does not have either it must dismiss a claim for want of jurisdiction. By the invention of implicit designation, the Tribunal has stripped the Contracting State of the authority to designate, to the Centre, an agency under Article 25(1) and given itself jurisdiction over the agency without the intervention of the State.

60. Article 25 does not require any particular order for the two events of "*designation*" by the contracting state under Article 25(1) and "*approval*" of the consent of the agency to ICSID arbitration by the State under Article 25(3). One may occur after the other or they may occur concurrently. From this as well as otherwise it is apparent that the Convention does not deny the State the authority to make such designation subsequent to the approval of the agency's consent to ICSID arbitration. It may grant such an approval before it makes a designation for that would free it from the concern of renegotiating the contract, in future, to provide for ICSID Arbitration.[49] In such cases if the State later designates the agency to the Centre, the parties to the investment agreement can seek recourse to ICSID Arbitration.[50] If it does not, then the approval of the agreement, by the State, will not on its own give an ICSID tribunal jurisdiction.

[49] Hearing Tr. Day 1, 104:5-8.

[50] "Indeed, Members of the Committee, there are many reasons why a state may decide to grant approval of consent like Bangladesh did in this proceeding but withhold designation. One example, as I said here, is that approval of consent may be granted in a commercial contract in anticipation that the agency or the State-owned entity may be designated to ICSID in the future. That is very common in commercial contracts like the JVA and the GPSA. This ensures that the State can designate the agency to ICSID in the future without actually having to worry about renegotiating the Contract because the consent to ICSID Arbitration is already there in the Contract. And if coupled with consent there is designation in the future, the Parties to the Contract can invoke ICSID Arbitration." Hearing Tr. Day 1, 103:17-104:10.

61. A Contracting State may also have other reasons for granting approval to the consent of an agency to ICSID arbitration without designating the agency to the Centre. It is not for a tribunal to second guess these or attribute lack of good faith to a State when it chooses not to exercise its authority to confer jurisdiction on the tribunal. The Convention gives the State authority both for designation to the Centre and approval of consent. It does not make one contingent on the other. It does not require that these be exercised in any particular order. It does not require that either both or neither be exercised. It also does not require the State to exercise both simultaneously. It does not provide that the explicit exercise of one would result in the implicit exercise of the other.

62. The exercise or lack of exercise of such authority by the State which is explicitly left in its domain by the text of the Convention cannot be denied to it by a tribunal exercising jurisdiction under the Convention. A tribunal also cannot assume that the State has acted without good faith by not conferring jurisdiction on it. To hold otherwise would be to rewrite the Convention under the guise of interpretation.

63. To support the conclusion that Petrobangla and BAPEX were "*designated, implicitly but necessarily*,"[51] the Tribunal refers to the writings of Chittharanjan Felix Amerasinghe[52] and Schreuer[53] and the *East Kalimantan* case. It steers away from the *Cambodia Power* case. It also compares the requirement of designation under Article 25(1) with Articles 12 to 16 of the Convention which provide for designation in other matters and seeks to draw support from the Institution Rules. I now proceed to discuss each in its turn.

Amerasinghe

64. The Tribunal relied on the writing of Amerasinghe:

> 308. The question has been examined in some detail by Chittharanjan Felix Amerasinghe, a well-known international lawyer who during his three decades of employment at the World Bank was involved in the early development of ICSID. In an article that appeared in 1979 he clearly distinguished between designation and communication and, when considering the words "designated to the Centre", explained that:
>
> > "*Normally, this would mean that there should be some kind of formal communication of the designation to the Centre*."

[51] Decision on Jurisdiction, para. 345.
[52] *Ibid*, paras. 308-311.
[53] *Ibid*, para. 312.

309. After considering a situation which in his view did not meet the requirement of Article 25(1), he continued:

> "*On the other hand, it is a moot question whether there must always be an official communication of the designation to the Centre. It is arguable that where there was a clear intention on the part of the Contracting State to file the designation with the Centre at the time the designation was made but the actual communication is not made by that State to the Centre, it is adequate if instead of there being a formal communication of the designation to the Centre by the State it is brought to the attention of the Centre in some way whether by the State concerned or by one of the parties to the consent agreement provided this is done before the initial intention is changed*."[54]

65. The Tribunal then quoted Schreuer's observations on Amerasinghe:

> 312. These explanations by Amerasinghe have been referred to by Schreuer who wrote:
>
> > "*The notification of an agreement with the investor containing the designation is enough. It has been argued that where there is a clear intention to designate, it does not matter how and through whom the communication reaches the Centre*."
>
> 313. Schreuer does not seem to disagree with this position. In the quoted passage he seems to take the view that designation can take any form but must come "*to the Centre's attention*".[55]

66. Based on the above, the Tribunal observed that:

> Amerasinghe's view has been confirmed by the arbitral tribunal in the *East Kalimantan* case. Relying on the quoted passage in Schreuer's book, the tribunal there found:
>
> > "*The form and channel of communication do not matter, provided that the intention to designate is clearly established.*
> >
> > [...]
> >
> > *Consequently, the designation requirement may in particular be deemed fulfilled when a document that emanates from the State is filed with the request for arbitration and shows that State's intent to name a specific*

[54] Decision on Jurisdiction, paras. 308-309, quoting Exhibit RLA-0525, Amerasinghe, "*The Jurisdiction of the International Centre for the Settlement of Investment Disputes*," 19 Indian Journal of International Law 166, (1979), p. 188.
[55] *Ibid*, paras. 312-313.

> *entity as a constituent subdivision of agency for the purposes of Article 25(1).*"[56]

67. First, the words of Amerasinghe[57] quoted by the Tribunal in para. 309 of the Decision on Jurisdiction, and which have been reproduced above were preceded by the following passage:

> What the Convention states is that the subdivision or agency must be "designated to the Centre". Normally, this would mean that there should be some kind of formal communication of the designation to the Centre. Thus, a mere designation of a sub-division or agency in an investment agreement to which both the Contracting State and the subdivision or agency are parties would per se be inadequate. Likewise, an undertaking in a similar agreement or in an agreement between the Contracting State and an investor to file the designation with the Centre or to take the necessary steps under the Convention coupled with a designation in the agreement clearly does not *per se* fulfil the requirements of the Convention. [58]

68. In view of the above, the rule, as articulated by Amerasinghe, requires a formal designation to the Centre. He regards designation through an investment agreement as inadequate. According to him, even an undertaking in such an agreement to file the designation with the Centre is insufficient.[59]

69. He makes an exception, however, for a case, when there is a clear intention on the part of the Contracting State to file the designation with the Centre. Only in such a case when the actual communication is not made by the State can the designation be communicated by a party to the agreement.

70. All that we have in this case is the approval by the State of the consent to ICSID arbitration and allegations of the State's close involvement in the negotiation of the agreement. There is no evidence, on the record, of any explicit designation made by the State or of its clear intention to file the designation. For this reason alone, this case does not fall in the exception articulated by Amerasinghe.

---

[56] Decision on Jurisdiction, para. 314, quoting from Exhibit RLA-484, *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*, ICSID Case No. ARB/07/3, Award on Jurisdiction, December 28, 2009, paras. 192-193.
[57] Reply, para. 90.
[58] Exhibit RLA-0525, Amerasinghe, "*The Jurisdiction of the International Centre for the Settlement of Investment Disputes*", 19 Indian Journal of International Law 166, (1979), p. 188.
[59] Schreuer expressed similar views: See C. Schreuer, The ICSID Convention: A Commentary, 1st ed., (2001), Cambridge University Press, pp. 153-154, para. 153. The same passage is reproduced verbatim in C. Schreuer, The ICSID Convention: A Commentary, 2d ed., (2009), Cambridge University Press, p. 156, para. 252.

71. Regarding Schreuer's observations on the requirement of written designation, the *Cambodia Power* tribunal observed that Schreuer had recorded the view of, *inter alia*, Amerasinghe, and not his own.[60] It further observed:

> 243. In the *East Kalimantan* case, the tribunal appears to misquote Professor Schreuer's view. This led the tribunal to conclude mistakenly that:
>
> > *"the form and channel of communication do not matter provided that the intention to designation is clearly established."*
>
> 244. It is clear that in the passage cited above Professor Schreuer simply records the view of some commentators that "*it does not matter how and through whom the communication reaches the Centre*." However, it is not Professor Schreuer's position that anybody through any type of channel or form can communicate the designation of an agency of a Contracting State.[61]

72. Amerasinghe and Schreuer when read in context do not approve of interpreting away the requirement of designation of an agency to the Centre by that State under Article 25(1).

East Kalimantan Tribunal

73. The facts of the *East Kalimantan* case are distinguishable and even otherwise this case does not support the view taken by the Tribunal.

74. The respondents in *East Kalimantan* submitted that the Contracting State had made no designation. This, according to them, was confirmed by the public list of constituent subdivisions or agencies which had been designated to ICSID by the Republic of Indonesia itself.[62] The Request for Arbitration did not contain a statement to this effect as required by Rule 2(1)(b) of the Institution Rules.[63] They submitted that "*a designation must be notified to ICSID by the State.*"[64] According to the Respondents the State's consent is required twice, that is for designation and for approval.[65] In contrast, the claimant argued that designation need not be made in any particular form.

---

[60] *Ibid*.
[61] Exhibit RLA-483, *Cambodia Power Company v. Kingdom of Cambodia,* ICSID Case No. ARB/09/18, Decision on Jurisdiction, March 22, 2011, paras. 243-244.
[62] Exhibit RLA-484, *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*, ICSID Case No. ARB/07/3, Award on Jurisdiction, December 28, 2009, para. 186.
[63] *Ibid*.
[64] *Ibid.*
[65] *Ibid*.

75. The claimants submitted that designation was established by (i) the minutes of the limited cabinet meeting and limited coordination meeting between Ministers,[66] (ii) the Framework Agreement,[67] and (iii) a judicial decision.[68] The tribunal proceeded to examine all three.

76. The tribunal held that the "*minutes relied upon by the Claimant do not create a sufficient basis for designation, as they do not show the State's intent to designate.*"[69] It found that the Framework Agreement comes somewhat closer to meeting the designation requirement although it is still insufficient.[70] The judicial decision was also not accepted as the tribunal was not persuaded that its language constituted "*a designation conveyed to the Centre with the Request for Arbitration*."[71] It agreed with the respondents that the "*judgment contains no clear statement of designation.*"[72]

77. The tribunal observed that the claimant had not advanced any "*convincing argument*"[73] establishing designation. It, thus, found that no designation was made.[74] There being no designation, the tribunal concluded that it had no jurisdiction. The discussion on Rule 2(1)(b) of the Institution Rules and on the channel of communication[75] to the Centre was, therefore, not necessary for the disposal of the *lis*.[76]

78. Further, even if *East Kalimantan* is read as supporting the principle that the designation requirement can be deemed fulfilled under certain circumstances, it does not provide any support for the proposition that a State's approval of an agency's consent in writing to ICSID arbitration under Article 25(3) will be deemed as fulfilling the requirement for designation under Article 25(1). To cite East Kalimantan in support of the latter proposition, would be to stretch its reasoning beyond recognition.

79. The designation requirement, according to the tribunal in *East Kalimantan*, "*may in particular be deemed fulfilled*" where (i) a document that emanates from the State; (ii) is filed with the request for arbitration; and (iii) shows the State's intent to name an agency under Article 25 (1).[77]

---

[66] *Ibid,* para. 189.
[67] *Ibid,* para. 195. The Framework Agreement was the investment agreement.
[68] *Ibid,* para. 196.
[69] *Ibid,* para. 194.
[70] *Ibid,* para. 195.
[71] *Ibid,* para. 198.
[72] *Ibid*.
[73] *Ibid, para*. 198.
[74] *Ibid*, para. 200.
[75] *Ibid,* paras. 192-193.
[76] See Reply, para.102.
[77] Exhibit RLA-484, *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*, ICSID Case No. ARB/07/3, Award on Jurisdiction, December 28, 2009, para. 193.

80. In the present proceedings, only the agreement for ICSID arbitration by the agencies and its approval by Bangladesh are on record. That agreement executed between the Parties and filed with the RFA is not a document that emanates from the State. The approval granted by the State satisfying the requirement of Article 25(3), was communicated to the Applicants. Neither the agreement nor the approval establishes the State's intent to name either entity as an agency for the purposes of Article 25(1). It is, therefore, clear that none of the three *East Kalimantan* criteria for "deemed" fulfilment of the requirement of designation are met by the facts of this case.

Cambodia Power Tribunal and Schreuer

81. The *Cambodia Power* tribunal categorically rejected implicit designation.

82. The claimant in *Cambodia Power* contended that regardless of whether designation of an agency was later communicated to the Centre by the Contracting State, its designation in the investment agreement sufficed.[78] It further submitted that "*because a state will generally only approve agencies' consents under Article 25(3) if it considers them to be eligible, the designation (confirmation of eligibility) might be inferred from the provision of consent. Therefore, the approval of consent that is notified to the Centre may be interpreted as an ad hoc designation of the constituent subdivision or agency*."[79]

83. The *Cambodia Power* tribunal was principally concerned with two issues. First, whether designation under Article 25(1) requires communication of designation to the Centre. Second, if communication of designation is required, what can be the forms and channels of such communication. Related to these two was the question of who can communicate the designation to the Centre for the purposes of Article 25(1) of the Convention.[80]

84. According to that tribunal, Article 25(1) imposes the twin requirements of (i) "*designation*" and (ii) "*to the Centre*" as "*jurisdictional thresholds for constituent subdivisions or agencies of a Contracting State.*"[81] It observed that "*[i]f 'designation' alone, without any communication, were sufficient for these purposes, the words 'to the Centre' would be otiose … communication is inherent in the very notion of "designation" as used in this provision*."[82] It concluded:

[78] Exhibit RLA-483, *Cambodia Power Company v. Kingdom of Cambodia,* ICSID Case No. ARB/09/18, Decision on Jurisdiction, March 22, 2011, para. 185.
[79] *Ibid,* para. 186.
[80] *Ibid,* para. 217.
[81] *Ibid,* para. 224.
[82] *Ibid,* para. 225.

> It is, therefore, clear that the requirement of "designation" was intended to be distinct from and additional to, mere uncommunicated "approval" by a Contracting State.[83]

85. The *Cambodia Power* tribunal acknowledged that a formal notification to the Centre by the Contracting State is not the only means of bringing a designation to the attention of the Centre.[84] It, however, held that the incorporation of such a provision in an investment agreement, unlike legislation, is a private act, without any "*public notoriety*," which the Contracting State has done nothing to bring to the attention of the Centre.[85]

86. The *Cambodia Power* tribunal held:

> Therefore, the Tribunal finds that in order for there to be a "*designation*" of an agency or subdivision of a Contracting State under the Convention, there has to be a written designation which is communicated to the Centre. It may be possible for this to be done other than in a direct communication from the Contracting State to the Centre, such as in a Treaty or Legislation that would inevitably have public notoriety. But in most cases, it would be by direct communication and thus cannot be complied with by the investor itself providing a document to the Centre which contains, or is said to contain, a designation.[86]

87. On who is to communicate the designation, the *Cambodia Power* tribunal was of the view that the language of Article 25(1) was "*unambiguous, and susceptible of little further elaboration*."[87] The designation "*must be 'by the State.*"[88] Communication was "*the sole preserve of the State itself*"[89] – and "*not a function which investors can discharge*."[90]

88. The *Cambodia Power* tribunal held:

> In conclusion on this point, it is clear to the Tribunal that not only does designation require a public communication by the State, but that such designation must also represent an unequivocal intention of the State to consider the entity as its agency or subdivision.[91]

---

[83] *Ibid,* para. 236.
[84] *Ibid,* para. 240.
[85] *Ibid*, para. 245.
[86] *Ibid*, para. 246.
[87] *Ibid.*, para. 249.
[88] *Ibid*.
[89] *Ibid*, para .250.
[90] *Ibid*.
[91] *Ibid*, para. 259.

89. The views of the *Cambodia Power* tribunal on the general notoriety of designation meeting the requirements of Article 25(1) closely track the views of Prof. Schreuer.[92] In the First Edition of his Commentary on the ICSID Convention he wrote:

> designation can take any form that gives it general notoriety and comes to the Centre's attention. Legislation by the Contracting State that clearly includes a designation in the sense of Art. 25 should suffice. This would also apply to a designation contained in a bilateral investment treaty.[93]

90. By the time the Second Edition of his Commentary was published, Prof. Schreuer was aware of the Award on Jurisdiction in the *East Kalimantan* case.[94] He refers to it. That, however, does not seem to have influenced his views. The opinion expressed by him in the First Edition was reproduced verbatim in the Second Edition.[95]

91. It is interesting to note, however, that in the Third Edition, Schreuer omits the requirement, of such "*general notoriety*" that comes to the attention of the Centre, articulated in the first two editions. It is also interesting to note that in the Third Edition, the Commentary adds "*agreement between the Contracting State and the investor*" to the list of legislation and BIT as an example of designation.[96] The reason for the changes in the Third Edition apparently is the Niko Decision on Jurisdiction, which is referred to there and which is also the subject of these annulment proceedings.

92. While the Respondent on Annulment has sought to draw support from the *East Kalimantan* case, it does not support its position and even on facts it is clearly distinguishable. The writings of Amerasinghe and Schreuer also do not support the Decision on Jurisdiction.

Comparing Other Convention Provisions

93. The Tribunal in its Decision on Jurisdiction compares Articles 12 to 16, 25(3)[97] and 54(2) of the Convention with Article 25. It observes that these other Articles also deal with some other designations under the Convention. In all of these it is specifically provided that "*the designations shall be notified to the Secretary General*"[98] or that "*the*

---

[92] *Ibid.,* para. 251: *"The Tribunal's interpretation is shared by Professor Schreuer…"*
[93] C. Schreuer, The ICSID Convention: A Commentary, 1st. ed., (2001), Cambridge University Press, p. 154, para. 153.
[94] Exhibit RLA-484, *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*, ICSID Case No. ARB/07/3, Award on Jurisdiction, December 28, 2009.
[95] C. Schreuer et al, The ICSID Convention: A Commentary, 2d ed., (2009), Cambridge University Press, p. 156, para. 252.
[96] See C. Schreuer, Schreuer's Commentary on the ICSID Convention – Volume I, 3rd ed., Cambridge University Press, p. 285, para. 555.
[97] "…unless that State notifies the Centre that no such approval is required."
[98] Article 16(3) of the ICSID Convention.

Contracting State shall notify the Secretary General of the designation"[99] Such a requirement, according to the Tribunal, is missing from "*designation*" under Article 25(1). From this "distinction" it draws the conclusion that "*the act of communicating the choice to the ICSID Secretary-General is not included in the term 'designation' as used*" in Article 25(1).[100]

94. The Tribunal notes that in Articles 12 to 16, the term "*designate*" means "*choosing a person for the function of serving on a panel.*"[101] It also notes that the term "*designate*" "*does not concern the communication of this choice*".[102] The Tribunal observes that "*a clear distinction is made in Chapter I, Section 4 of the Convention between 'designated' and 'notified.'*"[103] It finds that "*the term designation is understood as being distinct from notification.*"[104]

95. In view of the writings of Schreuer and Amerasinghe, the decisions in *East Kalimantan* and *Cambodia Powers* it is clear that designation under Article 25(1) does not have to conform to any form. The distinction drawn by the Tribunal between the other Articles of the Convention and Article 25(1) also confirms that. It makes clear that unlike some o other Articles of the ICSID Convention, in the case of designation under Article 25(1) it is perhaps not necessary that the designation must be notified in any particular form to the Centre by the state.

96. The lack of an explicit requirement of conforming to a particular form does not, however, dispense with the need for communication by the State "*to*" the Centre. As noted by the *Cambodia Power Tribunal*:

> The present Tribunal agrees with the East Kalimantan decision and Professor Schreuer's position that "there must be some form of communication.[105]

97. As that Tribunal noted:

> 224. The text of Article 25(1) of the Convention is clear. It imposes the following requirements as jurisdictional thresholds for constituent subdivisions or agencies of a Contracting State: *(1) "designation", (2) "to the Centre."*

[99] Article 54(3) of the Convention.

[100] Decision on Jurisdiction, para. 272.

[101] Decision on Jurisdiction, para. 270.

[102] *Ibid*. The *Cambodia Power* tribunal was of the contrary view: "*communication is inherent in the very notion of "designation"* para. 224.

[103] *Ibid*, para. 272. This Section contains Articles 12 to 16.

[104] *Ibid*, para. 276.

[105] Exhibit RLA-483, Cambodia Power Company v. Kingdom of Cambodia, ICSID Case No. ARB/09/18, Decision on Jurisdiction, March 22, 2011, para. 221.

> *225.* If "*designation*" alone without communication were sufficient for these purposes the words "*to the Centre*" would be otiose. Indeed … communication is inherent in the very notion of "*designation*" as used in this provision.
>
> 236. It is, therefore, clear that the requirement of "*designation*" was intended to be distinct from and additional to, mere uncommunicated "*approval"* by a Contracting State.

98. The words "designated to the Centre by that State" in Article 25(1) of the ICSID Convention make it clear, as noted by the *Cambodia Power* Tribunal that communication is inherent in designation to the Centre. These words, on their face, import some form of communication to the Centre by the State. While approval by the State, under Article 25(1), can be a purely domestic event which does not apparently require communication to the Centre by the State. The language of Article 25(1), "designated to the Centre by that State" is not such a purely domestic matter. It requires communication of designation. The view of the Tribunal, if accepted as correct, would result in either the deletion of the words "by that State" or result in the words "to the Centre" being rewritten as "for the purposes of the Centre". An ICSID tribunal has no jurisdiction to either delete words from the text of the Convention or to rewrite them.

99. Likewise, prior to the Decision on Jurisdiction, which is the subject of these proceedings, it was settled that the intent of the State should be clear. It should be expressed in a document which emanates from the State. When designation is not directly communicated to the Centre by the State it must be so public and notorious, like legislation, or a treaty, or publication in the Official Gazette of that State that it comes to the attention of the Centre. A notice to the world at large suffices because it makes it highly probable if not certain that the designation will be communicated to the Centre. Neither a private contract executed between an agency and the investor which is approved by the State nor its communication to the Centre by a claimant, in its RFA, meet these criteria. In particular, it is not a notice to the world at large and not something of such notoriety that when executed it would inevitably come to the attention of the Centre.

100. In the case of Articles 12 to 16, 25(3) and 54(2), the requirement that the Secretary General be notified means that public declarations by the State, no matter how notorious, that it has nominated a person to an ICSID Panel, or approved a contract, or designated a court or authority for the purposes of enforcement of an award will not be sufficient. The explicit requirement of the Convention that an act must be done in a particular form means that it will be given effect to only if that form is followed and not otherwise. Public declarations of a State in this regard irrespective of how widely these are publicized and no matter in what other form they are made will be of no legal effect. This does not, however, lead to the conclusion that the absence of a particular form of designation under Article 25(1) means that the requirement that the agency be "*designated to the Centre by*

that State" is diluted or dispensed with. All it means is that designation to be made by at State does not need be made in a particular form or through a particular channel. It must nevertheless be made. Where the designation made by a State is of such notoriety or is made in such a public manner and form which brings it to the attention of the Centre the requirement is satisfied.

101. The Tribunal also draws support for its view from the Institution Rules.

The Institution Rules

102. In recognizing implicit designation under Article 25(1), the Tribunal referred to Rules 2(1)(b) and (c) of the Institution Rules and the difference between the two.[106]

103. Rules 2(1)(b) and (c) of the Institution Rules require that a request for arbitration shall:

> *(b) state, if one of the parties is a constituent subdivision or agency of a Contracting State, that it has been designated to the Centre by that State pursuant to Article 25(1) of the Convention;*
>
> *(c) indicate the date of consent and the instrument in which it is recorded, including, if one party is a constituent subdivision or agency of a Contracting State, similar data on the approval of such consent by that State unless it had notified the Centre that no such approval is required.*

104. According to the Tribunal, Rule 2(1)(b) requires a Request for Arbitration to state that an agency has been designated to the Centre by the State. It does not appear to require any specific information in respect of designation such as the date or mode of designation. Rule 2(1)(c), however, requires a request for arbitration to include the date of consent and the instrument in which it is recorded.[107]

105. From the difference between the requirements for "designation" and "consent" under Rules 2(1)(b) and (c), the Tribunal concluded that:

> 298. … It is nevertheless significant to note the difference, at the stage of the commencement of the arbitration, in the treatment between designation and consent. With respect to consent by an agency, the request for arbitration must identify both the specific instrument in which consent is recorded and the instrument which records the State's approval. With respect to designation, the

[106] Decision on Jurisdiction, para. 297.

[107] The ICSID Convention Institution Rules, 2022 have modified the language of Rules 2 (1)(b) and (c) in the following manner:

(2) The Request shall include:
(e) if a party is a constituent subdivision or agency of a Contracting State:
(i) the State's designation to the Centre pursuant to Article 25(1) of the Convention; and
(ii) supporting documents demonstrating the State's approval of consent pursuant to Article 25(3) of the Convention, unless the State has notified the Centre that no such approval is required.

> requirements are simpler: it is sufficient that the request for arbitration state that designation occurred; no specific instrument recording designation is required.
>
> 299. The absence of a prescribed form for designation must have a further consequence: since neither Article 25(1) of the ICSID Convention nor the Institution Rules, nor any other text governing the requirement of designation prescribes a specific form for designation, implicit designation must be possible. Such implicit designation may be accepted when the intention to designate clearly appears under the circumstances and is not contradicted by other indications.[108]

106. For the Tribunal the absence of a prescribed form of designation under Rule 2(1)(b), allows the possibility of implicit designation. It draws support from the difference in the language of the two Rules to support its interpretation of Article 25(1) of the ICSID Convention.

107. The requirement of an instrument in which the consent to ICSID arbitration is recorded and a similar instrument for approval is prescribed in Rule 2(1)(c). The lack of such a requirement under Rule 2(1)(b) does not mean that the jurisdictional requirements of designation "*to the Centre by that State*" have been dispensed with. All that the difference suggests is that while under the former consent and approval must be established by a written instrument whose details must be provided in the Request for Arbitration, under the latter such details do not have to be provided and only the fact of designation if established is sufficient. The requirement that an agency be "*designated to the Centre by that State*" remains unaffected, however.

Schreuer

108. To support its view, the Tribunal relies[109] on Schreuer's Commentary where it states that designation "*can take any form that gives it general notoriety and comes to the Centre's attention.*"[110] This passage does not support the Decision on Jurisdiction. It supports the opposite view that absence of a form does not dispense with the requirement, under Article 25(1) and that designation must be made by that State to the Centre. It is clearly stated that:

> Designation cannot be dispensed with altogether. But it is submitted designation can take any form that gives it general notoriety and comes to the Centre's attention. Legislation by the Contracting State that clearly includes a designation

[108] Decision on Jurisdiction, paras. 298-299. This opinion has already dealt with the "contradicted by other indications" issue in the preceding paragraphs.
[109] Decision on Jurisdiction, para. 305.
[110] C. Schreuer, Schreuer's Commentary on the ICSID Convention, 2nd ed., (2009) Cambridge University Press, p. 156, para. 252.

> in the sense of Article 25 should suffice. This would apply to a designation contained in a bilateral investment treaty.[111]

109. Schreuer states that while designation is not subject to any formal requirements and need not be made in a formal document:

> The designation must be made to the Centre. Therefore, designation in an agreement with the investor is not enough. It is clear that the entity concerned cannot designate itself. But even an agreement of the Contracting State with the investor or a promise to make the designation to the Centre will not suffice. There must be some communication by the Host State to the Centre.[112]

110. The difference in the language of Rule 2(1)(c) and Rule 2(1)(b) does not suggest that the requirement of designation to the Centre by that State under Article 25(1) is dispensed with. It also does not suggest that the details of the written instrument provided with the RFA to meet the requirements of Rule 2(1)(c) also satisfy the requirements of Rule 2(1)(b). The Rules do not so state, and they cannot be read to support such an interpretation.

111. The Institution Rules were adopted by the Administrative Council of the Centre under Article 6(1)(d) of the ICSID Convention. The Convention is the foundational document and sets out the requirements that must be met to establish jurisdiction in respect of a dispute. It is the treaty which the States signed and ratified. The purpose of the Institution Rules, which operate on a lower plane than the treaty, is to facilitate the implementation of the Convention. They cannot expand or contract the meaning or scope of any provision of the ICSID Convention or dispense with one or more of its jurisdictional requirements. In case of any conflict between the Institution Rules and the ICSID Convention, the latter must prevail.

112. Rule 2(1)(b) of the Institution Rules can be used to facilitate the implementation of the Convention. It cannot, however, be used to dilute the jurisdictional requirements of designation to the Centre by the Contracting State under Article 25(1). It also cannot control the interpretation or limit or expand the scope of the Convention.

113. After reproducing Rule 2(1), Schreuer notes:

---

[111] C. Schreuer, The ICSID Convention: A Commentary, 1st ed., (2001), Cambridge University Press, p. 154, para. 153. The same passage is reproduced verbatim in C. Schreuer, The ICSID Convention: A Commentary, 2d ed., (2009), Cambridge University Press, p. 156, para. 252.

[112] C. Schreuer, The ICSID Convention: A Commentary, 1st. ed., (2001), Cambridge University Press, p. 153, para. 153. The same passage is reproduced verbatim in C. Schreuer, The ICSID Convention: A Commentary, 2d ed., (2009), Cambridge University Press, p. 156, para. 252.

> A request for conciliation or arbitration against a constituent subdivision or agency that is unsupported by evidence of a designation of that entity may be rejected by the Secretary-General as manifestly outside the jurisdiction of the Centre by virtue of his screening power under Arts. 28(3) and 36(3).[113]

114. It is interesting to note that there is no change in this passage between the First[114] and Second[115] Editions of Schreuer's Commentary. In the Third Edition, published after the Decision on Jurisdiction, however, the following words have been added, after the above quoted text:

> However, Rule 2 of the Institution Rules does not require the evidence of a valid designation, or a specific instrument containing it, is furnished; it is sufficient that the request states that the designation has occurred.[116]

115. For the addition of these words, Footnote 941 refers to *Niko Resources v. Bangladesh*, Decision on Jurisdiction (19 August 2013) para. 298. The reason for the addition of these words appears to be the very Decision on Jurisdiction, now part of the Award, the annulment of which is sought from this Committee.

116. Schreuer's Commentary also does not assert that Rule 2 of the Institution Rules can impact the meaning of the clear words of Article 25(1) of the Convention. To the contrary, it states:

> This may explain a somewhat looser scrutiny of the Secretary-General in respect of the requirement of designation as compared to other requirements for the Centre's jurisdiction.[117]

117. Rule 2 of the Institution Rules is identified as the cause of the Centre conducting a "*somewhat looser scrutiny*" of the jurisdictional requirement of designation. The play in the language of Rule 2 of the Institution Rules, causing a "*looser scrutiny*" by the Centre of the designation requirement, cannot change the meaning of the clear words of Article 25(1) of the ICSID Convention. The requirements of this Article are jurisdictional in nature. These cannot be altered by the language of the Institution Rules or diluted by a "*looser scrutiny*" by the Centre.

---

[113] C. Schreuer, Schreuer's Commentary on the ICSID Convention, Volume I, 2d ed., (2009), Cambridge University Press, p. 158, para. 259.
[114] C. Schreuer, The ICSID Convention: A Commentary, 1st. ed., (2001), Cambridge University Press, p. 156, para. 159.
[115] C. Schreuer, The ICSID Convention: A Commentary, 2d ed., (2009), Cambridge University Press, p. 158, para. 259.
[116] C. Schreuer, Schreuer's Commentary on the ICSID Convention – Volume I, 3rd ed., (2022) Cambridge University Press, p. 288, para. 566.
[117] *Ibid.*

118. In any event, the Tribunal's analysis is contrary to the plain language of Article 25 of the Convention. Rule 2(1)(b) of the Institution Rules cannot alter the plain meaning of Article 25. The Rule does not, in any event, lead to the conclusions derived from it by the Tribunal.

119. The Decision in *East Kalimantan* relied upon by the Tribunal, is distinguishable on facts and does not support the decision of the Tribunal. the In any event, the facts of this case fall far short of the criteria articulated there. The analysis of the Tribunal is plainly contrary to the Decision of the *Cambodia Power* tribunal. It is also not supported by scholarly writings on the subject or the Institution Rules.

NEPC v Bangladesh

120. The Respondent on Annulment places reliance on *NEPC v. Bangladesh Power Development Board*.[118] Both sides admit that this decision on jurisdiction remains unpublished.[119] It is not on the record of this Committee.[120] The Centre has not published even the excerpts.[121]

121. The Committee is informed of the conclusions reached in that case but is unaware of the reasons which led to the conclusions. Not only is the award not on the record but neither party has reproduced in its pleadings or submissions the reasons on which the outcome of the Award is based. In view of this, it is unsafe for this Committee to base its decision on the unpublished conclusions reached by the *NEPC* Tribunal.

VI. COMMUNICATING DESIGNATION

122. That having concluded that Petrobangla and BAPEX were never designated by Bangladesh to the Centre, it is clear that the Tribunal had no jurisdiction. Such designation having never been made, the question of whether the designation must be explicitly or publicly communicated to the Centre by that State, or whether it can be communicated through an RFA by an investor, does not arise for determination, in this proceeding. It would ordinarily be, therefore, unnecessary to deal with it in this opinion. The matter would be best left to a tribunal which concludes that designation has been made and is specifically confronted with the question of how the designation must be communicated. I deal with it, however, as both the Tribunal and my learned colleagues in majority have chosen to discuss this.

[118] *NEPC Consortium Power Limited v. Bangladesh Power Development Board (II)*, ICSID Case No. ARB/18/15, Decision on Jurisdiction, December 10, 2019 (Lord Mance).
[119] Counter-Memorial, para. 132, Hearing Tr. Day 1, 108:21-109:1, Hearing Tr. Day 2, 300:5-7.
[120] Majority Opinion, Footnote 307.
[121] Hearing Tr. Day 2, 300:14-15.

123. The discussion is brief because, as was inevitable, the issue has been discussed when dealing with designation.

124. Connected to the issue of designation, raised by the Applicants, is that of communication. The Applicants submit that the designation must be made by the Contracting State to the Centre.[122] Communication by others and not the State to the Centre does not satisfy the requirements of Article 25(1).[123] A designation which is never communicated by the Contracting State to the Centre and is brought to its notice by the claimant through the RFA does not meet the Article 25(1) requirement. The language of the text of the Convention unambiguously requires that the "*agency of a Contracting State*" must be "*designated to the Centre by that State*."

125. The Applicants' position is supported by the decision in *Cambodia Power*:

> The clear language of Article 25(1) requires that the designation be "*to the Centre*". As a matter of simple language, this naturally excludes designation without communication to the Centre. If this were not so, different language would obviously have been used.[124]

126. In the present case, the Tribunal considered the filing of the GPSA with the RFA as satisfying this requirement of Article 25(1). No express designation was made by Bangladesh in favour of Petrobangla and/or BAPEX. No such designation was communicated by Bangladesh to the Centre. Further, no actions of "*public notoriety*," such as legislation, publication of minutes of Cabinet meetings, a notification in the Official Gazette, or insertion of a provision in a Bilateral Investment Treaty, were taken by Bangladesh which could meet the requirement of communication. The filing of the RFA by the Respondent on Annulment with the GPSA, which contained the consent to ICSID arbitration and its approval by Bangladesh was, by itself, insufficient to comply with the requirement under Article 25(1) that the agency be "*designated to the Centre by that State*."

Conclusion

127. It is evident that Article 25(1) and (3) impose four key requirements. Without all four being satisfied the Tribunal could not assume or exercise jurisdiction. Two were admittedly met. BAPEX and Petrobangla had given their consent to ICSID arbitration. This consent had the approval of Bangladesh.

---

[122] Reply, para. 102.
[123] *Ibid*.
[124] Exhibit RLA-483, *Cambodia Power Company v. Kingdom of Cambodia,* ICSID Case No. ARB/09/18, Decision on Jurisdiction, 22 March 2011, para.238.

128. Two were not met. Neither agency was designated to the Centre, either generally or *ad hoc,* by Bangladesh.

129. The findings of the Tribunal transgress the boundaries of Article 25(1). For the Tribunal to assume jurisdiction where it had none, evidently is in excess of its powers.[125]

VII. MANIFESTLY

130. The award cannot be annulled, however, merely because the tribunal has "*exceeded its powers*".

131. To satisfy the requirements of Article 52(1)(b)[126] the excess of powers, by the tribunal must also be "*manifestly*" so. The word "*manifestly*" should be understood in its ordinary meaning. It means obvious, evident, clear, apparent. This has also been the approach of most committees.[127]

132. There is a divergence of views among commentators on whether the requirement that "*the tribunal has manifestly exceeded its powers*" is also applicable where the issue is one of jurisdiction. Authors as distinguished as Gabrielle Kaufmann-Kohler and Sir Frank Berman are of the view that jurisdictional transgressions should be subject to stricter scrutiny and held to higher standards.[128] There should be no room for discretion by the

---

[125] Schreuer et al., Schreuer's Commentary on the ICSID Convention – Volume I, 3rd ed., (2022) Cambridge University Press, p. 274-275, para. 524; Djanic, Vladimir and Schill, Stephan, "Chapter 4, Arbitration" in Fouret, Julien et. Al, The ICSID Convention, Regulations and Rules: A Practical Commentary, 2019, Edward Elgar, Cheltenham, p. 593; *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. The Federation of St. Kitts and Nevis*, ICSID Case No. ARB/95/2, Award, January 13, 1997, para. 2.28; Exhibit RLA-484, *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*, ICSID Case No. ARB/07/3, Award on Jurisdiction, December 28, 2009, para. 202; Exhibit RLA-483, *Cambodia Power Company v. Kingdom of Cambodia,* ICSID Case No. ARB/09/18, Decision on Jurisdiction, March 22, 2011, para. 224. Also see: Djanic, Vadislav and Schill, Stephan W, "Chapter 4, Arbitration," in Fouret, Julien et al., The ICSID Convention, Regulations and Rules: A Practical Commentary, (2019) Edward Elgar, Cheltenham, p. 593, para. 4.992.

[126] It reads:

> (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
> (b) that the Tribunal has manifestly exceeded its powers;

[127] See, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, June 5, 2007, para. 39; *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, January 15, 2016, para. 103; *Ioan Micula, Viorel Micula v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, February 26, 2016, para. 123.

[128] "[T]he requirement of manifestness appears inapposite in the context of jurisdiction. A tribunal either has jurisdiction or it does not, there is nothing in between. In other words, any exercise of jurisdictional power without proper jurisdiction is a manifest excess of power." Kaufmann-Kohler, Gabrielle, "Annulment of ICSID Awards in Contract and Treaty Arbitrations: Are there Differences?" in Gaillard, Emanuelle and Banifatimi, Yas, Annulment of ICSID Awards, (2004) Juris, New York, pp. 198-199.

committee, "*on whether to annul or not to annul the award if the tribunal lacked jurisdiction.*"[129]

133. This view has also gained some traction in the decisions of committees[130] because the clearest form of excess of power occurs when a tribunal exceeds the limits of its powers.[131] According to one committee there is a distinction between primary and secondary excess of powers. Jurisdictional issues fall in the former category. Such matters are considered more serious than other excesses of power:

> The primary concept of excess of powers refers to situations where a tribunal adjudicates disputes not included in the powers granted by the parties; if a Tribunal exceeds its jurisdiction and such excess is manifest, its decision cannot stand.
>
> The situation is quite different if a tribunal having jurisdiction adopts an erroneous decision that is said to exceed its powers; in this secondary concept of abuse of powers, annulment requires that the error committed by the tribunal consisted in applying the wrong law (not of wrongly interpreting the correct law) or that the error amounts to a gross or egregious error of law – a much more onerous test than in a case of primary excess of powers.[132]

134. In this case, however, one does not have to apply the strict scrutiny test or a more rigorous standard. It is obvious that the plain language of Article 25 does not support the conclusion reached by the Tribunal. The views that designation, of an agency by the State, under Article 25(1), is implicit in the approval, under Article 25(3); that approval under Article 25(3) can be construed as *ad hoc* designation under Article 25(1); and that the RFA by the Respondent on Annulment can satisfy the requirement, under Article 25(1) of the designation "*to the Centre by that State*" find no support in the plain language of Article 25(1) and (3). By assuming and exercising jurisdiction, contrary to the plain language of Article 25, it is obvious, that the Tribunal exceeded its powers. To hold that it is also "*manifestly*" so, the scrutiny need not be strict.

---

[129] See Berman, F, 'Review of the Arbitral Tribunal's Jurisdiction in ICSID Arbitration' in E Gaillard (ed), The Review of International Arbitral Awards (New York: Juris Publishing, 2010), 260.

[130] *Occidental Petroleum Corporation and Occidental Exploration and Petroleum Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, para. 481; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Annulment, September 16, 2011, para. 90; *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, March 9, 2017, para. 110.

[131] *Ioan Micula, Viorel Micula v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, February 26, 2016, para. 125.

[132] *Occidental Petroleum Corporation and Occidental Exploration and Petroleum Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, para. 481.

135. Some committees have also taken the view that to be manifest the excess of powers, by the tribunal, besides being obvious it must also be serious.[133] The excess of powers must have a significance for the decision or the award. This approach is, however, not uncontroversial and has been openly rejected by some committees.[134]

136. This Award is, however, not saved from annulment even if the requirement of being serious is read into the word "*manifestly.*" Nothing can be more serious than transgression of the limits of jurisdiction clearly and unambiguously set out in Article 25(1). Further, the excess of powers by the Tribunal is outcome determinative. If the Tribunal had observed the jurisdictional boundaries of Article 25 it would have declined jurisdiction. The claim would have failed. The effect of excess of powers is, therefore, serious. Consequently, even if "*manifestly*" means not only obvious, apparent, clear but also serious, the Tribunal has manifestly exceeded its powers.

137. Some take the view that a manifest excess of power is not established where opinions on the interpretation of a provision conflict or opposing views have been expressed by tribunals or committees. On the other hand, it is equally powerfully stated by Stephan Schill, the General Editor of Schreuer's Third Edition, in another learned discourse that:

> While the existence of opposing opinions or conflicting case law is no doubt a strong indication that a certain stance taken by a tribunal was not unreasonable, this fact should not in and of itself be taken as a conclusive proof on the matter and thus effectively act as a substitute for an analysis as to the tenability of the tribunal's approach. Instead, an annulment committee always should ask whether the approach taken by the tribunal was also tenable in respect of the specific facts of the case at hand and the law that governs it.[135]

138. The Award is not saved from annulment even on these grounds. In this case the Tribunal did not have before it a consistent series of decisions by tribunals on the interpretation of Article 25(1) and (3) which it could rely on to support the conclusions reached by it. Three cases dealt with the designation of an agency by the Contracting State. In *Cable*

---

[133] See *Victor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile,* ICSID Case No. ARB/98/2, Decision on Annulment, December 18, 2012, para. 70; *Suez, Sociedad General De Aguas De Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Argentina's Application for Annulment, May 5, 2017, para. 116; See, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, June 5, 2007, para. 40. Also see Djanic, Vadislav and Schill, Stephan W, "Chapter 4, Arbitration," in Fouret, Julien et al., The ICSID Convention, Regulations and Rules: A Practical Commentary, (2019) Edward Elgar, Cheltenham, p. 603, para. 4.1010.

[134] See Djanic and Schill, *op.cit*., p. 603, para. 4.110.

[135] Djanic, Vadislav and Schill, Stephan W, "Chapter 4, Arbitration," in Fouret, Julien et al., The ICSID Convention, Regulations and Rules: A Practical Commentary, (2019) Edward Elgar, Cheltenham, p. 604-605, para. 4.1015.

Television,[136] the tribunal found no designation by the Contracting State and accordingly declined jurisdiction. In *East Kalimantan*,[137] the tribunal also found no designation by the Contracting State. It concluded that the lack of designation was a bar to the exercise of jurisdiction by it. In *Cambodia Power*,[138] again the tribunal found that no designation by the Republic of Cambodia meant that that the jurisdiction of the tribunal was barred.

139. All three decisions reached the same conclusion. The Tribunal deviated from the ratio of all three cases. In the process, it sought support from the *East Kalimantan* case by a strained reading of some of its observations but ignored both its ratio and the criteria identified, it chose not to follow *Cambodia Power* and all but ignored *Cable Television*.

140. In this case,[139] the relevant ministry had approved the agreement of the agencies to ICSID arbitration. From this the Tribunal concluded that in the circumstances Bangladesh not only approved consent to ICSID arbitration, by these agencies, under Article 25(3) but also "*designated, implicitly but necessarily, BAPEX and Petrobangla as agencies in the sense of Article 25)(1).*"[140] It ruled that "*a particularly strong case of implicit designation occurs when the State formally and expressly approves in writing that one of its agencies enters into an investment agreement containing an ICSID clause.*"[141] None of these conclusions has any support in precedent, prior legal writings or the plain language of Article 25(1).

141. The Tribunal in this case was not following similar views earlier expressed. Neither *stare decisis* nor *jurisprudence constante* required such a course. Annulment cannot, therefore, be denied for this reason. To the contrary, as Yas Banifatemi and Elise Edson observe, till the Niko Decision on Jurisdiction, "*ICSID Tribunals had been reluctant to assume jurisdiction over disputes brought against a sub-entity of a Contracting State absent an express designation by that State.*"[142] Scholarly writing on the subject, prior to the Decision on Jurisdiction, as noted above, also leaned the other way. Even on this basis the Tribunal's exercise of jurisdiction in this case was, manifestly in excess of its powers.

---

[136] Exhibit RLA-482, *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. The Federation of St. Kitts and Nevis*, ICSID Case No. ARB/95/2, Award, January 13, 1997, para. 2.33.
[137] Exhibit RLA-484, *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*, ICSID Case No. ARB/07/3, Award on Jurisdiction, December 28, 2009, paras. 194-198, 200-202.
[138] Exhibit RLA-483, *Cambodia Power Company v. Kingdom of Cambodia,* ICSID Case No. ARB/09/18, Decision on Jurisdiction, March 22, 2011, paras. 259, 339.
[139] Decision on Jurisdiction.
[140] Decision on Jurisdiction, para. 345.
[141] Decision on Jurisdiction, para. 301
[142] Banifatemi, Yas and Edson, Elise, "Jurisdiction of the Centre" in Fouret, Julien, The ICSID Convention, Regulations and Rules: A practical Commentary, (2019) Edward Elgar, Cheltenham, para. 2.67, p. 142.

142. A view is also expressed[143] that for an award to fall foul of Article 52(1)(b) it must be so obviously wrong that it would take no more than a few pages to state its defects. The notion that an award is not manifestly in excess of powers if it requires meticulous examination has lost its luster as several annulment committees have held that at times an extensive analysis is necessary to hold that the tribunal acted with manifest excess of powers.[144] The *EDF* committee[145] observed that the requirement that excess of powers be manifest:

> does not mean that the excess must, as it were, leap out of the page on a first reading of the Award. The reasoning in a case may be so complex that a degree of inquiry and analysis is required before it is clear precisely what the Tribunal has decided.[146]

143. The *Pey Cassado* committee observed that "*extensive argumentation and analysis do not exclude the possibility of concluding that there is a manifest excess of power, as long as it is sufficiently clear and serious*."[147]

144. In this case, however, it is not necessary to go down this road. The excess of powers is manifest as the finding of implicit designation under Article 25(1) from the approval of the Contracting State under Article 25(3) is contrary to the plain language of Article 25. An ICSID tribunal has no jurisdiction to read away the words of Article 25(1) which require that the agency be "*designated to the Centre by that State.*" This is sufficient to declare that the Tribunal manifestly exceeded its powers. This manifest excess of powers leaps out of the page on a first reading of the Award.

145. Jurisdictional requirements should be interpreted in a manner that is consistent with the common intent of the Parties and the plain meaning of the words of the Convention.[148] If

---

[143] Bishop, R Doak and Marchili, Silvia M, Annulment under the ICSID Convention, 1st ed., (2012) Oxford University Press, p. 66, para. 6.25, quoting Paulsson J, "ICSID's Achievements and Prospects," 1991 6 ICSID Rev – FILJ 380 (1991), 392.

[144] *EDF International S.A., Saur International S.A., and Leon Participaciones Argentinas S.A., v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, February 5, 2015, para. 193; *Occidental Petroleum Corporation and Occidental Exploration and Petroleum Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, para. 267; *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment, February 21, 2014, para. 84; *Tenaris S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment, December 28, 2018, para. 75.

[145] *EDF International S.A., Saur International S.A., and Leon Participaciones Argentinas S.A., v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, February 5, 2015.

[146] *EDF International S.A., Saur International S.A., and Leon Participaciones Argentinas S.A., v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment, February 5, 2015, para. 193.

[147] *Victor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile,* ICSID Case No. ARB/98/2, Decision on Annulment, December 18, 2012, para. 70.

[148] As noted in *East Kalimantan*, "the Arbitral Tribunal considers that jurisdictional requirements shall be interpreted neither restrictively nor expansively, but simply in a manner that is consistent with the common intent of the Parties." (Para. 171).

an approval under Article 25(3) is used to create implicit designation in an *ad hoc* manner under Article 25(1), it would expand the scope of the "*approval*" contrary to the plain meaning of the language of Article 25(1), and subsume the expression "*designated to the Centre by that State*" in approval. It will make redundant the requirements of Article 25(1) for designation to the Centre by the State.

146. The Tribunal has conflated the "*analytically distinct*"[149] requirements of Article 25(1) with that of Article 25(3). By assuming jurisdiction on the basis that approval by the State under Article 25(3) is sufficient to meet the requirement of designation to the Centre under Article 25(1), and that the communication to the Centre by the Claimant through the RFA meets the requirement of such designation to the Centre "by that State" the Tribunal has rendered redundant the clear jurisdictional requirements of Article 25(1). The Tribunal has, thus, manifestly exceeded its powers.

147. The Tribunal having manifestly exceeded its powers the remedy of annulment must follow.

[149] C. Schreuer et al., Schreuer's Commentary on the ICSID Convention – Volume I, 3rd ed., (2022) Cambridge University Press, p. 274-275, para. 524.

Mr. Makhdoom Ali Khan
Member of the *ad hoc* Committee

Date: 9 October 2023