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CERTIFICATE

F-W Oil Interests, Inc

v.

The Republic of Trinidad and Tobago

(ICSID Case No. ARB/01/14)

I hereby certify that the attached document is a true copy of the Arbitral Tribunal's Award.

Scott B. White
Acting Secretary-General

Washington, D.C., March 3, 2006

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Washington, D.C.

Case No. ARB/01/14

F-W Oil Interests, Inc.

(Claimant)

v.

The Republic of Trinidad and Tobago

(Respondent)

AWARD

Before the Arbitral Tribunal Comprised of:

Mr. Fali S. Nariman, President

Sir Franklin Berman

Lord Mustill

Secretary of the Tribunal

Mr. Ucheora Onwuamaegbu

Representing the Claimants:

Mr. Stephen York
Mr. James Loftis
Mr. Shai Wade
Vinson & Elkins Solicitors

Representing the Respondent:

Ms. Lynette Stephenson SC, Solicitor General
Mr. James Dingemans, QC
Mr. John Almeida, Charles Russell Solicitors
Mrs. Carol Bristol

Date of Dispatch to the Parties: March 3, 2006

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PART – I

1 BRIEF INTRODUCTORY TEXT OF THE ISSUES INVOLVED IN THE CASE

1. In later sections of this Award we set out at some length the factual origins of the dispute, and examine the legal resources brought to bear by the parties on the issues of law to which it gives rise. As will appear, much of this material has played no part in our decision, and at first sight there might seem no reason to enter into it. In the event, however, it cannot be left wholly out of account. Thus, for example, although the disappearance from the case of the allegations of fraud and corruption has made it unnecessary, and indeed undesirable, to analyse in depth the evidence said to bear on these allegations, at least a general appreciation of the way the claim developed is still relevant to determining the real nature of the case before us, and in particular whether it is essentially a case about breach of contract remediable in principle in the local courts under domestic law, or instead (or as well) an infraction of the obligations of the State under international law falling within the jurisdiction of a tribunal like the present one. So also the erratic formulation of the claim has required careful study of the legal materials placed before us to see what parts of them are relevant to the legal elements of the Claimant's case in the shape in which it ultimately came to rest.

2. Accordingly, there remains a considerable amount of ground to cover in the present Award, and because of the haphazard way in which the issues emerged it is not altogether easy to identify those parts which are truly relevant to the dispute as it finally came to rest. We therefore think it useful, at the cost of some repetition, to begin by introducing the case in its barest outlines, starting with the facts.

3. Offshore oil is an important component of the economic heritage of Trinidad and Tobago. A part of it lies in the Soldado Fields. By an Act of 1969 this asset, amongst others, was vested in the Republic of Trinidad and Tobago (hereafter "the State"). Through a succession of instruments the offshore rights devolved on Petrotrin, the national oil company of Trinidad and Tobago, a corporate body wholly owned by the State. For the purpose of developing and exploiting these rights another company, Trinmar Limited

(hereafter "Trinmar"), was incorporated. At the outset of the events in question the State held a majority interest in the equity of Trinmar through Petrotrin, but there was one minority shareholder in the shape of Textrin, a local subsidiary of the US oil company Texaco.

4. In May 1999 one of the structures engaged in extraction of oil and gas in the Soldado Fields suffered a disaster, the consequence being serious, with a prolonged fall in production and hence in the revenue flow to the State. The value of this loss of production was estimated by Trinmar (in September 2000) as being of the order of T&T $200 million.[1] One would have expected that in a developing economy the maximum possible effort would be exerted by the State to help restore production in order to stimulate the economy. This the State had attempted to do when it directed Trinmar to negotiate an agreement with the Claimant in this Arbitration (hereafter "FWO"): but for various reasons an agreement did not fructify, with Trinmar ultimately withdrawing from the negotiations on 26 February 2001. Thereafter no meaningful steps were taken to exploit, either internally or through foreign participation, the State's vast resources of offshore oil. The record – oral and documentary – of this case is a long catalogue of failures; replete with apportioning of blame, antagonism between officials and inter-corporate bickering, exacerbated by political pressures. It is not our task to comment on why a vital resource in a developing economy was not attempted to be exploited: that is a matter for introspection by the Respondent State. All this however does form an inescapable backdrop to the entire dispute in this case.

5. After the May 1999 disaster it was a strong policy priority of the Government, quite understandably, to restore production from the Fields and the situation offered obvious opportunities to commercial concerns outside Trinidad and Tobago with experience in offshore construction and development. Prominent amongst those who showed interest at an early stage was F-W Oil Interests Inc. (hereafter "FWO"), a Delaware corporation, part of a group of companies established in the state of Texas. During August 1999 an approach was made by FWO to the relevant Minister; later, a confidentiality agreement enabled FWO engineers to review data concerning the Field; and by the end of 1999 FWO

[1] Letter dated 22 September 2000, addressed by Trinmar to its shareholders, Petrotrin and Textrin.

was presenting two alternative bases for financing, each of them involving a transfer to FWO of the mineral rights in the field. In the event, however, FWO's proposal was not adopted, and in place of direct negotiation a public tender process was begun.

6. The outcome was the distribution to potential bidders, including FWO, of a document entitled "Request for participation in Trinmar's West and South West Soldado Fields". Together with a brief description of the work, the Request comprised an "Invitation to Bid" and a Form of Tender. FWO was one of those responding with a tender.

7. It appears that Trinmar originally contemplated 1 March 2000 as the date for awarding the project, but this aim was frustrated by the intervention of the minority shareholder, Textrin, which contended that, Trinmar having no interest in the licences for the development of the Fields, the invitation was improper, as would be any acceptance of bids made in response. As it happens, this objection was made at a time when long-running negotiations for the acquisition by Petrotrin, as the national oil company, of the outstanding minority shareholding in Trinmar were coming to a head, the completion of which held up the project for several months. The dealings between Petrotrin and Trinmar at this stage remain somewhat obscure; what is certain, however, is that, despite having apparently sought and obtained approval from the upper management of Petrotrin that the bidding process should be suspended, Trinmar went ahead with it all the same. A series of undignified exchanges between the two State corporations followed, with each side seeking to enlist the support of the relevant Minister, who expressed his strong disapproval of the strained relations between those in charge of the two companies, and recalled in the strongest terms that the interests of the State (as indicated) lay in resumed production from the Fields as soon as possible.

8. Ultimately the bidding process led to the selection of FWO as the preferred bidder, and the Minister directed that negotiations with that company should go ahead. It should however be noted that by now Trinmar, at the insistence of Petrotrin, had changed the basis of the proposed transaction in an important respect, namely that the successful bidder would no longer be granted a licence or other proprietary interest in either the Field or the

minerals gotten from it, but would instead operate as a "Service Contractor", remunerated by a rate per barrel of oil produced. In due course the Board of Trinmar approved the selection of FWO and directed the management to proceed with negotiations, and on 20 September 2000 FWO was formally notified that it had been awarded the tender, "subject to the negotiation and execution of a mutually agreeable operating agreement…" Draft Heads of Agreement were annexed to the notification.

9. Meanwhile, having learned unofficially that it would receive the award, FWO had written two letters to Trinmar. The first reiterated previous requests for a guarantee or other form of security to secure payment to FWO under the anticipated contract, on the ground that – now that FWO was not to acquire rights to the oil itself – the outside interests who were intended to finance FWO's share in the project required some such security as a pre-requisite of participation. The second letter asked for assurances that FWO would be compensated for work done in anticipation of an agreement to carry out the project, if in the event such an agreement was not concluded.

10. Neither letter received a positive response. As to the former, Trinmar undertook to request a guarantee or other security from its shareholders but did not itself agree or promise that one would be provided. In relation to the second letter Trinmar simply replied that it did not hold itself liable for any costs or expenditure incurred by FWO prior to the execution of a contract.

11. Although much was happening behind the scenes between persons and bodies in Trinidad and Tobago the negotiations between Trinmar and FWO made no progress, and indeed Trinmar did not reply to follow-up letters addressed by FWO during October and December 2000 and January 2001, except to inform FWO on 11 October 2000 that Petrotrin had purchased Textrin's remaining 33.33% shareholding in Trinmar. Ultimately, however, Trinmar's Acting General Manager wrote to FWO on 26 February 2001 as follows:

(i) Trinmar was now wholly owned by Petrotrin.
(ii) The latter had not acceded to the request for a guarantee.
(iii) FWO had indicated that the guarantee was to be made available so as to enable it to conclude an agreement for the project.

(iv) The award was subject to the negotiation and execution of a mutually agreed contract.
(v) Trinmar did not hold itself liable for costs and expenditure incurred by FWO prior to the execution of a contract on the tender.
(vi) "In the light of the above Trinmar hereby notifies you that it has withdrawn from the negotiations and is reconsidering its position on the project".

12. This letter, which came out of a clear blue sky, five months after the notification that FWO had been awarded the project, marked the effective end of FWO's connection with it. Notwithstanding protests, Trinmar refused to reverse its decision, and the Government, when approached by FWO, declined to intervene. Following intensive consultation with Petrotrin and with the responsible Government Minister, Trinmar set in train instead an alternative bidding process in which FWO declined to take part – although this process, too, was in due course aborted, and the Soldado Field remains unproductive to this day.

13. That being, in outline, the history of the dispute, we turn to the proceedings before the present Tribunal. The Request to Institute Arbitration Proceedings asserted that FWO's "investment" in Trinidad and Tobago, for the purposes of ICSID's jurisdiction, existed in two forms: first, in the shape of an agreement made by FWO "with T&T", in relation to the Soldado project; second, "by contributing money and tangible and intellectual property … to the project". Thus, at this early stage FWO was advancing a claim of the kind which has become familiar in recent years in multi- and bi-lateral ICSID disputes, whereunder the foreign investor relies on a contract between itself and the host state which constitutes at the same time the investment on which ICSID jurisdiction is founded, and also the source of the obligation, the breach of which is the subject-matter of the claim.

14. Later, however, when FWO served its Memorial in the arbitration, the thrust of the claim was completely transformed. In its opening lines we read:

> "1:1 FWO's claims in this arbitration result from corruption and other unlawful conduct by officials of T&T state enterprises. In retaliation for FWO's refusal to pay a US$1.5 million bribe in connection with an oil and gas contract, senior officials of the T&T state oil and gas company engaged in wrongful conduct that caused a

> subsidiary to breach its contractual obligations to FWO … the officials then commenced a campaign of disinformation designed to force FWO's removal as a successful bidder and abused their oversight positions in Petrotrin and the T&T government to block Trinmar proceeding with the award. This conduct was part of a plan to avoid the acknowledged contractual rights of FWO … During the negotiations however, and without FWO's knowledge, certain T&T officials hoping to benefit personally from the Trinmar project, had embarked on a course of conduct that would ultimately cause Trinmar wrongfully to withdraw the award of the contract."

Similar allegations were repeated on several occasions later in the document. Finally, in paragraph 7.1 the reformulated case was summarised as follows:

> "In view of the matters stated above FWO claims that T&T
> - Failed in breach of the Tender Contract and in bad faith to perform its promise to award FWO the project.
> - Failed to treat FWO fairly and protect its investment from harm in accordance with its treaty obligations under the BIT.
> - Was unjustly enriched through its bad faith actions …"

15. Nothing could be plainer. A relatively mundane, although intellectually rather elusive, dispute about the existence of contractual rights arising under domestic law from dealings before the conclusion of a formal agreement, and about their relationship to a bi-lateral investment treaty, was now to be the stage for a highly-coloured attack on officials, sufficiently senior for their conduct to be identified with that of the State. This attack was reiterated in FWO's Reply, served on 26 September 2003, only six weeks before the start of the oral hearing. It continued to be part of FWO's case throughout almost the entirety of the hearing, until (on 16 December 2003, the penultimate day of the hearing) counsel for FWO withdrew that part of the allegations which related to the conduct of a junior minister. The remainder of the allegations did however remain on the record. Pressed by the Tribunal, counsel for FWO explained that the case had "matured" in the previous year, and that the allegations of fraud and corruption were no longer "a central plank" of it. The Tribunal was dissatisfied with this account of the current state of FWO's case, and required FWO to state whether or not it was pursuing the allegation. Eventually, counsel said, on fresh instructions, that the allegation (or at least the part of it which impugned the conduct of a senior official) was withdrawn. An undertaking was given to amend the Memorial accordingly, but when the Amended Memorial was delivered, after the conclusion of the

oral hearing, it was found that a considerable portion of the references to bribery had not been expunged. This was unsatisfactory, but we have not devoted time to pursuing the matter further. If there had ever been sufficient evidence to justify the levelling of these charges we have not seen it, nor have we had any proper explanation of how it came about that very serious accusations were made which in the event the accuser made no effort to sustain. In the circumstances, we leave these accusations out of account, and concentrate on the less dramatic, but intellectually more taxing, contentions based on the assertion that FWO had the benefit of a binding pre-contractual agreement, which constituted an investment in Trinidad and Tobago, and which the State unfairly infringed, either by using its powers to ensure that Trinmar did not take the bidding process to a conclusion, or (if on a true understanding of the contractual situation the counterparty to FWO in this agreement was the State, and not just Trinmar), by itself failing to perform the agreement.

16. Even this brief description is enough to show that essential to almost every variant of FWO's case is the existence of a contract, the benefit of which was lost to FWO when Trinmar announced that the negotiations would not proceed. Leaving aside for the moment a separate argument related to pre-contract work and expenditure, the contract relied upon is said to have been what was called a "Tender Contract". Drawing on a considerable number of decided cases from other common law jurisdictions, FWO sought to establish that it was the obligee under a contract, arising from the dealings between the parties and reinforced by inferences of law, which governed the way in which both sides were obliged to carry on negotiations towards a final substantive agreement. This contract, so it was maintained, was enforceable in Trinidad and Tobago under the law of that country, and was therefore an investment which the State of Trinidad and Tobago as host nation was bound as a matter of international law under treaty to recognise and protect. Any claim resulting from a failure to do so would (so it was argued) be justiciable before this Tribunal.

17. The second critical feature of the alleged Tender Contract was substantive rather than jurisdictional; namely that, if proved, it established and set the bounds of the rights which the actions of the State are said to have infringed. In other words, unless the Tender Contract could be proved, the claim would founder on both jurisdiction and the merits.

18. Much of what follows in this Award is occupied with an examination of the existence and characteristics of the Tender Contract relied upon by FWO. The bare outlines of FWO's case defy being shortly stated because, although the expression "Tender Contract" is borrowed from decisions on preliminary contracts which at first sight bear a strong resemblance to what is alleged here, in fact the resemblance is illusory, for the subject matter of those decisions was almost always a failure to comply with a bidding process said to be enforceable in law, whereas the complaint of FWO in the present case was not that something had gone wrong with the bidding - for that ended in an award in favour of FWO – but that the award had not been followed up by a binding final contract. There was little analysis of this complaint, and little help to be gained from the reported cases. We discuss it below. Once the ground has been cleared of irrelevant authority, it seems to us that a solution is relatively straightforward.

19. Another important respect in which the formulation of FWO's claim has lacked precision is in the absence of any consistent identification of the parties to the Tender Contract. FWO was obviously one party, but who was the other? FWO's contentions never made this clear, for the repeated references to "T&T" as both the contracting party and the party whose actions and inactions brought about and constituted the breach have blurred the analysis required by the issues which the Tribunal is called on to solve. We seek to clarify them later. For the moment it is sufficient to indicate that, if the claim is that the State was itself a party to the Tender Contract (because Trinmar was to be identified with the State for the purpose), then the cancellation by Trinmar of FWO's participation would presumably be argued to be at the same time a breach by the State under domestic law of the State's own contractual obligations, and an infringement by the State of the rights under international law created by the BIT. If on the other hand the Tender Contract (assuming there was one) was made not with the State but with a separate entity, the argument would presumably be that the State can be held responsible under the Treaty if through its own officers or Agencies it illegitimately interfered with FWO's rights under the contract.

20. The enquiry must thus be focused on the existence and terms of the alleged Tender Contract; on the identification of the parties to it; on the acts and omissions alleged to have

constituted a breach of it, or alternatively a wrongful interference with the performance of it. Then, when answers have been given to these questions it must be considered whether whatever wrongful act or omission there may have been on the part of persons or bodies in Trinidad and Tobago, was also a breach of the obligations of the State under the BIT.

21. The above sketch may serve to clarify what might otherwise seem a confused set of issues, and it will we hope also explain why it seemed obvious to the Tribunal (and evidently to the parties as well) that questions of jurisdiction and merits were so inextricably entwined that it would have been pointless to attempt a decision on jurisdiction in advance of a hearing on the merits.

PART – II

2 THE PARTIES

22. The Claimant, FWO, is an energy company engaged in the exploration, development and production of oil and natural gas, primarily from offshore fields; FWO is a Corporation registered in Delaware, USA founded by Franklin C. Wade ("Wade") in 1995.[2] Wade is FWO's sole shareholder, Chairman and Chief Executive Officer. The Claimant's address is given as:

> F-W Oil Interests Inc.
> 9821 Katy Freeway Suite 1050
> HOUSTON Texas 77024

23. The Respondent is the Government of the Republic of Trinidad and Tobago.[3] The Respondent's address is given as:

> The Republic of Trinidad and Tobago
> Represented by the Office of the Attorney General and Ministry of Legal Affairs
> Cabildo Chambers
> 25-27 St Vincent Street

[2] The Claimant was initially established as Offshore Drilling Consultants Inc., and its name was changed to FW Oil Interests in September 1998.

[3] For convenience, the Tribunal will, as the occasion permits, use the shorthand form "State" to refer both to the Respondent State and to its territory, but only where the context is clear enough to avoid ambiguity. The territory of the State is defined in Section 2 of the Constitution of the Republic of Trinidad and Tobago of 1976, as amended by Act, No. 89 of 2000. There is also a definition for treaty purposes in Article I (d)(l) of the BIT.

Port-of-Spain
Republic of Trinidad and Tobago

3 PROCEDURAL HISTORY OF THE CASE:

(a) The Request for Arbitration

24. On September 28, 2001, FWO filed a request for arbitration at the Centre, against the Republic of Trinidad and Tobago. On the same day, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("Institution Rules"), the Centre acknowledged receipt of the Request, and transmitted a copy to the Republic of Trinidad and Tobago and to its Embassy in Washington, D.C.

25. In the request, FWO claimed that it had established an investment in the territory of Trinidad and Tobago by entering into an investment agreement with the State, by acquiring rights under the laws of Trinidad and Tobago, the "BIT" and international law in relation to an offshore oil and gas development and production project and by contributing money and tangible and intellectual property to the project as more particularly described. It was stated that each of these qualified as an investment of FWO in the territory of the State for the purposes of both the ICSID Convention and the BIT.

26. The "investments" concerned the financing and development of the West and South West Soldado oil fields, natural resources and assets vested in the State ("Soldado Fields"). The Soldado Fields (it was stated) were exploited through two instruments of the State, namely the Petroleum Company of Trinidad and Tobago Limited ("Petrotrin") and Trinmar Limited ("Trinmar").

27. The "legal dispute" arising out of or relating to the "investment" was encapsulated in the Request as follows:

> - that relying on its discussions with representatives of "T&T" and on terms of an Invitation to Bid dated 23 December 1999, FWO had submitted bids, and invested substantial sums and intellectual property in connection with those bids including the procurement of a platform and jacket to be installed in place of

BS-25 (the central processing station through which until May 1999, all production in Soldado Fields had been routed);

- that in the period from 9 June to 15 September 2000, after material commercial terms had been discussed and agreed between the parties, FWO had received on 20 September 2000 a Notice declaring it the Successful Bidder, and had also been sent Heads of Agreement – at which time Trinmar undertook to negotiate in good faith and in an expeditious manner towards the execution of an Operating Agreement for the provision of facilities and services in the Soldado Fields; that by the said process of issuing negotiating, accepting and awarding a tender, "T&T" had entered into an "investment agreement", evidenced in writing by the said Invitation to Bid, submissions, Letter of Notice to Successful Bidder and Heads of Agreement, and FWO had further acquired rights in relation to the proposed development of the Soldado Fields;

- that on 26 February 2001, and without having taken any steps to negotiate and execute an Operating Agreement or to otherwise progress the financing and development of the Soldado Fields and without lawful jurisdiction or excuse, Trinmar informed FWO that it was withdrawing and seeking to abrogate FWO's rights;

- that in June 2001 the State issued another public invitation to bid for the development of the Soldado Fields utilising the same process and utilising information and know-how derived from FWO, thereby seeking to expropriate the rights of FWO.

(b) Notice of Registration

28. On 5 October 2001 and 1 November 2001, the Centre requested further information and supporting documents from the Claimant with regard to various issues raised in the request for arbitration, and generally concerning the consent of the Respondent to ICSID arbitration, to which the Claimant responded by letters dated 10 October 2001 and 7 November 2001.

29. The Request for Arbitration, as supplemented by the Claimant's letters of 10 October 2001 and 7 November 2001, was duly registered by the Centre on 29 November 2001, pursuant to Article 36(3) of the ICSID Convention, and on the same day the Secretary-General, in accordance with Institution Rule 7, notified the parties of the

registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

(c) Constitution of the Arbitral Tribunal and Commencement of the Proceeding

30. In accordance with ICSID Arbitration Rule 2, the Claimant, by a letter of 6 December 2001, proposed to the Respondent that there be a Tribunal composed of three arbitrators, one appointed by each party, and the third, who shall be the president, appointed by agreement of the parties. A deadline for the appointment by the parties of arbitrators was proposed, as was the method for appointing the presiding arbitrator.

31. On 30 January 2002, sixty days having passed since the registration of the request for arbitration, and the parties having not reached an agreement on number of arbitrators and the method of their appointment, the Claimant notified the Centre that it was opting for the method in Article 37(2)(b) of the ICSID Convention. In the same letter, the Claimant notified the Centre of its appointment of Sir Franklin Berman QC, a national of the United Kingdom, as an arbitrator and of the candidate whom they proposed for appointment as the presiding arbitrator.

32. By a letter of 27 February 2002, the Respondent notified the Centre of its appointment of the Rt. Hon. Lord Mustill, a national of the United Kingdom, as arbitrator. Further, the Respondent by a letter dated 22 March 2002 rejected the candidate proposed by the Claimant as the presiding arbitrator and proposed another candidate, and this candidate was, in turn, not accepted by the Claimant who by a letter of 16 May 2002 requested, pursuant to ICSID Arbitration Rule 4(1), that the appointment be made by the Chairman of the Administrative Council, since more than ninety days had passed since the registration of the request for arbitration.

33. Pursuant to Article 38 of the Convention and ICSID Arbitration Rule 4(4), the Acting Chairman of the Administrative Council of the Centre, in consultation with the parties, appointed Mr. Fali S. Nariman, a national of India, as an arbitrator in the case and designated him as the President of the Tribunal.

34. All three arbitrators having accepted their positions, the Centre by a letter of 19 June 2002, informed the parties of the constitution of the Tribunal, consisting of Sir Franklin Berman QC, the Rt. Hon. Lord Mustill and Mr. Fali S. Nariman, and that the proceeding was deemed to have commenced on that day, pursuant to ICSID Arbitration Rule 6 (1).

35. As agreed between the Tribunal and the parties, and in consultation with the Centre, the Tribunal held its first session in London, on 4 October 2002, with the parties and their representatives in attendance. Various issues of procedure identified in the provisional agenda sent to the parties in advance of the meeting, were discussed, and the conclusions at the meeting, including the schedule for the filing of submissions, were recorded in the minutes of the Tribunal that were subsequently distributed to the parties. The schedule for filing of written pleadings under Rule 31 of the Arbitration Rules was subsequently modified by agreement of the parties.

(d) Claimant's Memorial

36. The Claimant filed its Memorial on 28 February 2003, in which its claim was summarised in the following terms:

> "SUMMARY OF DISPUTE
>
> 1.1 FWO's claims in this arbitration result from corruption and other unlawful conduct by officials of T&T state enterprises. In retaliation for FWO's refusal to pay a US$1.5 million bribe in connection with an oil and gas contract, senior officials of the T&T state oil and gas company engaged in wrongful conduct that caused a subsidiary to breach its contractual obligations to FWO and to violate the rights guaranteed to FWO as an investor under the Bilateral Investment Treaty ("BIT") between T&T and the United States. This conduct was part of a plan to avoid the acknowledged contractual rights of FWO.
>
> 1.2 In February 2000, Trinmar invited FWO to participate in a competitive tender for a contract to redevelop the state owned Southwest and West Soldado oil and gas fields (the "Soldado Fields" or the "Fields"), located in the territorial waters of T&T. Trinmar is a subsidiary of the state oil and gas company, Petrotrin, and is charged with management of T&T's offshore oil

and gas resources. Petrotrin and Trinmar are state enterprises of T&T and act on behalf of the state in oil and gas matters. The bid process was subject to express and implied terms governing the evaluation of the bids and the eventual award of a contract for the project (the "Tender Contract").

1.3 FWO's proposal was assessed in a detailed nine-month evaluation process, supervised by independent auditors. On 20 September 2000, Trinmar formally awarded FWO the contract for the Soldado Fields. FWO's proposed capital commitment to the project was in excess of US$60 million.

1.4 During the negotiations, however, and without FWO's knowledge, certain T&T officials, hoping to benefit personally from the Trinmar project, had embarked on a course of conduct that would ultimately cause Trinmar wrongfully to withdraw the award of the contract.

1.5 In July 2000, acting through intermediaries, certain T&T officials demanded a US$1.5 million bribe and threatened to block FWO's proposals unless the bribe was paid. FWO refused. They later caused a fax to be sent to FWO listing a Cayman Island bank account and demanding that US$200,000 be deposited into the account as the first payment on a bribe. FWO again refused. The officials then commenced a campaign of disinformation designed to force FWO's removal as the successful bidder and abused their oversight positions in Petrotrin and the T&T government to block Trinmar from proceeding with the award. These officials ultimately caused Trinmar to withdraw the award in February 2001.

1.6 Finally, in June 2001, T&T submitted the Project to a new tender. In breach of its contractual obligations and duties of good faith, and confidence to FWO, T&T modelled its new tender on FWO's confidential business plans and economic models.

1.7 By its conduct, T&T has breached its agreements with FWO and its obligations under T&T law, the BIT and international law, and has caused FWO substantial damage and loss. FWO respectfully requests that it be awarded compensation for its lost profits and wasted costs."

37. The Memorial went on to give particulars of the bribery and corruption charge in considerable detail.

38. It was also submitted that it was unfair to award a project in accordance with a competitive tender and eight months later unilaterally decide to re-tender the project "without a good faith effort to finalize a substantially completed agreement".

39. It was contended that in these circumstances by its conduct the State not only breached its agreements with FWO and its obligations under the law of Trinidad and Tobago, but also breached its obligations under the BIT and international law, and thereby caused FWO substantial damage and loss.

(e) Respondent's Counter Memorial

40. In the Respondent's Counter-Memorial filed on 29 August 2003:

- it was accepted that the Tribunal had jurisdiction to determine whether or not there was any legal dispute arsing directly out of and investment between the State and the Claimant (Article 25 of the ICSID Convention) and that if there was any such dispute, to determine the merits of such dispute;

- it was denied that there was any legal dispute arising directly out of an investment between the Claimant and the State – any claim that the Claimant might have (it being denied that the Claimant had any valid claims) would be against Trinmar or the officials of Petrotrin for their unlawful personal conduct mentioned in various paragraphs of the Claimant's Memorial (it being denied that there was any such conduct); it was contended that Trinmar, Petrotrin and the officials of Petrotrin were all separate entities from the State; it was further stated that the relevant actions of Trinmar, Petrotrin and the officials of Petrotrin were all commercial or private and not governmental, and the State was not liable in respect of any such action;

- it was further denied that Trinmar was liable in respect of the tendering process; it was stated that the selection of the Claimant as preferred bidder was made expressly "subject to the negotiation and execution of a mutually agreeable operating agreement" – which was never agreed to or executed;

- it was stated that the failure to finalize and execute any operating agreement on the part of Trinmar was not in breach of any duties owed to the Claimant; Texaco Trinidad Limited ("Textrin") and Petrotrin (as shareholders in Trinmar) had reasonably refused to provide any guarantee to the Claimant; besides, allegations were

made about the propriety of the Claimant, and the Claimant was in dispute with a co-venturer in its bid, which meant that Trinmar reasonably refused to proceed with the Claimant; it was urged that all relevant decisions were taken by Trinmar and Petrotrin and not the respondent State;

- it was denied that any contract was awarded to the Claimant; it was further urged that the Claimant itself sought to impose new terms, including a demand that Petrotrin should guarantee Trinmar's obligations under the proposed contract; these new terms were not accepted and therefore there was no contract in law between the Claimant and Trinmar nor breach of any duties owned by Trinmar to the Claimant; the Claimant's tender was made on the condition that if accepted the Claimant would be obligated to Trinmar only upon the entry into force of a definitive written agreement between the Claimant and Trinmar; both Trinmar and Claimant had made it clear that contractual duties and obligations would arise only on execution of a written contract;

- it was denied that the Claimant had made an investment within the meaning of the ICSID Convention or the BIT – the allegation that there was a tender contract was denied; it was also denied that Trinmar acted in breach of any implied terms (such as that Trinmar was obliged to act in good faith towards the claimant) by not providing a guarantee or negotiating with the Claimant;

- the allegations of corruption and bribery set out in the Claimant's Memorial were specifically denied;

- the Respondent further conceded that after the conclusion of the tendering process with the Claimant, Trinmar did put the redevelopment of the Soldado Fields out to re-tender (but had not accepted any re-tender) but denied that it used any of the Claimant's business plans and economic models.

- it was contended that at the time of the State's alleged breach of contract there was no prospect of the Claimant undertaking the project utilizing its own resources: it would have had to obtain external finance, its own assumptions were that it would require between US$45m to US$60m, but the Claimant had no firm offer of finance to enable it to undertake the project, despite having contacted more than twenty prospective lenders; the only two financing term sheets produced by the Claimant made clear on their face that they were no more than discussion documents; both discussion documents would, if translated into firm offers,

have been contingent on the Claimant finding equity in excess of that which the Claimant would have been able to offer;

- it was submitted that, given the Claimant's lack of an established track-record (whatever the qualities of some of its personnel) and the particular difficulty of obtaining finance for projects in developing projects in developing countries, the Claimant would not in any event have been able to perform the project had it been successful.

(f) The Claimant's Reply

41. In the Claimant's Reply filed on 26 September 2003 it was stated:

- the domestic law argument of the Respondent was irrelevant to the question of responsibility; in the BIT, the State had expressly agreed to be responsible for the conduct of its state enterprises in the context of investment disputes; and it was a well-settled principle of international law that the state is responsible for conduct such as that alleged in this case; the facts would show that the wrongful conduct was under the direct supervision of state officials and the State could not avoid answering for the damage done to FWO;

- the facts demonstrated that the State had internal problems with the tender "likely influenced by corruption after T&T had accepted FWO's proposal", and that the facts also showed that at the time Trinmar had terminated the contract, it had legal advice that it could not do so without liability to FWO and that its stated reason was a mere pretext;

- in light of voluminous evidence of the State's direct active control over all facets of the tendering process and the acceptance of the tender, the Respondent's assertion that neither the State nor the Minister of Energy was involved in any of the decisions simply could not be sustained, and were therefore denied; according to the Respondent's own submissions Petrotrin exercised regulatory and policy control over the procurement process, culminating in its decision to withdraw the award; and Petrotrin's conduct both in the nature of and in fact, undertaken in the exercise of delegated regulatory and administrative government authority was binding on the State;

- the arguments as to corruption were further amplified and developed.

(g) Respondent's Rejoinder

42. In the Respondent's Rejoinder filed on 24 October 2003, it was stated:

- the Claimant had failed to identify any "investment dispute" between the State and the Claimant – at its highest the Claimant's case was that it had a contract with Trinmar (notwithstanding all the express words to the effect that there would be no contract in force until a contract was signed) which was breached because the then Chairman of Petrotrin arranged for copies of existing adverse media articles about the Claimant to be sent to the Minister of Energy for his own "corrupt purposes"; there was however no evidence showing that the Chairman was involved or caused Petrotrin to refuse to offer a guarantee to Trinmar when demanded by the Claimant; in any case this was not an "investment dispute" with the State, and the State was not responsible for the actions of Trinmar or Petrotrin;

- it was admitted that the Claimant was selected as the preferred bidder but the selection of the Claimant by Trinmar as preferred bidder was expressly 'subject to the negotiation and execution of a mutually agreeable operating agreement', and it was the Claimant who sought to impose new financial terms to be incorporated in the operating agreement.

- the State had no material involvement and did not control the bidding process between Trinmar and the Claimant; the evidence showed that Trinmar failed even to involve Petrotrin in the bidding process, resulting in difficulties between the Boards of Trinmar and Petrotrin;

- the Claimant had assumed in its Reply that it had a concluded contract and that the contract was with the State; both assumptions were wrong: there was no concluded contract between the Claimant and Trinmar and Trinmar was not carrying out any governmental act making the State liable for the actions of Trinmar;

- Trinmar was not owned by the State; it was not at all material times controlled by ownership interests by the State by reason of the shareholding of Textrin; indeed the evidence showed that part of the problems related to conflicts between the Boards of Trinmar and Petrotrin; neither Trinmar nor Petrotrin was exercising regulatory, administrative or other governmental authority delegated to it;

- it was plain that from 1999 Trinmar was pursuing objectives different from Petrotrin; in particular there was concern that Trinmar was adopting a 'high profile public-relations programme' at a time when there were negotiations for the purchase of the Textrin shareholding; further Trinmar invited bids for participation in the Soldado Fields without the authority or consent of Petrotrin (as appears from the letter dated 8 March 2000 from Petrotrin) and, having halted the process, recommenced the process again in June 2000 without the approval of the Board of Petrotrin;

- Textrin had made it clear, as a shareholder in Trinmar, that it was not appropriate to seek bids for the Soldado fields before an internal evaluation had been carried out; the letter from the Chairman of Trinmar to the Chairman of Petrotrin asserted the independence of Trinmar from Petrotrin in relation to all matters, including the Soldado Fields, but Petrotrin remained concerned about the process used to arrive at a preferred contractor and Textrin disapproved of the decision to nominate the Claimant as preferred bidder;

- the decision of Trinmar to issue a letter of intent to the Claimant was made without reference to Petrotrin, which only became involved again in the process because the Claimant wanted it to provide for a guarantee;

- the corruption charges were once again denied and it was asserted that that Claimant's making of and persistence in these allegations was an abuse of the arbitration process;

- there was no agreement between the Claimant and Trinmar because:

- both Claimant and Trinmar had made it plain that contractual relations were not to be entered into until execution of a formal contract (in the invitation to bid and the Claimant's bid);

- Trinmar had declared the Claimant successful bidder 'subject to the negotiation and execution of a mutually agreeable operating agreement';

- Trinmar had made it plain that the letter declaring the Claimant successful bidder would be 'subject to the negotiation and execution of a definitive agreement';

- the Claimant would not have been able to obtain funding and the fact that the Claimant was attempting to extract financial

guarantees from Petrotrin in part evidenced by the Claimant's problems";

- the Claimant had asked for but had not been provided with an agreement to pay compensation for anticipatory work in the event that a definitive agreement could not be concluded (letter dated 15 September 2000);

- the Claimant had itself noted (in its second letter dated 15 September 2000) that no definitive agreement had been reached;

- as at 26 September 2000 the Claimant was recording uncertainty regarding security interest and referred to 'the project after the award, if awarded' (email dated 26 September 2000);

- thus the Claimant had no valid claim against Trinmar (or Petrotrin or the State).

(h) Events Subsequent to the Filing of the Pleadings

(i) Exchange of documents

43. After the filing of the written pleadings, an agreed bundle of documents was exchanged by the parties in advance of the hearing containing correspondence and other documents including cases and decisions. Witness Statements and Supplemental Witness Statements had also been filed by both Parties between February and October 2003.

(ii) Fresh documentary evidence

44. Before the hearing in December 2003, the Respondent filed a further affidavit attaching documents obtained under the Mutual Legal Assistance Treaty between the USA and Trinidad and Tobago, in support of further allegations by the Respondent of planned wrong-doing on the part of FWO and its initial collaborator Lexicon in relation to the proposed project.

(iii) The Oral Procedure – Hearing and Post-Hearing Submissions

45. As previously agreed, the Tribunal conducted a hearing in Tobago from 9 to 19 December 2003. The parties were represented by counsel who made presentations of their

respective cases to the Tribunal and also examined witnesses from their side and put questions to witnesses from the opposing side. Transcripts were made of the hearing and distributed to the parties; as also summary minutes thereof. Present at the hearing were:

> Members of the Tribunal: Mr. Fali S. Nariman, President, Sir Franklin Berman and the Rt Hon Lord Mustill; Secretary of the Tribunal: Mr. Ucheora O. Onwuamaegbu.

Attending on behalf of the Claimant:

> Mr. Stephen York, Mr. James Loftis, Mr. William H. Weiland, Mr. Shai Wade, Mr. Eugene J. Silva II, and Mr. Mark Beeley, of Vinson & Elkins; Mr. Frank Wade, Mr. James Brock, Mr. Eric Bosshard, Mr. Darin Bissoondatt, Mr. Jeffery Hughes, Mr. Robert Moore, Mr. William Abington, and Mr. Nirmal Rampersad.

Attending on behalf of the Respondent:

> Mr. James Dingemans QC, Mr. John Almeida of Charles Russell, Ms. Lynette Stephenson SC, Ms. Carol Hernandez, Mr. Adrian Darmanie, Ms. Anne-Marie Rambara, Mr. Martin Daly and Ms. Maureen … of the Government; Mrs. Carol Pilgrim Bristol, Mr. Ulric McNicol, and Mrs Allison Betancourt of Petrotrin; Mr. Haseeb Ali, Mr. Aleem Hosein, Mr. Shiraz Rajab, Mr. Robert Stauble, Mr. Rodney Jagai, Mr. Donald Baldeosingh, Mr. Basdeo Panday, Mr. Stuart Travers and Mr. Rawden Seagerade.

The following witnesses were examined on behalf of the Claimant:

> Mr Frank Wade, Mr James Brock, Mr Darin Bissoondatt, Mr Robert Moore, Mr William Abington, Mr Jeffrey Hughes, Mr Nirmal Rampersad, and Mr Eric Bosshard.

The following witnesses were examined on behalf of the Respondent:-

> Mr Aleem Hosein, Mr Haseeb Ali, Mrs Carol Pilgrim Bristol, Mr Shiraz Rajab, Mr Robert Stauble, Mr Donald Baldeosingh, and Mr Baseo Panday.

46. On 2 and 9 February 2004, respectively, Claimant and Respondent filed post-hearing memorials. Following an exchange of correspondence in that regard, the Parties filed a second round of post-hearing submissions on 2 April 2004.

47. The Tribunal addressed further questions to the parties on 6 August 2004, which were responded to in writing by each of the parties on 30 September 2004.

48. Following the hearing, Members of the Tribunal deliberated by various means of communication and, ultimately, the Tribunal declared the proceeding closed pursuant to ICSID Arbitration Rule 38(1). The Tribunal has taken into account all pleadings, documents and testimony in this case.

PART – III

4 THE BRIBERY AND CORRUPTION CHARGES AND ALLEGATIONS OF WRONGDOING – their ultimate withdrawal and filing of the Amended Claimant's Memorial dated 16 January, 2004, along with the Claimant's Amended Reply also dated 16 January, 2004 – consequential effect on the claim of FWO against the Respondent.

49. Brief reference has been made above to the allegations of corruption, dishonesty and wrongdoing advanced (by both sides) in the written pleadings and evidence, and maintained up to and through the main part of the oral hearings in December 2003 in Tobago. Further important exchanges in this regard took place between the Tribunal and the Parties which can be found in the transcripts of the proceedings on 17 December 2003 (Vol.7, pp.2215 and following). In the course of these exchanges, Counsel for the Claimant, having obtained fresh instructions, indicated that his client would no longer be basing its Claim on the allegations of corruption, etc.[4]

50. The Tribunal asked for a precise indication of how this change in position would affect the arguments advanced by the Claimant, and this led in due course to the filing of an amended version of the Claimant's Memorial along with an amended version of the Claimant's Reply on 16 January 2004. In the Amended Memorial, the Summary of the Dispute was now re-stated (with deletions) as shown below:

> "Summary of the Dispute
>
> 1.1 FWO's claims in this arbitration result from ~~corruption and~~ unlawful conduct by officials of T&T state enterprises. ~~In~~

[4] "We are going to withdraw the allegation and we will ask you not to make a ruling on it. Consider that it has been withdrawn …" (Vol. 8, pp. 2482-2494)

~~retaliation for FWO's refusal to pay a US$1.5 million bribe~~ In connection with an oil and gas contract, senior officials of the T&T state oil and gas company engaged in wrongful conduct that caused a subsidiary to breach its contractual obligations to FWO and to violate rights guaranteed to FWO as an investor under the Bilateral Investment Treaty ("BIT") between T&T and the United States. This conduct was part of a plan to avoid the acknowledged contractual rights of FWO.

1.2 In February 2000, Trinmar invited FWO to participate in a competitive tender for a contract to redevelop the state owned Southwest and West Soldado oil and gas fields (the "Soldado Fields" or the "Fields"), located in the territorial waters of T&T. Trinmar is a subsidiary of the state oil and gas company, Petrotrin, and is charged with the management of T&T's offshore oil and gas resources. Petrotrin and Trinmar are state enterprises of T&T and act on behalf of the state in oil and gas matters. The bid process was subject to express and implied terms governing the evaluation of the bids and the eventual award of a contract for the project (the "Tender Contract").

1.3 FWO's proposal was assessed in a detailed nine-month evaluation process, supervised by independent auditors. On 20 September 2000, Trinmar formally awarded FWO the contract for the Soldado Fields, FWO's proposed capital commitment to the project was in excess of US$60 million.

1.4 During the negotiations however, and without FWO's knowledge, certain T&T officials, ~~hoping to benefit personally from the Trinmar project~~, had embarked on a course of conduct that would ultimately cause Trinmar wrongfully to withdraw the award of the contract.

1.5 In July 2000, ~~acting through intermediaries, certain T&T officials demanded~~ a US$1.5 million bribe was demanded and ~~threatened~~ threats were made to block FWO's proposals unless the bribe was paid. FWO refused. ~~They later caused a~~ A fax was then sent to FWO listing a Cayman Island bank account and demanding that US$200,000 be deposited into the account as the first payment on a bribe. FWO again refused. Following this T&T ~~The~~ officials, then commenced a campaign of disinformation designed to force FWO's removal as the successful bidder and abused their oversight positions in Petrotrin and the T&T government to block Trinmar from proceeding with the award. These officials ultimately caused Trinmar to withdraw the award in February 2001.

1.6 Finally, in June 2001, T&T submitted the Project to a new tender. In breach of its contractual obligations and duties of good faith and confidence to FWO, T&T modelled its new tender on FWO's confidential business plans and economic models.

1.7 By its conduct, T&T has breached its agreements with FWO and its obligations under T&T law, the BIT and international law, and has caused FWO substantial damage and loss. FWO respectfully requests that it be awarded compensation for its lost profits and wasted costs."

51. In January 2004, the Respondent submitted a Closing Skeleton Argument in which it was stated inter alia as follows:

"4. The claims in relation to corruption made by the Claimant, which were the principal claims made by the Claimant (as appears from its summary of claims), completely failed. So complete was the failure that the Claimant itself permitted its lawyers to withdraw the allegations. These were not allegations which were made only in the Memorial. They were repeated in the Reply (at pages 2-3 and 24-25). They were claims which should not have been made or pursued."

"20. The Claimant's case on corruption had failed completely at the oral hearing. The Claimant announced on Monday 16 December (page 1672) that it was withdrawing the allegations against William Chaitan (paragraph 3.80 of the Claimant's Memorial) and has done so. The Claimant announced at the beginning of the afternoon session on 18 December 2000 that it was withdrawing its remaining allegations of corruption. It was understood that this included all of the allegations against Donald Baldeosingh.

21. The Amended Claimant's Memorial dated 16th January, 2004 does not achieve the purpose of withdrawing the wrongful allegations made and appears to make a new and distinct case.

22. The Claimant's continuing attempts to salvage something from its allegations of corruption appear from its letter dated 14 January 2004 to the Secretary stating the Claimant maintains its allegations that it received a request for a payment which it considers improper… this remains relevant to Claimant's claim under the protection and security guarantee of the relevant treaty'. In the circumstances the State respectfully submits that the Claimant ought to have permission to make the deletions

from its memorial but should not have permission to make any additions to the Memorial.

23. Further the State respectfully submits that the Claimant's attempt to rely on the allegation of bribery (in respect of the protection and security guarantee) should not be permitted. This case was not developed at the hearing. In any event the new case cannot be sustained. …"

52. The relevant portion of the Claimant's letter dated 14 January 2004 to the Secretary of the Tribunal (mentioned in para 22 of the Respondent's Closing Skeleton Arguments) quoted above reads as follows:

> "The Tribunal will note that that Claimant maintains its allegations that it received a request for a payment which it considers to have been improper – although it no longer alleges that the request came from an official of the Respondent – and that it reported this request to the then Prime Minister on two separate occasions. This remains relevant to the Claimant's claim under the full protection and security guarantee of the relevant treaty." (Emphasis supplied).

53. In short, there remains a significant degree of disagreement between the Parties as to how completely the Claimant has withdrawn these allegations, or whether (as the Respondent would have it) the Claimant is trying to rescue something from allegations supposed to have been withdrawn. The Tribunal was thus left in a situation which it has found to be extremely unsatisfactory, even though, in the event, it proved unnecessary (in the light of the conclusions recorded below) for the Tribunal to express any view either as to whether these allegations had been withdrawn or not, or indeed any view on the substance of the allegations themselves. The consequences of this uncomfortable state of affairs are spelled out in more detail in paragraphs 210-212 below.

5 THE RELEVANT FACTUAL ASPECTS OF THE CASE AS THEY HAVE UNFOLDED:

The Soldado Fields – their Development, Ownership and Control – the relationship of the State of Trinidad and Tobago with the two corporate entities, Petrotrin and Trinmar

54. The West and Southwest Soldado Fields (hereafter "the Soldado Fields") – located offshore of Trinidad – encompass an area of approximately 67,000 acres and lie in shallow

waters of less than 100 feet: they are bounded on the west and south by the Venezuela/Trinidad maritime boundary, to the north by Trinmar's North Soldado Field and east by the coastline of the south-western peninsula of Trinidad. The Southwest Soldado Field was discovered in 1982 with the successful completion of well S.352. The erstwhile Colony of Trinidad and Tobago had granted a mining lease No. 1038/53 dated 6 November 1952, to a company incorporated in England and Wales known as Trinidad Northern Areas Ltd. ("TNAL"); this mining lease included the Soldado Fields.

55. From 1982 up to December 1999 a total of 78 wells had been drilled with the majority of development taking place in the main southwest area; the well facilities in the field comprised 9 well protector platforms (known as clusters, each with nine well slots) and 9 other single well structures. The Field utilized gas lift as the primary means of artificial lift and facilities. Until May 1999, all production in the Soldado Fields was routed to a central offshore processing station BS-25 that also housed the gas lift and gas sales compression equipment. BS-25 was taken out of service in early 1999 resulting in a decrease in production of approximately 4000 BOPD; in or about May 1999 BS-25 was completely shut down because of structural problems[5] and by December 1999, the production from the Southwest field was limited to only seven flowing wells that were processed at facilities in the Main Field approximately ten miles away.

56. When Trinidad and Tobago became a Republic on 31 August 1962, the entire Soldado Fields stood vested in the State pursuant to the provisions of Section 3 of the Petroleum Act 1969. The exploitation of all gas reserves, including the Soldado Fields, had been delegated by Acts of Parliament to the national Petroleum Company, Petrotrin.[6]

57. By a written agreement dated 1 August 1960 three companies viz. Texaco Trinidad Inc, Shell Trinidad Limited and BP (Trinidad) Limited, who had acquired rights to drill for oil and gas from TNAL, agreed to incorporate a limited liability company – Trinmar – to explore, develop and conduct operations in the mining area. Trinmar was duly incorporated as a limited liability company on 7 February 1962 with a share capital of $W.I. 1,500.[7]

[5] Later in February 2000 it was converted into in a Pipeline Manifold.
[6] Sections 3 and 4 of the National Petroleum Act, 1969; Petrotrin Vesting Act, 1993.
[7] RAD Vol – J/A/3.

The shareholding of Trinmar was divided on an equal basis between the three companies. The main object of Trinmar was stated to be:

> "(a) To carry on in all its branches the business of exploring and prospecting for, producing, refining, storing, transporting, supplying, selling and distributing petroleum and other oils and any products thereof".

58. The State issued in favour of Trinmar an Exploration and Production Licence in respect of the West and Southwest Soldado Fields, the term of which was to expire in 2012.

59. The Trinidad and Tobago Oil Company ("Trintoc"), and the Trinidad and Tobago Petroleum Company Limited, ("Trintopec") became the successors-in-title of Shell Trinidad Limited and BP (Trinidad) Limited respectively. Later, the assets of Trintoc and Trintopec were vested in the National Petroleum Company, Petrotrin, pursuant to the Petrotrin Vesting Act 1993. Petrotrin thus became the owner of two thirds of the issued share capital of Trinmar, and Textrin remained the owner of one third of the issued capital of Trinmar.[8] The Minister of Finance acted as Corporation Sole for Petrotrin pursuant to the provisions of the Minister of Finance (Incorporation) Act, Chapter 69:03.

60. On 21 July 1993 Petrotrin was incorporated under the provisions of the Companies Ordinance Chapter 31 No. 1 as a company limited by shares with the object of acquiring and taking over the undertakings of Trintoc and Trintopec with a view to acquiring all or any of the shares, assets, debts and liabilities of those companies.[9] The subscriber to the Memorandum of Association of Petrotrin was a representative of the Ministry of Finance (one hundred shares) along with two officials of Government holding one share each.[10] Petrotrin thus became the owner of two-thirds of the issued share capital of Trinmar, and Textrin remained the owner of the remaining one-third of the issued share capital in Trinmar. At all relevant times Petrotrin and Trinmar had their own respective Board of

[8] Textrin was a separate (USA) corporate entity not alleged to be nor shown to be controlled by the State. Trinmar became wholly owned by Petrotrin (wholly owned State enterprise) only from October 2000 when the latter bought out Textrin's interest in Trinmar.
[9] See RAD/Vol-I/A/1.
[10] See RAD/Vol-I/A/1.

Directors "who were responsible for acting in the best interests of the respective companies".[11]

6 FACTS AND EVENTS: CONCERNING THE AWARD OF THE TENDER FOR THE EXPLOITATION OF THE SOLDADO FIELDS TO FWO AND ULTIMATE WITHDRAWAL FROM NEGOTIATIONS BY LETTER OF 20 FEBRUARY 2001.

61. In or about July 1999 FWO developed an "informal understanding" with Lexicon Inc ("Lexicon"), a Delaware Corporation, to co-operate in developing and exploring potential for oil and gas projects in Trinidad and Tobago. What is described as an "informal understanding" apparently never came to fruition and is of no relevance to the questions that fall for decision in this case or on the alleged liability of the Respondent. Hence the story of the development of this relationship (although covered in some detail in the evidence presented to the Tribunal) will be omitted from this Award in the interests of brevity.

62. It is also the Claimant's case – not disputed by the Respondent – that Lexicon had introduced FWO to representatives of Millennium Energy Industries Ltd. (MEI), a local business contact in Trinidad and Tobago, and had arranged a number of introductory business meetings for FWO and Lexicon – with the Management of Trinmar, the Management of Petrotrin, the Prime Minister (Mr. Basdeo Panday) and the Minister of Energy (Mr. Finbar Gangar). Following its meeting with Trinmar, FWO also met with the President of Petrotrin (Rodney Jagai) and a number of other members of the Petrotrin Board. Petrotrin explained the nature of relations between the Government, Petrotrin and Trinmar. According to the Claimant, during this meeting (in July 1999) FWO and Petrotrin discussed the Soldado Field project and "Petrotrin indicated that it was ultimately responsible for all oil and gas projects, (but) it directed FWO to work directly with Trinmar".[12] And FWO did work with Trinmar as instructed.

63. It appears from the correspondence that FWO entered into a Confidentiality Agreement with Trinmar on 7 October 1999, and the FWO team of Engineers reviewed the

[11] Para 16 of Respondent's Counter Memorial Vol 1.
[12] Paras 3.7 to 3.9 (Factual Background) – Claimants Memorial Vol.1.

data of South and Southwest Solado Fields project;[13] on 1 December 1999, FWO presented two proposals to Trinmar which contemplated an assignment to FWO of a 100% mineral interest in Soldado Fields.[14]

64. But later in the month Trinmar decided to submit the Project to a public tender process; this was stated to be at the direction of the Minister of Energy, for "transparency reasons".[15] Requests for proposals ("RFP") were issued to nine contractors, the RFP being issued in accordance with Trinmar's Contracting Procedures Manual.[16] On 23 December 1999, Trinmar specifically invited FWO to tender for the contract to redevelop the Soldado Fields.[17]

65. The RFP stated that Trinmar had 100% ownership in the West and Southwest Soldado Fields, and that its Exploration and Production Licences would terminate in the year 2012; that Trinmar could not be responsible for any costs and expenses incurred by any Bidder in connection with the preparation, submission and presentation of bid proposals; that upon evaluation, Bidders may be required to present their proposals to Trinmar, after which the successful bidder "shall be notified in writing of acceptance of its bid" and that "the formal contract shall be executed thereafter".

66. Information that was to accompany the Bid included "any technical or commercial proposals, which Bidder feels can be mutually beneficial to Bidder and Trinmar"; in the form of tender it was provided that the minimum work programme (MWP) should include activities to achieve the Year 1 obligatory targets and other such activities to develop the fields to their maximum potential – the MWP being the firm commitment of the Bidder for each year; it was stipulated that costs should provide for capital and investment activities as well as operating and general administrative activities with each element being separately identified; there was also a requirement for Bidder's financial standing and methods of financing; the extended date for submission of bids for this tender was 8 February 2000.

[13] See Claimant's Vol.IIC-4, pages 7 to-9.
[14] See Claimant's Vol.IIC-5 Pages 36 to 37 (proposed commercial terms).
[15] See message dated 6 December 1999 from Winston Millet, General Manager of Trinmar (C0006).
[16] Exhibit 94 RAD Vol.3.
[17] See Trinmar letter dated 23 December 1999 Claimant's Documents Vol-2, C8, pages 43 to 50.

67. On the stipulated date FWO submitted its bid, in which it stated that if it was adjudicated the winning bidder it or one of its affiliates would be the party to the Agreement, as defined in Section 12, to be negotiated with Trinmar. To emphasize FWO's interest and commitment to complete the project in a timely and successful manner it was also stated that FWO had purchased an exclusive option on a jacket and deck (the "Platform Option") specifically to be utilized to replace BS-25; FWO indicated its willingness to commit capital to enable it to meet the schedule of Obligatory Targets of the Minimum Work Programme contained in the Tender; and that, notwithstanding the minimum commitment as stated in the Tender, FWO would endeavour to accelerate the schedule (when practical from a business perspective) and obtain the Obligatory Targets in the shortest possible time; FWO urged for an early decision and finalization of the Agreement to take advantage of the Platform Option, the term of which would currently expire on 15 March 2000.

68. In the Technical and Financial Proposals, whilst setting out the Minimum Work Programme, FWO made it clear that

> "FWO's Tender is made on the condition that if accepted FWO shall be obligated to Trinmar only upon the entry into force of a definitive written agreement between FWO and Trinmar (the "Agreement")."

69. It was further stipulated by FWO that:

> "The Agreement shall contain a definition of the Effective Date which shall mean the last of the date on which F-W Oil receives approval from Trinmar, the Honourable Mr. Finbar Gangar, Minister of Energy and Energy Ministries, the Honourable Mr. ANR Robinson, the President of the Republic of Trinidad and Tobago and the date of the final agreements, licences, authorizations and or approvals required for it to perform operations under the Agreement, (the "Effective Date")."

70. Under the head "Method of Financing" it was stipulated by FWO that:

> "**1.2 Method of Financing**
>
> "The MWP will be financed 100% by F-W Oil through a combination of shareholder equity and debt funding, cash generated from operations and external loans, if necessary. Mr. Frank Wade is the principal shareholder in F-W Oil. Attached as Exhibit 1.2(a) is a letter

> from Morgan Stanley Dean Witter, a large financial institution with whom Mr. Wade conducts a portion of his investment business, referencing Mr. Wade's character and financial wherewithal."

71. In a letter of 15 February 2000, Textrin expressed its concern with respect to the bidding process started by Trinmar on the ground that Trinmar had no authority to request such bids, and that permission to invite offers had not been requested nor granted by the Trinmar Board of Directors.[18]

72. The Chairman of Trinmar, Gordon Bartlett, thereupon wrote to Trinmar's principal shareholder, Petrotrin, on 18 February 2000, drawing attention to Textrin's concerns, and suggesting that the Chairman of Petrotrin should communicate specific instructions to withdraw the bidding process for the West and Southwest Soldado Fields "given Textrin's concerns". The true background, as appears from the letter, was not however Textrin's concerns, but that negotiations were then in train between the Government of Trinidad and Tobago and Texaco for the purchase of Textrin's one-third shareholding in Trinmar; the fear was that any release of information would greatly compromise the position of Petrotrin (and by extension the Government) in respect of a final market valuation of the shareholding.

73. At a meeting of his Board on 8 March 2000, the Chairman of Petrotrin, Donald Baldeosingh, stated that as far back as July 1999, the Board meeting of Textrin gave the Trinmar Board the requisite decision-making authority – and in any case the Board had regularised the situation in the November 1999 Meeting by directing Management to issue the RFP which was subsequently issued and responses obtained.[19] He stated however that given Textrin's position on the unauthorised nature of the bid process and the fact that the proposed sale of its one third interest contemplated an effective date of 1 January 2000, "Petrotrin would not object to terminating Trinmar's involvement in the matter"(sic).

74. Despite these developments, the General Manager of Trinmar wrote to FWO on 9 June 2000:[20]

[18] See Respondent's additional documents, Vol. 2, Exh. 54.
[19] See Respondent's Additional Document Vol. 2/E/55.
[20] See Claimant's Documents Vol. 2 Exhibit 13 p. 269.

> "Your proposal has been shortlisted for further consideration and in order to continue with the evaluation process we request that you make formal presentations to the Company".

75. Trinmar must have written similarly to the other bidders, because FWO (along with other shortlisted bidders) made a presentation to the Evaluation Committee on 19 June 2000. The Evaluation Committee consisted of representatives of Trinmar and Texaco and of Ernst and Young[21] (the latter had been engaged to evaluate the bids and short-list the bidders). According to Haseeb Ali, the representative of Trinmar on the Committee, it was made clear to the bidders at this presentation on 20 June 2000, that Trinmar would not be in a position to sub-licence the Soldado fields as part of the project.[22]

76. On 20 June 2000, Mr. Jagai of Petrotrin wrote again to Mr. Millet of Trinmar, confirming "our recent telephone conversation in which I reminded you that Petrotrin had requested that this project be suspended pending the sale of Texaco's interest", and that accordingly "no decision to award should be made unless the approval of the parties is sought first and obtained".[23] The objections voiced by each of the shareholders of Trinmar were not treated by Trinmar as putting the bid process on hold altogether, because Mr. Millett wrote once again on 23 June 2000 to inform FWO that "as you are aware" Trinmar has further "short listed the two highest ranked bidders", but then requested that FWO "reformat" its bid proposals in accordance with guidelines set out in the letter;[24] the guidelines were to the effect that

> "Trinmar could NOT award any licence to any Bidder for the Southwest and West Fields;
>
> The successful bidder would be acting as a Service Contractor to Trinmar with the Bidder being responsible for providing all the expenses (capital for infrastructure as well as operating expenses) associated with the rehabilitation and development of the field
>
> The period of the intended service contract would run to the year 2012, when Trinmar's licence expired." [Emphasis added]

[21] At the meeting of the Operating Committee of Trinmar on 10 February 2000 it was recorded that after discussion between the Ministry of Energy and Energy Industries and the Chairman it was agreed that the evaluation of the bids be undertaken by Ernst and Young.
[22] See para 24 of the Witness Statement of Haseeb Ali – for the Respondent.
[23] See Respondent's additional documents, Vol.1 Exhibit 39.
[24] See Respondent's additional documents, Vol. 1 Exhibit 40

77. These guidelines were very substantially different from FWO's original proposal; FWO would no longer own mineral rights and the income stream would become a series of fee payments: under FWO's original proposals FWO would have been assigned the licence and ownership of all hydrocarbons accruing to the company. According to the guidelines FWO would instead have to provide plant, equipment, finance and operation of the project and be repaid out of the project cash flow; FWO was not expected to fund all capital and operating costs, whilst Trinmar was entitled to the oil and gas recovered, and required to pay FWO a fee on a per barrel basis.

78. Meanwhile on the same date Mr. Baldeosingh of Petrotrin was writing to Mr. Bartlett of Trinmar in the following terms:[25]

> "I shall appreciate it if you can, as a matter of urgency, indicate the reason(s) why, notwithstanding your knowledge of Textrin's serious concerns and Petrotrin's desire to suspend the bid process, Trinmar has re-commenced the process. Kindly also provide details on the precise nature of the meeting currently being held with bidders and the procedure Trinmar proposes to follow to complete the bid process inclusive of shareholder approval.
>
> As I am due to leave the country tomorrow kindly copy your response to Petrotrin's President so that he can apprise me of same while I am away.
>
> I look forward to your prompt response."

Mr. Bartlett replied at length on 26 June 2000, stating inter alia:[26]

> that he "obtained the concurrence of the Hon'ble Minister to proceed, especially in the light of the need to maximise the value of all Trinmar's assets with a focus on the narrow window of high oil prices".

He pointed out moreover, that the Minister had expressed his grave concern that Trinmar's negligence in allowing BS-25 to deteriorate to a point where it had to be decommissioned had been exacerbated by the inability to get it restarted thereby severely impacting upon the State's revenues.

[25] See Respondent's Additional Documents, Vol. 2 Exhibit 56
[26](See Respondents Additional Document Vol.2 Exhibit 57.

79. Thereafter between 26 and 30 June 2000, a team comprising Messrs. Rajab and Haseeb Ali of Trinmar and Niranjan of Ernst and Young visited the facilities of FWO in Houston and Aventura in Calgary (Aventura being the second highest bidder) "in order to ensure themselves that the bidders had the technical and financial capacity to handle a project of this scope and size."[27] In June 2000 a report was prepared by Mr. Niranjan which concluded that FWO was recommended over Aventura to handle the Soldado project.

80. On 5 July 2000 Mr Baldeosingh returned to the charge in strong terms, taking particular exception to Trinmar's having sought the support of the Minister, and threatening a cleanout of the Trinmar Board.[28]

81. Meanwhile, on the same day, FWO responded to Trinmar's request to "reformat" its proposals, and covering, amongst other matters, the visit to Houston, the jacket and deck, and an update of project financing.

82. At this stage the Minister (Mr. Gangar) stepped in once again, in a "private and confidential" communication of 13 July, to reprimand Messrs Baldeosingh and Bartlett over their internal bickering and to "instruct" both Petrotrin and Trinmar to continue with the Soldado Fields Bid Process.

83. The next twist in the tale was a private and confidential letter of 18 July from the Minister to Mr. Bartlett of Trinmar forwarding an extract from Platt's Oilgram News[29] which in his view "cast very serious doubts as to the propriety" of having Mr. Wade of FWO as a potential contractor on the Soldado Project.[30] Bartlett was instructed to arrange for a forensic firm ("maybe Kroll who had done work for Petrotrin") to do a detailed check and requested that the matter be treated in the strictest confidence.[31]

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[27] See para. 28 of Haseeb Ali's Statement. See Respondent's Statements and Report Vol.-B Exhibit-I.
[28] Respondent's Additional Document Vol.2, Exhibit 58.
[29] Respondent's Additional Documents Vol-2 Exhibit 64.
[30] Who passed this extract to the Minister remains a mystery. It is not impossible that it was a member of the public, as the proposed award of the Project was already being criticised in Trinidad & Tobago. Mr. Gangar himself declined to appear to give evidence before the Tribunal.
[31] Letter dated 18 July 2000; See Respondent's Additional Document Vol.2 Exhibit 64.

84. As with the corruption allegations levelled by the Claimant in this Arbitration[32], the Tribunal does not believe that any purpose would be served by repeating the detail of the allegations against Mr. Wade. Suffice it to say for present purposes firstly that the fact that the allegations had been repeated came to the knowledge of FWO, whose President (Jim Brock) wrote to Mr. Bartlett on 23 August 2000 offering to meet with Trinmar to set the matter to rest,[33] and secondly that Trinmar does appear to have set in train an investigation through Kroll Associates, as required by the Minister. On 31 August 2000, FWO's representative met with Trinmar's representatives who reassured FWO that the Kroll investigation had resolved all doubts.[34]

85. By 4 September 2000, therefore, Mr. Bartlett of Trinmar was writing to FWO ("Attention Mr. Frank Wade"), somewhat inexplicably headed "without prejudice", thanking him for meeting with the members of the Board of Trinmar and senior management on 31 August, and stating:

> "As discussed at that meeting, Trinmar recognizes the importance of this project to its operations and is committed to bringing this matter to an early conclusion. The Company has completed its internal evaluation which has resulted in F-W Oil Interest, Inc. being ranked the highest.
>
> The approval process will include external stakeholders and Trinmar is seeking to expedite this process.
>
> We trust that this will allow you to continue negotiations in good faith."[35]

86. A report on the situation then went to the Minister, who held a meeting with all concerned to discuss it on 7 September 2000. The Tribunal was given in evidence a full report of the meeting in a Memorandum of 11 September 2000, written by Carol Pilgrim Bristol, Corporate Secretary/Legal Adviser, Trinmar, who also gave evidence and deposed to the contents of this Memorandum.

[32] See paras. 209 to 211 below.
[33] See Claimants Vol:3 Ex. 18.
[34] See Respondent's Witness Statements and Reports, Vol-B-Haseeb Ali's Statement para. 38 page 8.
[35] See Claimant's Vol-3, Exhibit 19 p-492.

87. On 14 September 2000, at a meeting of the Board of Directors of Trinmar it was resolved.[36]

> "The Board approved the selection of F-W Oil Interests as the preferred service contractor to reactivate and develop the Southwest and West Soldado fields based on their proposal of a lower fee per barrel of incremental oil produced in the fields. Management is authorized to proceed with the way forward in negotiations but to revert to the Board before the Letter of Intent is issued to the preferred service contractor." (Emphasis supplied)

88. Meanwhile by letter dated 15 September 2000 FWO wrote to the Manager of Corporate Planning, Trinmar (Haseeb Ali), requesting that an interim agreement be arrived at between the parties which would provide that, in the event that a definitive agreement was not concluded within a reasonable period of time, Trinmar (or a person acceptable to FWO) would pay a sum of money as liquidated damages not exceeding USD$10 million, as follows:[37]

> "We have been advised that we will receive today a letter from Trinmar declaring F-W Oil the successful bidder in accordance with the Tender, subject to the negotiation and execution of a definitive agreement. As we have indicated to you, F-W Oil has incurred substantial expense in connection with its preparation of its bid and has acquired in advance of the award and definitive agreement a platform and jacket to be installed in the place of Trinmar's BS-25.
>
> We would be willing to continue to perform work and acquire equipment in anticipation of concluding an agreement to carry out the project but in order to do so, we would need to receive assurances from Trinmar or another person acceptable to us that we would be compensated for our anticipatory work in the event that a definitive agreement cannot be concluded with Trinmar.
>
> Please advise us whether you wish us to continue to perform work prior to concluding the definitive agreement. If you do, we would like to work with you to conclude an interim agreement to govern our relationship. The interim agreement would provide that in the event the definitive agreement is not concluded within a reasonable period of time, Trinmar or a person acceptable to F-W Oil would pay within 30 days of receipt of invoice to F-W Oil a sum of money as liquidated

[36] See Respondent's Additional Documents Vol-1 Exhibit 8.
[37] See Claimant's Vol-3, Exhibit 24 p-502.

> damages and not as a penalty equal to those costs incurred by F-W Oil in connection with the preparation of its bid and the services and equipment it has engaged and acquired to advance the development of the project not to exceed US$10 million."

89. Meanwhile, on 14 September the Trinmar Board (by majority – with a strong dissent by Textrin)[38] approved FWO as the successful bidder and preferred service contractor and also approved the Heads of Agreement document.

90. FWO was duly notified that it had been awarded the bid in a letter of 20 September 2000[39] from the General Manager of Trinmar (Aleem Hosein) in these terms:[40]

> "Please be advised that Trinmar Limited hereby declares F-W Oil Interests, Inc. the successful bidder in captioned Tender No: 99/NO2/129. This award is made subject to the negotiation and execution of a mutually agreeable operating agreement for the provision of facilities and services in Trinmar Limited's West and Southwest Soldado Fields. We intend to negotiate in good faith and in an expeditious manner towards the execution of such agreement between Trinmar Limited and F-W Oil Trinidad, L.L.C.
>
> The operating agreement will incorporate the contractual terms generally set forth in the attached "Heads of Agreement" together with other terms and conditions mutually acceptable to the parties found in transactions of this nature.[41]
>
> Trinmar is in receipt of letter dated 2000 September 15 and undertakes to request of its Shareholders a guarantee or other form of security required by F-W Oil to carry out this project. Trinmar makes no guarantees as to the provision of this security. We look forward to working with you."[42]

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[38] See Minutes of Meeting of 14-09-2000 Trinmar Board. See RASD Vol-3/8.

[39] The Tribunal was offered no explanation of the delay between the decision of the Board and the issue of the Award Letter.

[40] See Claimant's Vol-3 Exhibit 27 Page 518.

[41] The attached Heads of Agreement is headed: "SUBJECT TO NEGOTIATION AND EXECUTION OF A DEFINITIVE OPERATING AGREEMENT".

[42] With respect to this important communication, it is stated in the Respondent's Counter Memorial (para 20) as follows:

> "By letter dated 20th September 2000 Trinmar informed the Claimant that it was the successful bidder 'subject to the negotiation and execution of a mutually agreeable operating agreement'. It is denied that the contract was thereby awarded to the Claimant. There were outstanding issues to be agreed including the issue about whether or not Petrotrin should provide a guarantee for payments due to the Claimant under any proposed contract. An operating agreement was never finalized and executed.

On the same day, Trinmar wrote another letter to FWO as follows:

> "Reference is made to your letter of 2000 September 15 wherein you requested inter alia assurances from Trinmar before proceeding further on the captioned Tender.
>
> As you are aware Trinmar has today issued to F-W Oil Interest Inc., under separate cover, a letter of intent together with Heads of Agreement. Further as per your other request as stated in another letter of 2000 September 15, Trinmar has sought from its Shareholders, a guarantee or other form of security to satisfy the requirements of the Lenders.
>
> As indicated in our letter of intent of even date, Trinmar makes no guarantee as to the provision of this security, and awaits a decision of its Shareholders.
>
> Please note further that Trinmar does not hold itself liable for any costs or expenditure incurred by F-W Oil Interests prior to the execution of a contract on this tender.

91. Trinmar followed up on 22 September 2000 by writing to both its shareholders, Petrotrin and Textrin, seeking the guarantee requested by FWO, in these terms:

> "The Board of Directors of Trinmar Limited, by majority decision, has approved the selection of F-W Oil Interest as the preferred Service Contractor to reactivate and develop the Southwest and 30 November 2005 West Soldado fields based on their proposal of a lower fee per barrel of incremental oil produced in the fields. A copy of the letter of intent together with the Heads of Agreement is attached (see Attachment 1).
>
> FW Oil has advised Trinmar that in order to obtain financing for this project, their lenders will require F-W Oil to obtain and maintain during the term of the agreement, a guarantee or other form of security interest in form and substance acceptable to the lenders to secure payment to F-W Oil under the contract. Under the subject arrangement, Trinmar is required to initiate such request.

Thereafter, according to the evidence of Haseeb Ali (of Trinmar):

> "In anticipation of negotiations for concluding a definitive Operating Agreement, and because we had not previously entered into a contract of this nature, namely a Risk Service Contract, I sought assistance for the provision of legal and technical services from the US law firm of Baker and McKenzie as well as Gaffney Cline and Associates, a US firm of management and technical advisors to the petroleum industry. I also sought to begin the process of due diligence through Dun and Bradstreet, an international firm of financial consultants. However, this exercise was not pursued, because the negotiation for an operating Agreement was not initiated." (Witness Statement of Haseeb Ali paras 49 and 50).

> As part of its evaluation, Trinmar contracted with Kroll Associates to carry out a "due diligence" search on F-W Oil Interest. The company did not find any evidence of wrongdoing. Attached is a legal opinion by our Corporate Secretary/Legal Adviser, on the findings of the Kroll report. (see Attachment 2).
>
> Since the closure of Block Station 25 in 1999 May, #3,500 BOPD of artificial lift production has been 'lost'. The value of this 'lost' production to date is of the order of $TT200 million at current oil prices. Early reactivation of the Southwest and West Soldado Fields is therefore an urgent priority.
>
> Kindly advise whether the Parties as Shareholders will provide such guarantee. Suggested forms of guarantee as attached have been supplied by F-W Oil Interests. (See Attachment 3). Kindly advise whether further information is required in order to accede to this request.
>
> We await your response since this is critical to the conclusion of the arrangement between Trinmar and F-W Oil.
>
> Also attached for your information is a summary report of the Technical and commercial Justification of the Project. (See Attachment 4)".[43]

92. On 11 October 2000, Trinmar informed FWO of the sale of Textrin's shareholding to Petrotrin, indicating that a response was still awaited from the Shareholders (now reduced of course to Petrotrin alone) on the guarantee or security that had been requested.[44]

93. On 20 October 2000, FWO wrote to Trinmar again urging the latter to resolve any outstanding issues it may have with its Shareholder "in order that we may initiate and complete as soon as possible negotiations of the contract that will permit us to start work".[45]

94. On 27 October 2000, Haseeb Ali prepared a report for the Chairman of Trinmar concerning the Reactivation of the Soldado Fields;[46] Mr. Ali stated in his evidence[47] that

[43] See Respondent Additional Document Vol 2, Exhibit 70.
[44] See Claimant's Vol. 3 Exhibit 29 page 535- confirmed in Haseeb Ali's Respondent Witness Statement Vol.-b PARA 81.
[45] (Volume III Exhibit 30 page 537) – This letter was not replied to by Trinmar till 26-02-2001 (Claimant's Documents Vol..3-Exh. 42 page 582).
[46] See Claimant's Documents Vol.-3 C031 page 452 at p.544.
[47] Para. 54.

he presented the contents of this Report to the Minister of Energy (now Senator Lindsay Gillette). According to FWO,[48] Trinmar made a presentation to the directors of Petrotrin concerning the reactivation of the Soldado Fields, the purpose being to inform Petrotrin of the nature of the agreement reached with FWO and to obtain "a guarantee or other form of security interest that is required by the successful bidder to carry out the reactivation of the Southwest and West Soldado Fields". However no progress was made. At a Special Meeting of the Board of Directors of Trinmar on 9 November,[49] the General Manager, Aleem Hosein, informed the Board that by a letter dated 2 November Petrotrin had specified that:

> "a. Trinmar is to go out on the open market for a Risk Service Contract using a two-envelope system, starting all over and giving up all potential bidders full details of what is required In the Scope of Works.
>
> b. That an independent audit on the bid process be conducted in consultation with Trinmar's Management."[50]

95. But in view of Trinmar's Letter of Award to FWO the Board directed that Trinmar ascertain the exposure to the Company, both legal and financial, before proceeding further, and the General Manager indicated that Petrotrin had requested that a forensic audit be undertaken inter alia on the letter of intent to FWO.

96. On 8 December 2000, Mr. Brock of FWO wrote again to Mr. Hosein of Trinmar as follows:

> "We refer to your letter dated September 20, 2000, in which you declared F-W Oil Interests. Inc. the successful bidder under the Tender and the last item of correspondence we have received from you, your letter dated October 11, 2000. In this latest letter you advised us that your parent, Petroleum Company of Trinidad and Tobago ("Petrotrin") had acquired the remaining one-third interest in Trinmar Limited ("Trinmar") from Texaco Tinidad Inc. You also informed us that consistent with your undertaking to do so, you had requested on

[48] Para 3.64 of the Claimant's Memorial.
[49] See Respondent's Additional Documents Volume -1 part 8 of Exch 8 (Minutes of Board Meeting of Trinmar held on 9th November 2000).
[50] Minutes of Trinmar Board meeting on 9-11-2000, RAD Vol-I/B/8. At the same meeting, Director Chaitan indicated that in the light of information that had come to his attention since the decision (re Letter of Award to FWO), he reversed his decision to authorise the company to progress on the project.

> September 22, 2000, of your shareholder a guarantee of form of security for the contract under the Tender.
>
> We are aware that developments in the makeup of the boards of directors of both Trinmar and Petrotrin have made it difficult for Trinmar to follow up on its agreement to continue our ongoing negotiations of the Agreement contemplated in the Tender which were initiated during the week of September 11, 2000, in Point Fortin. Although we agreed with your staff that we would continue our meetings during the week of September 25, 2000, we understand that because of Trinmar's organizational uncertainties resulting from its unsettled relations with its shareholder, Petrotrin, it has not been possible for Trinmar to return to negotiations on our agreement. As requested by your project team, however, we have completed a revised draft of the Operating and Services Agreement, to take into account the matters negotiated and agreed to in principle in the Heads of Agreement to the above referenced September 20th award letter. We are prepared to forward this revised document to your management team for their review and final comments as soon as you deem appropriate."[51]

FWO wrote a further letter on 12 January 2001 to Trinmar stating that:

> "Accordingly, we have requested that you indicate to us by return letter no later than January 22 2001, if possible, when we should be prepared to meet to finalize negations of the definitive agreement between our companies."[52]

In its response (dated 2 February 2001)[53] Trinmar acknowledged receipt and stated that "this matter is still receiving the attention of our shareholder and the Board of Trinmar Limited."[54]

97. Thereafter, armed with the opinion of counsel, Trinmar informed FWO by letter dated 25 February 2001[55] of its withdrawal from the negotiations, in these terms:

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[51] See Claimant's Vol.-III – Exch. CO36 – Page 573.
[52] See Claimant's Vol-3 Exhibit-40 pages 549-580.
[53] See Claimant's Vol-3 Exhibit – 41 page 581.
[54] It is apparent from the Minutes of the Board Meeting that Trinmar was seeking legal advice as to whether Trinmar or Petrotrin would be subject to liability in law if the award to FWO was not pursued. This is also corroborated by the letter from Petrotrin to Trinmar of 8th January, 2001, Claimant's Col.2 Exhibit 39 at page 578. Ultimately it appears that after receiving counsel's opinion the letter of February 26, 2001 was addressed (See Minutes of Board of Trinmar of 16th February, 2001 – Respondent's Additional Document Volume 2 part of Exhibit -8).

> "We refer to your letters 2000 October 20 and December 08 and 2001 and January 12.
>
> As you are aware Trinmar is now wholly owned by Petrotrin. We regret to advise that our shareholder has not acceded to our request for a guarantee or other form of security for the proposed contract.
>
> You have indicated that this support was to be made available so as to enable the conclusion of an agreement for this project. Indeed you were requiring the guarantee even before our letter of 2000 September 20 notifying that you were the successful bidder. Further as you are aware the award was made subject to the negotiation and execution of a mutually agreed contract and Trinmar does not hold itself liable for any costs and expenditure incurred by F.W. Oil Interests prior to the execution of a contract on the tender.
>
> In light of the above Trinmar hereby notifies you that it has withdrawn from the negotiations and is reconsidering its position on the project."

98. Following the receipt of this letter, FWO made various attempts to have the decision withdrawn by Trinmar, or countermanded by the Government.

99. On 19 March 2001, Mr. Brock, FWO's President and CEO, met with Messrs Hosein and Ali of Trinmar and Mrs. Pilgrim-Bristol. Later that day he met also with Mr. Parriag, the newly-appointed Chairman of Petrotrin, and then (together with others) saw the new Minister of Energy (Senator Gillette).

100. On 26 April 2001, Mr Brock wrote to the Prime Minister in person warning of the damage that would be done by maintaining the withdrawal of the award from FWO. That led to a further meeting with the Minister of Energy on 1 May 2001, at which the Minister explained the current situation and made it plain that, on advice, he had decided to re-submit the project to a new competitive bidding process, and that FWO would be invited to participate in it.

[55] During the hearing the Claimant's representatives withdrew the allegations (initially made in paragraph of 3.80 Claimant's Memorial) that the final paragraph in Trinmar's letter of 26.2.2001 was inserted without Board Approval by the new Energy Minister William Chaitan acting in his own self interest: in the circumstances the Tribunal must proceed on the basis that the notification to FWO that Trinmar had withdrawn from the negotiations and was re-considering his position on the project was made with the authority of the Board of Directors: See Claimant's Documents Vol-3-C042 page 582.

101. FWO's objections to the re-tender were expressed in writing in a letter of 2 May 2001 to Mr Hosein of Trinmar, and in a further letter of 11 May 2001. The reply from Trinmar, dated 6 June 2001, reiterated the substance of the letter of 25 February, and enclosed FWO's Invitation to Bid for the re-tender. FWO thereupon reiterated its objections, this time in a letter to the Solicitor General of Trinidad and Tobago, and in due course the Request instituting the present arbitral proceedings was lodged.

7 JURISDICTION

102. In its Counter-Memorial and subsequent pleadings, the Respondent has consistently declined to agree that its consent to ICSID jurisdiction covers the present dispute. It has however from an early stage been common ground between the Parties that the disputed issue of jurisdiction was closely linked to the questions of fact and law that lay at the same time at the heart of the substantive dispute. At the first session of the Tribunal in London on 4 October 2002, it was agreed by both Parties (although not formally recorded in the Minute of the Hearing) that outstanding issues as to jurisdiction would be pleaded together with the merits, both in the written and the oral phases. The Tribunal considers that to have been a wise decision; it has found itself of necessity having to consider the questions of jurisdiction and of substance together, and decide them together.

8 THE JURISDICTION OF THE CENTRE

103. The jurisdiction of the Centre depends upon the terms of the Washington Convention. As is well known, Article 25(1) of the Convention provides that the jurisdiction of the Centre extends to "any legal dispute arising directly out of an investment"; and the dispute must be one between a Contracting State and a national of another Contracting State, which the parties consent in writing to submit to the Centre. It is common ground that both the United States of America and Trinidad and Tobago are (and were at all relevant times) Contracting Parties to the Convention, and that FWO meets the definition of "national of another Contracting State" contained in Article 25(2)(b) of the Convention. The consent invoked by the Claimant in these proceedings is that given by the Respondent through the medium of the BIT, which will be analysed in the next following section. For the moment, it need only be noted that – the question of consent aside – the

three requirements under the Washington Convention are that there must be a legal dispute, it must relate to an investment, and it must arise directly out of the investment. In the present case, and irrespective of the merits of the claims brought by FWO, there is no issue as to whether the dispute over those claims is a legal dispute, or as to whether the claims arise directly out of the transactions summarised above. The sole issues are as to whether the claims relate to an "investment" within the meaning of the ICSID Convention and whether the dispute in this regard is with the State.

104. As is so well known that it needs no further demonstration, the term "investment", crucial though it is to the operation of the Centre, is not further defined within the ICSID Convention, but instead was left, quite deliberately, to be given its content through the particular agreements reached between Contracting States, and between them and investors.[56] The answer is therefore to be sought in the present case in the terms of the BIT.[57]

(a) The Position of the Parties

105. Without reciting the opposing contentions in full, the positions of the Parties on the question of "investment" can be summarised as follows.

106. The Claimant asserts that its claims arise out of the investments made by it in the bid process for the Concession, and as a result of the rights afforded by a Tender Contract between itself and the Respondent and by the BIT (Claimant's Memorial, para. 5.2), and invokes in that respect Article IX of the BIT, particularly its paragraph (1). The Claimant describes the nature of its investment in Trinidad and Tobago as a mixture of frustrated

[56] Although the Parties' freedom in that respect is not absolute; for a discussion of the limits, see the decision of the Tribunal in *Joy Mining v Egypt* (ICSID Case No. ARB/03/11).

[57] The Tribunal refers to the fact that the Parties appeared, at an early stage in the proceedings, to have been in dispute over the question whether the BIT had been duly ratified and was therefore in force. The Respondent's initial argument to that effect was clearly based on a serious of mistake of fact, but was very properly withdrawn when the true facts were drawn to its attention, so that it was not in the event necessary for the Tribunal to devote its own attention to the point, which therefore deserves no more than a brief mention, and the Tribunal rests no conclusions on it, except to the extent that it may throw some light on the question whether those who were (on any view of the matter) acting for the State in the chain of factual events recited in Section 11 of the Award were conscious, at the time of acting, of the State's obligations towards foreign investors under this and similar treaties entered into by it.

contractual rights, intellectual property and preparatory expenditure. (Claimant's Memorial, para. 5.96).

107. The Respondent, while not seeking to deny either the consent given by the State in the BIT or the power vested in the Tribunal to determine its own jurisdiction, nevertheless does not concede that its consent extends to the claims advanced by the Claimant. It argues that there was no dispute arising out of (relating to) an investment, as required by both the ICSID Convention and the BIT, because there was no investment ("covered investment") (Respondent's Counter-Memorial, para. 158). It characterizes the costs and expenditures incurred by the Claimant as "pre-contract expenditure" which (so it asserts) has been held not to amount to an investment (Counter-Memorial, para. 168). It argues further that the dispute is not between the Claimant and State, but rather one which arises in respect of the actions of Trinmar, Petrotrin or their officials, for which the State is not liable. (Counter-Memorial, para. 3).

108. In reply, the Claimant asserts that the BIT incorporates a wide and all-encompassing notion of "investment", and asserts further that its investment of time, money and expertise in the tender process; the performance of agreed work; its contractual relationship arising under local law as a result of the tender process; and its contribution of intellectual property each constitute an investment within the meaning of both the Washington Convention and the BIT. (Claimant's Reply, para. 2.2).

109. The Respondent answers that the dispute is a purely commercial one and the Government is not party to it; and that the claims submitted to the Tribunal do not fall within the concept of investment dispute laid down in the BIT, since they are connected neither to a "covered investment" nor to an "investment agreement" or "investment authorisation." (Respondent's Rejoinder, para. 15).

(b) The Tribunal's Questions

110. Faced with conflicting contentions of law as well as fact, and with argument on the meaning and application of the BIT which appeared in some respects to be incomplete, the Tribunal posed further questions to the parties on 6 August 2004. So far as material to the present issue, these questions read as follows:-

> "Please identify with precision the source and content of the rights and obligations which are the subject-matter of the dispute between FW Oil Interests and Republic of Trinidad and Tobago.
>
> To the extent that it is contended that these rights and obligations extend beyond any of those asserted under domestic law, what is their source and content under international law?
>
> How does the dispute between FW Oil and the Government of Trinidad and Tobago in the present proceedings relate specifically to Articles IX(1) and I of the T&T/USA BIT?"

111. Both Parties correctly understood these questions as inviting them, inter alia, to expand upon the notion of an "investment agreement", as specifically established by the terms of Article I(h) of the BIT, and the possible application of that notion to the facts of this case.

112. The Parties responded in writing on 30 September 2004. The replies from each Party are of some importance for the disposal of this case, and are therefore set out here in some detail.

113. The Claimant reiterated that, on the proper construction of the ICSID Convention, the question of what constituted an "investment" was remitted to what the Contracting States had agreed upon in the BIT. (Claimant's Answers, para. 2.9). In the alternative (and in the event that it was maintained that "investment" had an autonomous meaning under the Washington Convention) the Claimant argued that the meaning in the Convention was whether the expenditure incurred contributed to the economic development of the recipient State – or, more particularly whether the expenditure formed part of an operation the overall effect of which was to promote the economic development of Trinidad and Tobago. (Claimant's Answers, paras. 2.10-15). As regards "investment agreements", the Claimant ranked claims in this respect differently from what it termed "International Law Claims" (i.e., claims arising out of or relating to any alleged breach of any right conferred created or recognized by the BIT with respect to a covered investment); its assertion was that the BIT gave the Tribunal an additional jurisdiction over municipal law claims (for example domestic law breach of contract claims) provided that they arose out of or related to any "investment agreements." (Claimant's Answers, para. 3.2). In sum, the Claimant

contended that, inasmuch as the course of conduct described above gave rise to both a Tender Contract and a Definitive Operating Agreement under the law of Trinidad and Tobago, both of these legal relationships constituted at the same time "investment agreements" under the BIT, such that the Tribunal's jurisdiction extended to any disputes arising out of them. (Claimant's Answers, paras. 3.23-24).

114. The Respondent, on the other hand, while denying that on the facts any contract or agreement came into being with any Trinidad and Tobago party, denied by the same token that there was an "investment agreement" between the Claimant and the Respondent. (Respondent's Answers para. 22).

(c) The Issues

115. The Tribunal accordingly concludes that (questions of breach and its consequences aside), the principal issues that divide the Parties are:-

(a) whether a contract had come into being between the Claimant and any of the parties on the Respondent's side;
(b) whether – in the absence of a contract as in (a) – there could be a "covered investment" for the purposes of the BIT;
(c) whether – even in the absence of a "covered investment" as in (b) – there was nevertheless an "investment agreement", breach of which would be sufficient to support the claims of the Claimant.

116. In order to deal with these issues, the Tribunal must first turn to the interpretation of the BIT itself (issues (b) & (c)), before devoting its attention to what formed the main portion of the argument and evidence before it, namely whether a contract had come into existence (issue (a)).

(d) The Interpretation of the BIT

117. The Tribunal approaches the interpretation of the BIT in accordance with the classic rules laid down in Articles 31 & 32 of the Vienna Convention on the Law of Treaties of 1969. This requires the Tribunal to begin 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." (Article 31, paragraph 1). The remainder of Article 31 defines what is meant by the "context" and

specifies other materials to be taken into account, and Article 32 deals with "supplementary means of interpretation" which may be employed in certain circumstances.

118. In the view of the Tribunal, and in the light of the evidentiary materials presented to it by the Parties, its task of interpretation can be accomplished by application of the basic rule cited in the preceding paragraph, without the need for supplementary means. For that purpose, the Tribunal takes the "object and purpose" of the BIT to be "the encouragement and reciprocal protection of investment" in their territories, on the basis of a "stable framework for investment", as a contribution to "greater economic cooperation between" the two States, as recited in the sixth, third and first paragraph of the preamble to the BIT. The BIT, in other words, was conceived as having not just a protective role, but a dynamic one in encouraging and stimulating future investment.

119. This is not however to suggest that the Tribunal found the interpretation of the BIT an entirely simple matter. Its individual provisions are not always harmonious or easy to follow. In particular, the Tribunal experienced some difficulty with the concept of an "investment agreement", as will appear below.

(e) Jurisdiction under the BIT

120. The jurisdiction of the Tribunal is grounded in Article IX of the BIT. Paragraph 4 of Article IX establishes the consent of each State Party to the BIT (in the present case Trinidad and Tobago, represented by its Government) to the submission of any investment dispute to binding arbitration at the instance of an investor of the other Party (in the present case the United States of America), and at the election of such investor pursuant to paragraph 3. The legal nexus is then completed by Article 25, paragraph 1, of the Washington Convention, under which "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any 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".

121. There is no dispute that FWO (assuming it to be an "investor") qualifies under these paragraphs and has validly chosen arbitration through ICSID. The crucial questions are

rather whether FWO is indeed an "investor", whether there exists an "investment dispute" between it and the Government of Trinidad & Tobago, and whether the dispute brought before the Tribunal is one "which arises directly out of investment in the State". Although these can be stated as three questions, in view of the Tribunal they resolve themselves into one single question, namely whether FWO's operations in and in relation to the State (i.e., those which gave rise to the dispute) did in fact constitute an "investment" within the meaning of the relevant treaty instruments.

122. The BIT operates principally through the notion of "covered investments". The substantive protections laid down in Articles II, III, IV, V and VI all relate in terms to "covered investments", as indeed does the jurisdictional provision in Article IX.[58] An investment is a "covered investment" if it is an investment of a national or company of one Party in the territory of the other Party. The criterion is not one that gives rise to especial difficulty in the present case, although circumstances can readily be envisaged in which a question might arise as to whether an investment is in truth located "in the territory of" the respondent State. If the Claimant's expenditures and activities in the present matter do indeed constitute an "investment", then the Tribunal has no doubt but that that investment should be regarded as located in Trinidad and Tobago, especially in the light of the extended territorial definition given in Article I(I).

123. What, then, constitutes an "investment"? The term is the subject of a long and particularized definition in Article I(d), as follows:-

> "'investment' of a national or company means every kind of investment owned or controlled directly or indirectly by that national or company, and includes investment consisting or taking the form of
> (I) a company;
> (II) shares, stock, and other forms of equity participation; and bonds, debentures, and other forms of debt interests, in a company;
> (III) contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions, or other similar contracts;

[58] The word "covered" does not appear in the heading to Article II, but no importance appears to attach to the omission.

(IV) tangible property, including real property; and intangible property, including rights, such as leases, mortgages, liens and pledges;
(V) intellectual property, including …;
(VI) rights conferred pursuant to law, such as licenses and permits".

124. The intention to establish a comprehensive and wide-ranging definition of what is to constitute an "investment" is plain, and needs no further demonstration.[59] The Tribunal must however decide whether, to bring itself within even so broad a definition of "investment", the investor must show the existence of some form of legally enforceable right, or its equivalent (issue (b) in paragraph 115 above). This is a question that was debated at some length between the Parties in their written pleadings and in oral argument, although not at the same length as the debate between them over the underlying question whether some form of contract had in fact come into existence. The Tribunal believes that the question as to the existence or not of an "investment", vital as it is for deciding the case before it, should not be approached in a narrow technical way, but rather in the context of the intention animating the BIT and in the light of its terms.

125. Looking at the matter that way, the Tribunal finds that the notion of an "investment" ("covered investment"), the axis around which the operation of the BIT revolves, can only realistically be understood as referring to something in the nature of a legal right or entitlement. This appears clearly enough from the extensively itemized definition of "investment" in Article I(d) quoted above, each item in which is either a form of property or is expressed as a "right". It is admittedly the case that the definition given in Article I(d) is on its own terms not exhaustive; it is expressed merely to "include" the forms of investment itemised on the list. The common thread is nevertheless so strong that the Tribunal is unable to conclude that the intention can have been to bring within the scope of the term claims other than those based on proprietary or contractual rights, which,

[59] It may be noted that the definition is so drawn that the vehicle through which an investment is made or operated itself becomes an "investment"; hence, for example, the reference to "a company" in sub-paragraph (d)(i). The intention was no doubt to ensure that an investment vehicle taking the form of a locally incorporated company did not find itself falling outside the nationality requirements in the accompanying definition of "covered investment", and this is readily understood, despite a certain element of artificiality that results from time to time: see, for example, the definition of "investment agreement" discussed in paragraphs 127 and following below.

in the Tribunal's view, corresponds in any event to the whole underlying notion of an "investment". Further weighty support for this interpretation of the BIT can be drawn from Articles II, III, IV & V, which lay down the main substantive protections to be accorded by each part to "covered investments", such as national and most-favoured-nation treatment, fair and equitable treatment, full protection and security, protection against arbitrary expropriation, freedom to make transfers, and so forth. It would be difficult, or even impossible, to apply these standards in any meaningful way to claims falling short of actual proprietary or contractual rights.

126. In support of their opposing contentions on whether there existed an "investment", the Parties cited to the Tribunal a number of arbitral decisions, notably those in Fedax NV v. The Republic of Venezuela,[60] SGS S.A. v. Islamic Republic of Pakistan,[61] SGS S.A. v. Republic of the Philippines,[62] and Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka.[63] The Tribunal does not, however, derive much assistance from any of those decisions in considering the circumstances of the present case. The decision in Fedax turned on whether the claimant's rights in respect of promissory notes issued in connection with a duly concluded contract amounted in themselves to "investments", but there was no argument that the rights at issue were not existing contractual rights. Not dissimilarly, in the two SGS cases, the principal question for decision was whether SGS's rights under service contracts were protected under the substantive provisions of the BITs in question, or in the alternative were subject to the exclusive jurisdiction of the domestic courts, but again there was no dispute that contracts had been concluded (and indeed put into operation) under which the claimant possessed actionable rights. That said, the Tribunal notes the observation of the Tribunal in SGS v. Philippines that "ICSID Tribunals have been very reluctant to acknowledge that an investment has actually been made until the contract has been signed or at least approved

[60] *Fedax N.V. v. The Republic of Venezuela* (ICSID Case N.o ARB/01/13) Decision on Jurisdiction, July 11, 1997.
[61] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, (ICSID Case No. ARB/01/13) Decision on Jurisdiction, Agust 6, 2003.
[62] *SGS Société Générale de Surveillance S.A. v.The Republic of rhe Philippines*, (ICSID Case No. ARB/02/6, Decision on Jurisdiction, January 29, 2004.
[63] *Mihaly International Corporation v. The Democratic Socialistic Republic of Sri Lanka*, (ICSID Case N.o ARB/00/2) Award of March 15, 2002.

and acted on."[64] The Mihaly case was perhaps closest to the present one, in that the preliminary Objection *ratione materiae* by the respondent (Sri Lanka), which was ultimately upheld by the Tribunal in that case, was to the effect that the expenditures made by the claimant in the expectation of the award of the contract for power generation in Sri Lanka, did not in the circumstances amount to an "investment" for the purposes of the relevant BIT (the terms of which were very similar to those of the BIT in the present case). But nevertheless the Mihaly decision appears to have been one very much on its own facts; and indeed the powerfully reasoned separate Opinion by Mr. Suratgar makes it plain that, in his view, further facts were required in order to rest the decision of "no investment" on a sufficiently solid basis.

(f) "Investment Agreements"

127. There remains however a separate question, foreshadowed in paragraph 115(c) above, as to whether, even in the absence of an "investment" (or "covered investment"), there nevertheless existed an "investment agreement" under the BIT. Within the Treaty the two notions lie alongside one another. Indeed, Article IX(1) (the jurisdictional clause) puts the two side-by-side[65] in precisely equal terms. This is important. Its consequence would appear to be that a dispute arising out of an "investment agreement" can be just as much an "investment dispute" as a dispute arising out of the failure to accord the substantive protection under the Treaty to a "covered investment" in the strict sense of that term. It presumably must follow that a dispute of that extended kind would also be brought within the jurisdiction of the Centre. (Article 25(1); see above). This must apparently be so, despite the fact that such a dispute may not arise out of an "investment" very "directly" at all, since any other reading would frustrate the clear intentions and expectation of the Contracting States as expressed in Article IX(1) of the BIT. In other words, it appears that Article IX(1) has to be so understood as if the definition of "covered investment" is extended so far as may be necessary to encompass "investment agreements".

128. Even if so, the question would remain, what substantive protections does the BIT extend to "investment agreements"? As indicated above, Articles II, III, V and VI are all

[64] At paragraph 132, Footnote 62 *Supra.*
[65] And side-by-side with the third notion, that of an "investment authorization."

drafted so as to relate in terms to "covered investments" and to "covered investments" alone. No doubt, if the jurisdictional reference to "covered investment" in Article IX is properly to be extended so as to take in "investment agreements", then the same applies substantively when it comes to considering what standard of treatment is required from the host State in respect of an "investment agreement". Before reaching that point however it is convenient to look at what an "investment agreement" is.

129. The term is defined (again in an extensive form) in sub-paragraph (h) to Article I, to mean:

> "a written agreement between the national authorities of a Party and a covered investment or a national of company of the other Party that (i) grants rights with respect to natural resources or other assets controlled by the national authorities and (ii) the investment, national or company replies upon in establishing or acquiring a covered investment".

130. It follows that seven requirements would have to be fulfilled in order to constitute an "investment agreement":

(i) an agreement
(ii) in writing
(iii) with the national authorities
(iv) which grants rights
(v) the rights are with respect to natural resources
(vi) and the foreign party relies upon them
(vii) in establishing or acquiring a covered investment.

It will be evident that the above definition gives rise, in the context of the present case, to several questions over and above the primary question whether an "investment agreement" implies the existence of a contractual right that might in appropriate circumstances be capable of vindication in court.

131. So far as the Tribunal is aware, although the concept of an "investment agreement" appears regularly in BITs concluded by the USA at around this time, the concept is unique to those concluded by the USA. Nor is the Tribunal aware of any Arbitral Award or other decision in which the term has been construed and applied, or its practical consequences explored. No material of this kind was offered in the written or oral pleadings of either Party, despite the fact that the Claimant had asserted from the outset *inter alia* that it had

entered into an investment agreement sufficient to ground a claim under the BIT.[66] Given the questions thus arising, the Tribunal offered the Parties an opportunity for further written argument, as described in paragraph 110 above.

132. Both parties correctly understood the Tribunal's questions as a request to define their position as to whether an "investment agreement" had come into being between FWO and a Trinidad and Tobago party and, if so, what the legal consequences were.

133. Understood in the light of its response to the Tribunal's questions, the Claimant's case continued to be based on the claim that it had acquired contractual rights as a result of the course of dealings between it and Trinmar (and other Trinidad and Tobago parties). These rights constituted at one and the same time "covered investments" and an "investment agreement". For the Claimant, the function and effect of the inclusion of "investment agreement" within the jurisdictional clause of the BIT was to transform its domestic law claims into international law claims such that they would then fall within the jurisdiction of this Tribunal. (Claimant's Answers, paragraphs 3.23-24).

134. The Respondent, for its part, rested ultimately on the argument in its post-hearing Memorial that the Claimant had been unable to identify the document in which a written agreement was said to have been concluded.

135. The Tribunal finds itself unable to accept the argument of either Party on these questions. The Claimant's argument would turn the provisions of "investment agreements" into a form of "umbrella clause" apt to transform any contractual claim into a claim sounding under the BIT, but the Tribunal can find no warrant for such an argument in the terms of the BIT itself or their context. In any event, the Claimant puts its arguments on "investment agreement" in terms that require it to establish a concluded contractual claim, so that the arguments on "investment" and "investment agreement" become, in effect, rolled into one. The Respondent's argument, on the other hand, rests on the assumption that an "investment agreement" must necessarily and in all circumstances take the form of an enforceable contract between the Respondent and the Claimant, which seems to the Tribunal to involve a gentle re-writing of the terms in which Article I(h) is cast.

[66] Paras. 5 & 11 of the Request.

136. Given its conclusions on issue (a), the contractual question (paras. 182-183 below), it is unnecessary for the Tribunal to pursue the question of an "investment agreement" further. The Tribunal will simply observe that it would not wholly exclude the possibility that circumstances might arise under which (on an appropriate showing of fact) a tribunal might conclude that an "investment agreement" with a claimant, as foreseen in a provision such as Article I(h), had come into being, and was sufficient to found a valid claim under a BIT, even in the absence of an actionable contract and thus an "investment" ("covered investment") in the strict sense of the term. Indeed, there is no other way in which meaning can be given to the parallel treatment of these two concepts in Article IX. But those are not the present circumstances.

9 CONTRACT: FWO's Final Case

137. Having thus dealt with issues (b) and (c)[67], relating to "covered investments" and "investment agreements", the Tribunal must now proceed to issue (a), namely whether a contract had come into being between the Claimant and any of the parties on the Respondent's side.

138. No useful purpose would be achieved by tracing the mutations of FWO's case on the components of jurisdiction and breach, as in the course of time the allegations of fraud and corruption progressively withered away, leaving only vestiges behind. The more practical approach will be to direct this stage of the analysis to FWO's own final summary, which (in defining the relevant "covered investments" on which it bases the jurisdiction of this Tribunal) impliedly defines the breaches in respect of which recovery under the BIT is sought. It reads as follows:

> "FWO has made a number of qualifying covered investments, as defined under the BIT each of which is now the subject of a dispute at issue in this arbitration as a result of the State's action. In sum, these investments are as follows; (1) contractual rights obtained by FWO through the tender process; (2) rights conferred by law; (3) FWO's transmittal of specialised industry know-how, intellectual property, and original, innovative and unique economic business models by the State; and (4) FWO's investment of tangible property and funds to develop the program."

[67] Paragraph 115 above.

139. Just as at the outset of the proceedings FWO began its exposition with a brief and uncompromising statement of its then central proposition (that the entire transaction was infected with dishonest conduct), so also at their end FWO launched its Post-Hearing Memorial by quoting from the transcript of an exchange between counsel and the Tribunal which stated the essence of the case (as it then stood) in terms which posited the existence and breach of a contract antecedent to, and anticipatory of, the agreement from which FWO was to earn its anticipated profits. Since the Tribunal agrees that this is where the weight of the dispute can now be seen to be, it will concentrate on the dispute's contractual aspects, but must first clear the ground by examining the last three of the cumulative propositions quoted in the preceding paragraph.

140. Little time need be taken over proposition (2), for although briefly signalled at an early stage it was scarcely developed thereafter. Whatever may be its theoretical basis, the Tribunal can see no way in which, given the particular circumstances of the present case, it could succeed if all other routes were blocked. We therefore set it aside, as for the moment we also do with proposition (3), which raises wholly distinct factual arguments potentially yielding a different measure of relief.[68]

141. Proposition (4) "FWO's investment of tangible property and fund to develop the programme" is at first sight altogether more attractive, for it depends on two undoubted facts, namely the wasting of FWO's pre-contract efforts and expenditures and the withdrawal from negotiations with FWO before the achievement of a final contract, plus an obvious causal connection between the two. Moreover, in a different context it might have had a real prospect of success, in reliance on a small group of English cases which show that expenditures made in anticipation of a contract may in certain circumstances be recoverable even if the contract never comes to fruition.[69] Nevertheless we are in no doubt that on three cumulative grounds it must be rejected. In the first place, although the precise juristic basis of these cases may be controversial, it is at least quite clear that whilst facts such as those just mentioned are necessary pre-conditions for a recovery under this doctrine, they are not in themselves sufficient. Disappointed expectations are not enough;

[68] But see paragraph 184 below.

[69] These authorities are helpfully discussed in *Regalian Properties v London Docklands Development Corporation* [1995] 1 WLR 212, and Goff & Jones, the Law of Restitution (4th Edn) 554-563.

some other ingredient such as an express or implied request to perform the work or make the expenditure must also be present before the responsibility of the intended employer is engaged. Competitors for a project often expend work or deploy equipment and materials in advance to gain a tendering advantage or a flying start on the project once it is under way. This may be an expensive gamble, yet nobody could assert that if the gamble does not succeed the loser can simply look to the employer to get its money back. In the present case we are not at all sure that there was sufficient in the nature of an inducement by the State to relieve FWO from the risk that for one reason or another the final contract would not materialise.

142. Secondly, even if FWO were able to clear this hurdle, it would give FWO a cause of action under the law of Trinidad and Tobago, which would be a promising start, but would not itself create a valid claim under the BIT without showing that the domestic-law right of action qualifies as an "investment." The enquiry into whether this requirement was satisfied opens the way to an obstacle of a different kind. To establish a valid claim under the BIT/ICSID regime it must be shown both that the Claimant possessed an investment and an illegitimate interference with that investment by the State. In the ordinary situation, exemplified by FWO's other contractual claims which we come to shortly, there is no logical difficulty in holding that these requirements can co-exist, because they are independent of each other. But the position is different here, for the locally enforceable cause of action relied upon as the "investment" protected by the BIT depends entirely on the failure of the contract in anticipation of which the moneys etc. were spent. Yet it is that very failure brought about by the conduct of the State which is relied upon as a breach of the BIT. The same event, therefore, namely the non-completion of the Final Contract, is advanced at the same time as a source of the right infringed and the infringement of it. This logical contradiction proves too much.

143. Finally, however, even if these difficulties could somehow be overcome there is one hurdle which must surely be insurmountable. It may be very simply expressed. From the outset of the bidding process it had been made clear that the ordinary position obtained: as already noted, the Terms of Bid provided that Trinmar would not be responsible for costs or expenses incurred by bidders in connection with the preparation, submission and

presentation of bid proposals. In itself, this disclaimer only went so far, and it could well be argued that on its own it did not cover expenditures made in connection, not with the bid, but with preparations for the execution of the works which would be useful if and when the contract was placed. This topic remained submerged until 15 September 2000, when there began the exchange of correspondence quoted at paragraph 90 above. It will be recalled that the second letter of 20 September 2000 concluded with the words: "Please further note that Trinmar does not hold itself liable for any costs or expenditure incurred by F-W Oil Interests prior to the execution of a contract on this tender."

144. In the view of the Tribunal, this state of affairs is inconsistent with any of the routes by which, in certain instances, it been held that pre-contract expenditures can be recovered. There is no room for the law to imply a right of repayment, which was expressly requested and expressly refused. As in the normal tendering situation, FWO undertook the expenditures at its own risk.

145. In these circumstances we reject the proposition that FWO had a legally enforceable claim for reimbursement under the law of Trinidad and Tobago. By the same token we are unable to agree that FWO's preparatory expenditure constituted an "investment" for the purposes of the BIT or the Washington Convention.

(a) Contractual Rights: Fundamentals

146. This leaves for consideration only the first of the four cumulative propositions set out above, namely that FWO obtained "contractual rights through the tender process", which the State unfairly destroyed or eroded in breach of its obligations under the BIT.

147. Before entering into any details, it is essential to stand back from FWO's submissions to see how they seek to implicate the State in the matters of which complaint is made. It is not enough to show that Trinmar made a contract and broke it. Only the State is a party to the BIT; only the State can be held liable for infringing it; and only the State is a respondent to these ICSID proceedings.

148. In most cases where the investment which is said to be protected by a BIT or similar treaty takes the shape of a contractual right, the infringement alleged against the

host State is an interference with that right from outside. Thus, for example, if the investment is a debt, it may happen that the host State intervenes to annul or seize it. In that event the State is a party to the act alleged as an infringement of the BIT, but it is not a party to the contract whose status as an investment confers jurisdiction on the dispute-resolution body empowered to adjudicate on disputes arising under the treaty. Recent jurisprudence shows, however, that a host State may also be a participant in the investment itself as counter-party to the foreign investor, so that where the complaint is simply that the contract between investor and State has not been performed, the State potentially occupies a double role: namely, as both as the maker and the breaker of the contractual obligation. Here, the State may be said to have infringed the BIT from within. A further variant exists where the contract is made ostensibly with a third party, but where that party is said to be an emanation of the State, so that, whatever appearances might suggest, the investment once again consists of an obligation owed by the State to the investor, and the State is involved as both the creator and the infringer of the obligation, acting from within.

149. This analysis opens up the following theoretical possibilities:

(a) FWO was a party to a contract made directly with the State. The contract was protected by the BIT and founds the jurisdiction of ICSID. Failure by the State to perform the contract was a breach of the BIT by the State.
(b) FWO was a party to a contract made indirectly with the State through the medium of Trinmar, which for this purpose is to be identified with the State. Otherwise, the position is the same as under (a).
(c) FWO was a party to a contract with Trinmar, which for this purpose is not to be identified with the State; nevertheless interference by the State, leading to a non-performance of this contract by Trinmar, was a breach of the BIT by the State.

(b) Introductory comments

150. Although possibility (a) has been included for the sake of completeness it is of no practical importance here, since it could not be (and so far as we can discern from FWO's submissions was not) suggested that the State was a direct party to any contract with FWO.

151. This leaves only possibilities (b) and (c). The question whether FWO made any contract at all of the kind if alleged is the same for each, but there is a critical difference when one comes to breach, for in relation to (b) the allegation would be that the breach consisted of a simple non-performance of the State's obligations under the contract (i.e., it acted "internally" to the investment contract), whereas under (c) FWO must prove that the State wrongfully interfered with a contract to which it was not a party (i.e., it acted "externally" to that contract). Quite plainly, there is a fundamental difference between the two types of breach, and an examination of whether there was a breach, and if so what was its nature and consequences, depends critically on which route to a recovery under the BIT is pursued. We return to this later.

(c) Domestic Law.

152. Before proceeding to consider what enforceable rights FWO lost when Trinmar withdrew from the negotiations, it must be stated that by "enforceable" the Tribunal means enforceable in the courts of the State in accordance with the substantive law of that country, no other courts and no other law having been brought forward as potentially relevant. We must therefore start by identifying the relevant features of the substantive law of Trinidad and Tobago (called for convenience "the Domestic Law"). This task cannot be performed directly, simply by looking up the law in a book. In one sense the entire field of relevant law does not yet exist, since the legislature and the courts have not had occasion to address it. This does not of course mean that the Courts would act in an arbitrary manner, merely that the relevant Domestic Law would have to be developed *ad hoc* by a court adjudicating upon FWO's complaints. Since FWO has not actually chosen to proceed in Trinidad and Tobago under the Domestic Law we must speculate about how a court would proceed, in the absence of direct local guidance, if faced with a claim by FWO.

153. It seems to the Tribunal that the court would initially approach the matter from first principles, and in particular the general principles of the law of contract which can safely be assumed to be broadly similar[70] in Trinidad and Tobago to those developed by the common law throughout the Commonwealth.[71] Having then arrived at a preliminary

[70] Though not necessarily identical, as witness the problem of undertakings to negotiate, referred to below.
[71] No decisions from the United States have been cited which assist the present problem

opinion in the light of general principles, the court would turn to see how common law courts elsewhere have reasoned when faced with problems similar to those before it. This would involve the accumulation of a body of authorities, such as that placed before this Tribunal, which the court would marshal to see what ideas, perspectives, theories and reasoning could be deduced and applied to the matter in hand.

154. When performing this exercise the court would be inclined to look particularly at the English cases, not through any notion of hierarchy of precedent but because the law of Trinidad and Tobago has founded for much of its history on doctrines from that source, so that the English authorities may be expected to anticipate what the local court might decide if the problem were to come before it. Reported cases from other jurisdictions would however be an important resource, particularly those from Canada where the problem has been discussed intensively at all levels.

155. In drawing upon this body of English authority the domestic court would, we believe, exercise caution in two respects. First, because what may at first sight seem to be decisions based on generally accepted principles of English Law may on examination prove to be decisively influenced by European Community Law.

156. So also with the Canadian cases, which appear to constitute the most fully developed jurisprudence on this topic, but were decided against the background of formal tendering structures and contractual practices unrelated to those existing in Trinidad and Tobago. The judgments in these cases may prompt ideas which can take root in the present context, but it would be unsafe to follow them directly.

(d) Was there a contract*?*

157. It will readily be seen that, leaving aside for the moment the issue of breach, there are two central questions to be addressed. Did FWO have a contract with anyone concerning the project? And if so with whom was the contract made?

158. The Tribunal starts with the first question. For the sake of simplicity, when considering the first element of this question, Trinmar will be named as the counter-party to FWO in the postulated contract, since it was with Trinmar that the negotiations were conducted. Even if no Final Contract (i.e., the full and formal written agreement towards which the negotiations were directed) was ever made, did Trinmar nevertheless enter into a contract or contracts with FWO, constituting the latter's investment in the State? FWO contend for an affirmative answer to this question, in terms of two contracts, which must be carefully distinguished.

159. In its submissions, FWO has called these "The Tender Contract" and "The Definitive Operating Agreement". For the purposes of discussion the Tribunal prefers to call the first of these "the Process Contract" since that begs fewer questions.

160. Although the Process Contract, if it existed, is probably the earlier in time, it is convenient to start with the Definitive Operating Agreement, which raises fewer problems. Notwithstanding its name, this was not the complete and formal final Contract towards which, as a definitive statement of their substantive rights and duties in relation to the Soldado Fields, both parties were continuing to negotiate. Rather it is said to have been a binding agreement, embodying fewer terms than the Final Contract, and coming into existence at an earlier date as a by-product of the negotiations. The problem, whether sufficient terms have been agreed for the purpose of a binding agreement to have been reached, is notoriously difficult to solve, especially as it may be significantly affected by the parallel question whether the parties intended to create legal relations but there is no need to enter into the law upon that problem for there are two grounds on which it seems clear that FWO's contention must be rejected. The first concerns FWO's request for a shareholder guarantee, which comes into the case on two separate occasions. One was at the very end of the story, when the failure by Trinmar to persuade its parent to put up a guarantee was used by it (Trinmar) as the ground for treating the transaction as at an end. Yet it seems to us plain that the furnishing of a guarantee never became an agreed term, non-performance of which would have spelt the termination of whatever contract had been made, either on the basis that it was a condition precedent to the arising of any obligations at all, or as a term of the contract sufficiently important to make any breach a wrongful

repudiation of the contract. Quite apart from this, any such term would have been a stipulation in favour of FWO on which Trinmar was therefore not entitled to rely, given that FWO could have waived this stipulation.

161. On the other hand, the story of the guarantee is of great importance in a quite different respect: not because the parties agreed that one would be provided, so that the failure to do so would be a breach of one term of a contract already agreed, but rather as a condition precedent imposed by FWO itself on the making of any agreement at all. It is plain that a guarantee was regarded as an important element in the future of the contract, and the parties were still wrangling over it when the negotiations came to an end. The failure to agree on a guarantee, not the failure to provide one, left a gap in the consensus which could not be filled by implication.

162. The combination of this factor with other terms yet to be agreed would in the Tribunal's view have made it hard for FWO to establish the "Definitive Operating Agreement", even in the absence of a feature which in the Tribunal's opinion is fatal to FWO's argument: namely, the insistence by both parties that they would not be legally bound before the execution of a formal contract. As to this, quite apart from the disclaimer in Clause 6 of Trinmar's Request for Proposals (which is only peripherally relevant, since it was concerned with bidding, not the ultimate contract), almost the first sentence of the Formal Notice to Successful Bidder read:

> "This award is made subject to the negotiation and execution of a mutually agreeable operating agreement for the provision of facilities and services in Trinmar's West and Southwest Soldado Fields…"

163. The heading of the draft heads of Agreement annexed to this letter stated prominently –

> "Subject to negotiation and execution of definitive operating agreement".

FWO made no complaint about this stipulation, either then or later, which is not surprising since it had made clear at the every outset of the negotiations, in its response to the Request for Proposals, that-

> "F-W Oil shall be obligated to Trinmar only upon the entry into force of a definitive written agreement".

164. FWO never withdrew from this position and it is quite clear to the Tribunal both from these express reservations and from the general tenor of the exchanges that the parties were keeping each other at arms length and wished to preserve their freedom of action until firmly and formally bound to acceptable terms. The Tribunal is in no doubt that in such circumstances, even apart from the other obstacles in the way, FWO cannot now be heard to insist on a preliminary informal contractual relationship which the parties were at such pains to avoid. Accordingly, quite apart from any question of a lack of consensus, we reject on these grounds the proposition that there was a "Definitive Operating Agreement".

165. This leaves for consideration a question on which much time and skill has been deployed, with the backing of copious citation of authority: namely, whether there was a "Process Contract", antecedent to the Final Contract at which the negotiations were aimed, but not itself (unlike the alleged Definitive Operating Agreement) creating any substantive obligations in relation to the development and operation of the Soldado Fields. Rather, it is submitted that a contract came into existence during the negotiations which made legally binding provision for the way in which a Final Contract was to be arrived at. FWO plainly cannot rely on any explicit bargain to this effect, for in the letter of 15 September 2000 to which reference has already been made, they asked for "an interim agreement to govern our relationship" – and never got one. Furthermore, the reservation to the effect (though not in those precise words) that the transaction was subject to contract, to which the Tribunal has already referred, must be as fatal to the idea of a Process Contract as it is to the informal Definitive Operating Agreement. Nevertheless, in deference to the assiduous assembly of a large volume of reported decisions from various jurisdictions the Tribunal thinks it right to see whether it can extract from them any propositions which may enable FWO to overcome the obstacles which stand in the way of its submission. For this purpose it is convenient to break down the bulk by looking at the individual propositions which the cases seem to establish. In doing so, it is also convenient on occasion to follow the practice of some Canadian judgments and call the Process and the Final Agreements "Contract A" and "Contract B", respectively.

166. The Tribunal derives from the cases the following propositions:-

(A) General Principles:

(i) The law recognises the possibility of a process contract, and will enforce it if one is found, but there is no assumption that one will exist in the individual instance. Most frequently there is none.

(ii) Whether there is a process contract is to be determined in the same way as with any other alleged contract. Regard must of course be to the express terms of the negotiations, and to the legal, statutory, and administrative background against which the negotiations take place. In particular it must be proved that the parties intended to bind themselves contractually, and that there is sufficiently complete consensus to make the bargain workable. There is nothing special about process contracts, and nothing special about the process for determining whether they exist.

(B) Consensus

167. As with other aspects of the modern law of contracts, there is no room for a mechanistic approach. In the simplest situations it may be enough to look for an offer matched by an acceptance, or a counter-offer, and so forth, but for complex commercial negotiations a more flexible method is required. Whilst care must be taken not to build fragments into an incomplete whole, the entire course of the exchanges must be examined to see whether they disclose a continuing intention to make a binding contract, reflected in a sufficient accumulation of terms on which both are agreed, even if they are not all gathered together at a single place and time.

(C) Effect of an invitation to potentially interested parties.

168. In the Tribunal's opinion, the following rules concerning particular situations can be collected from the reported decisions cited in argument.

(i) Very often the first step in the tendering process will be no more than a notification to potentially interested parties that a tender process is in the offing. Those who wish to learn more about the project and the terms on which it is currently intended to offer it, and to show that they are serious contenders, are enabled to communicate without risk of a present commitment on either side. It is not normally an offer, and the response to it does not in general have contractual effect.

(ii) On other occasions, an invitation to tender may launch the contractual exchanges themselves, intended to have some contractual effect. In the simplest and most usual case, the invitation may form one side of a bargain, to be completed when the addressee responds with an unqualified acceptance. There is a doctrinal problem about this situation. Perhaps the invitation is a "unilateral contract", already binding, which is transformed into a bilateral contract when the invitee proffers a compliant bid. Nothing turns on this in the present case.

(iii) The invitation may go further and establish a set of criteria which tenderers must fulfill in order to be considered for an award, or it may declare that a mandatory method of choice will be applied as between conforming bids. Such terms may be expressed in the invitation; or may be derived from a background of established tendering procedures; or both. In some instances an invitee who responds with a bid satisfying the criteria by that very act concludes a process contract (Contract A) with the invitor.

(iv) The process contract may in appropriate circumstances found a cause of action against the offeror; for example a conforming bidder who does not receive an award may on occasion have a right of action under Contract A for the loss of the opportunity (or even the certainty if there is mandatory bid selection scheme which guarantees selection of the lowest conforming bidder) of going ahead to the revenue-generating Contract B. So also, if a rival non-conforming bid has been admitted into the process, or if a rival bidder has been given an opportunity to amend his bid after tender, or if the prescribed method of choosing between conforming bids has not been followed. Equally, a bidder may complain if a conforming bid has been excluded from the process, either because the criteria for conformity have not been correctly applied, or because the invitor has privately given effect to further criteria not disclosed to the generality of invitees. Or again, it may be that the complaint is not about the treatment of the bidder himself, but about an unfair advantage given to a rival if (for instance) his non-conforming bid is admitted into the selection process.

(v) These are examples of the way in which terms expressed or implied in an invitation to tender may work to the advantage of a bidder. But they may also work to his disadvantage, for, if the invitation contains a deadline, the court may be willing to imply a clause prohibiting him from withdrawing a bid once made.[72]

(D) A duty to consider bids

[72] As in paragraph 4 of Trinmar's Request for Proposals. The cases in the years following Ron Engineering are helpfully set out in *R v. Health Care Developers* (1996)D.L.R (4th)609; *Best Cleaners and Contractors v. R* (1985) 2 F.C. 293; and *MJB Enterprises Ltd. v. Defence Construction* [1999] 1 S.C.R. 619.

169. Even if a Process Contract can be shown to exist, it will not necessarily take the shape just described. Instead of a regime which determines the outcome once the conforming bids have been identified, it is common to leave the invitor with a degree of subjective discretion. The scale of the discretion can vary widely, from (for example) one which enables the invitor to disregard all the tenders and either cancel the project altogether or put it out for re-tender, to one fixing a list of factors to be taken into account without prescribing how they should be weighted. It does however appear that at all points on the scale the courts will usually infer one common factor, namely that the invitor must at least consider all conforming bids, even if deciding not to accept them; and that they must be considered fairly. This term cannot be given any fixed meaning. Its content will depend on factors peculiar to the transaction, such as its size and complexity, and also on the background, including local practices and any municipal or statutory rules governing the tender process.

(E) Discretion over-ridden

170. Clause 6 of Trinmar's Request for Tenders has already been set out. Provisions of this type (referred to as "privilege clauses") have been the subject of considerable discussion in the Canadian Courts. The Tribunal understands the outcome of these cases to be, in summary: there is no objection to such clauses in principle, as they may perform a valuable economic service, and other things being equal they will be applied according to their terms, thus enabling the invitor to award no contract at all, or to award one to someone other than the lowest bidder. But a clause of this kind has to be read in harmony with other provisions of the tender documents. In the most extreme situation this may require the privilege clause to be disregarded altogether, and short of this there may be constraints on the invitor's apparent freedom of action. For example he will not usually be able to accept non-compliant bids, even though he is not required to accept the lowest of the compliant bids. And so on. Everything depends on the way in which the clause can be fitted in to the language and commercial background of the tender documents as a whole.

(e) The Position under Domestic Law

171. The Tribunal has set out its understanding of the cases at a little length because FWO asserts that its investment in the State takes the shape of a Process Contract, or a Definitive Operating Agreement, or both, enforceable locally under the laws of that country. To see whether that is so, it is necessary to speculate about what would have happened if FWO had sought to enforce the alleged contracts in the Courts of Trinidad and Tobago, and for this purpose the Tribunal has had no choice but to assume that the Courts there would have arrived at conclusions generally similar to its own, even if not identical in expression or details.

172. What guidance would the Domestic Courts have obtained from the propositions set out above, when reaching the stage of deciding whether FWO had vested rights which were infringed when Trinmar withdrew from the negotiations? The Tribunal is forced to say: very little. If the sole question had been whether Clause 6 of the Request for Tenders (equivalent to "the privilege clause") enabled Trinmar simply to abandon the process and either give up the project altogether, or start again in a different basis, the cases would have posed a delicate problem on which we would have expected (though without great confidence) Trinmar to succeed. But there is no need to go so far, since there are two arguments against the application of the case law to which we can see no answer.

173. The first is that the cases are irrelevant. They were all concerned with things happening or not happening before Contract A came into existence, and then during the period when, after the receipt of the bids, whatever system for assessing them and awarding the contract was required by Contract A (if there was one) had to be put into effect. The outcome of the whole process (if it had worked properly) would then have been the coming into existence of Contract B, between the offeror and a bidder selected in accordance with Contract A. The present dispute is not concerned with this at all. The bidding process was completed, and yielded the notification to FWO that it was the successful bidder. There could be no complaint about that. What FWO does complain about is that after it had won the contest it did not achieve Contract B, at which the previous dealings had been aimed. The cases do not discuss a complaint of this nature, for they deal with a two-stage process, the first concerned with tendering, and second the necessary outcome of a successful

tender. Here, however, one must contemplate the possibility of another intermediate stage, namely one during which, after Contract A had led to the award of a tender, the parties strive towards Contract B. About this, the cases cited have nothing to say, and the Domestic Court would be obliged to proceed from first principles. The outcome of the first stage obviously contemplates a period of negotiation, but does it involve either party in obligations about the manner of the negotiations? Clearly it cannot require that the parties are contractually obliged to reach a successful outcome, but at what level do their duties operate? Are they both to work towards Contract B in a reasonable way, or only in a way consonant with good faith? Modern international legal concepts tend to favour the latter, but some common law systems (amongst them conspicuously English law) do not yet acknowledge in full the binding effect of an agreement to negotiate. And if the post-Contract A situation obliges Trinmar to discuss with FWO the terms of the Final Contract in a particular way, what was that way?

174. It is a curiosity of this (and similar questions) that the present Tribunal is not called upon to give a direct answer to these questions, for the only purpose of the enquiry is to see whether under Domestic Law FWO had rights in Trinidad and Tobago which ranked as investments for the purposes of the BIT; and this exercise calls for an assessment of what the Domestic Courts would make of the question if it were ever to be brought before them, which *ex hypothesi* it will not be. The Tribunal can only say that the judge in the Domestic Court, faced with widely differing world-wide attitudes to questions of this nature, would not have had an enviable task.

(f) An obligation to negotiate in good faith?

175. It remains for the Tribunal to consider whether there was an obligation on Trinmar to negotiate in good faith towards a final project agreement (i.e., Contract B), the breach of which might serve as the foundation for a claim under the BIT.

176. The Claimant asserts in its Memorial (paras. 5.51 onwards and paras. 5.60 onwards) and again in the amended Reply (paras. 5.16 and 5.17) that there was an obligation on the part of Trinmar/Trinidad and Tobago to negotiate in good faith. It asserts also that this

obligation was breached, and in support thereof that there was no justification whatever as to why the definitive operating agreement was not signed.

177. Whether an obligation on a would-be contracting party to enter into negotiations is enforceable – a plea prompted by the last sentence of the first paragraph of Trinmar's letter of 20th September, 2000 ("We intend to negotiate in good faith and in an expeditious manner toward the execution of such agreement between Trinmar Ltd., and F.W. Oil Trinidad LLC") – is questionable under the English common law of contracts which applies in Trinidad and Tobago.

178. In the common law, a contract to negotiate, even when supported by consideration, is not regarded as a contract known to law – it is too uncertain to have any binding force; and no Court can estimate the damages for breach of such an agreement: see Courtney v. Tolani 1975 (1) All E.R. 716 (C.A). In that case Lord Denning M.R. said that the "tentative opinion" of Lord Wright expressed in Hillas and Co., v. Arco, 1932 All E.R. Rep. 494 at 505 (H.L), that "in strict theory there is a contract (if there is good consideration) to negotiate" was "not well-founded". Lord Diplock added that the dictum of Lord Wright quoted by Lord Denning "though an attractive theory should in my view be regarded as bad law": It is still so regarded: See Chitty on Contracts, 28th Edition, Volume 1, General Principles, 1999, paras. 2-126 and 2-127 (Agreement to Negotiate). In the Third Cumulative Supplement to this Edition an even later case is cited for the proposition that an agreement to make reasonable endeavours to agree is not enforceable at law.[73]

179. As to the alleged lack of good faith, the correspondence does not substantiate this plea. On 8 December 2000 we find FWO accepting in a letter to Trinmar that it was Trinmar's "unsettled relationship with its shareholders Petrotrin" that had prevented the definitive agreement being finalized. And even in January 2001[74] FWO acknowledged that the parties were still to meet to finalize negotiation of a definitive agreement: no allegation was then made of any lack of good faith. When one party does not complete negotiations

[73] *London and Regional Investments Ltd v. TBI plc and Belfast International Airport Ltd.*, [2002] EWCA Civ. 355 – where there was express agreement to "use reasonable endeavours to agree" but this was held to lack contractual force as it "was no more than an agreement to agree". Most recently, Longmore LJ has revisited the subject in paras. 115-121 of his judgment in *Petromec Inc. v. Petrobras SA* [2005] EWCA Civ 891.
[74] Letter of 12 January 2001 from FWO to Trinmar.

as agreed and the other party sets out its understanding of the true reason for this, it is not open to that other party subsequently to complain that the failure to complete is due to a lack of "good faith" on the part of the first party.

180. On the evidence presented to it, the Tribunal is not able to disentangle the precise reasons why the definitive operating agreement was not completed. The Tribunal accepts that there was a strong element of pretext in Trinmar's latching on to the ultimate refusal of Petrotrin to authorise a guarantee, and notes in particular that the issue was never presented to FWO in such a way as to allow it to consider whether the project finance could be secured in some other way (which at a late stage we were told in evidence would have been quite possible)[75] That said, it cannot be denied that a guarantee was nowhere part of the tender documentation nor of FWO's formal bid in response. Even when FWO responded to Trinmar's request to "reformat" its proposals (i.e., in June 2000) FWO informed Trinmar that it had available to it "sufficient interim funding through shareholders equity and contributions to commence and fund the initial stages of the project; and that permanent financing should be made available and should close within 45 to 60 days from the Effective Date of Agreement with Trinmar." And in its letter of 5 July 2000 (when dealing with project financing under the "reformatted" guidelines) FWO continued to express complete confidence in its ability to raise finance and funding on its own. The matter was in fact never raised in writing until mid-September 2000.[76]

181. However that may be, the allegation in the Claimant's Memorial (paragraph 3.76) that FWO had received "repeated assurances" from T&T or Trinmar in the course of the tender process and negotiations about furnishing a guarantee or security has not been

[75] Evidence of Robert Moore, 11 December 2003: Hearing volume III pp. 905 onwards.
[76] FWO's letter of 15 September 2000; although the letter claims that the issue had already been raised orally: "As we have advised you on several occasions, in order for F-W Oil to obtain financing for the project contemplated in the Tender lenders will require F-W Oil to obtain and maintain during the term of our agreement from either Trinmar, its shareholders or another person acceptable to F-W Oil and the lender a guarantee or other form of security interest in form and substance satisfactory to the lenders to secure payment to F-W Oil under the contract concluded in accordance with the Tender and repayment of the lenders under the arrangements for financing provided to F-W Oils."

established. Even the sentence fastened upon by the Claimant in its argument [77] was at best an assertion of what FWO had required, not what Trinmar had agreed to.

(g) Conclusion

182. In reality, however, there is no need to take the enquiry so far. As has been shown, the discussions were from the start impressed with the assumption that neither side wished to make a commitment short of a fully enforceable Contract B. The Tribunal sees no reason why this disclaimer should not also apply to the intermediate obligation postulated as arising after the performance of Contract A, as much as to any of the other asserted contractual obligations. In brief it seems that FWO was concerned not to take on any obligations until the Final Contract was fully agreed and signed. This is a perfectly understandable commercial stance which it is not the Tribunal's task to question, but since the parties were at one in this respect, there is no ground not to give effect to it.

183. Finally, the Tribunal should note that it is far from clear that an intermediate obligation of the nature presupposed, <u>being concerned only with negotiating methods and not with substantive rights</u>, could rank as an "investment" for the purpose of conferring jurisdiction on the present Tribunal.[78] There is however no need to explore this further, since we consider that the "subject to contract" qualification puts paid to all claims that the Tribunal has jurisdiction by virtue of locally enforceable contractual rights, and hence (on the views which we have expressed on other jurisdictional issues) to our power to entertain the dispute at all.

10 THE INTELLECTUAL PROPERTY CLAIM

184. It remains for the Tribunal to deal with FWO's claim in respect of its contribution of intellectual property, which can be done briefly. The Claimant's allegation that its confidential plans and economic models, produced as part of its offer under the first tender process, were unlawfully appropriated for use in the second tender process, is denied by the Respondent. However that may be, given in particular that the second tender process came to naught, the Tribunal has seen no evidence that FWO has suffered specific loss in this

[77] Contained in the letter of 26 February 2001 from Aleem Hosein of Trinmar: "Indeed you were requiring the guarantee even before our letter of September 20th, 2000, notifying that you were the successful bidder."
[78] See Part III, sections 7 and 8 above.

respect. Nor is the Tribunal able to conclude in any case, on the basis of the argument and evidence presented to it, that FWO's development of these plans and models, as part of its preparation of the tender offer, represents an "investment", any more than do the alleged intermediate contractual rights dealt with in the preceding section.

11 THE RESPONSIBILITY OF THE STATE

185. Having thus dealt with the central question of "investment" under both domestic and international law, the Tribunal must now proceed to another aspect of the case, namely how far (if at all) the State was responsible at law for the actions or omissions which form the foundation for FWO's claims in this Arbitration.

186. As already indicated, it was a recurrent theme of the Respondent's argument that both Trinmar and Petrotrin were and are separate corporate entities with their own legal personality under the law of Trinidad & Tobago, and that the Government of Trinidad & Tobago (the Respondent in the Arbitration) could not be held legally responsible for their actions or omissions, including, that is, for their contractual relations with outside parties. In an alternative variant, the argument took the form that the "dispute" submitted to arbitration was not one with the Government of the State at all, so that one of the preconditions for jurisdiction under Article 25(1) of the Washington Convention was not met. This argument, primarily one of domestic law, was extended in the course of the arbitral proceedings to cover the position at international law as well, in other words to deny that the activities of Trinmar and Petrotrin in relation to FWO could – or in the premises did – engage the responsibility of the Government under the BIT. In support of this line of argument, the Respondent relied in particular on the provisions of Article XV(2) of the BIT, on the distinction in international law between *acta jure imperii* and *acta jure gestionis*, and on the Arbitral Award in Maffezini v. Kingdom of Spain.[79]

187. For its part, the Claimant continued throughout to maintain that the factual circumstances underlying its case, taken in their totality, and taken together with the legal status of state enterprises under the law of Trinidad and Tobago, did represent breaches of

[79] *Emilio Agustín Mafezzini v. The Kingdom of Spain* (ICSID Case No. ARB/91/7) Award, November 9, 2000.

the obligations of the State of Trinidad & Tobago under the BIT, though this aspect of the argument was never concisely drawn together in such a way as to allow the Tribunal to appreciate the precise basis on which it had been put forward. Indeed, the Tribunal feels moved to say that it derived no assistance whatever from the undifferentiated way in which the Claimant continued, throughout both the written phases of the case and the oral argument, to plead its case in terms of "T&T", the expression apparently being intended to be understood to cover indiscriminately any or all of the entities and agencies involved.

188. As the arbitration developed, both of the Parties did however invoke, each in its own support, the draft Articles on State Responsibility drawn up by the UN International Law Commission (ILC), and the Parties did, to a degree, join issue on the application of those draft Articles to the present dispute. It is therefore incumbent on the Tribunal to respond to these arguments to the extent necessary.

189. Before doing so, it would no doubt be useful to summarize briefly what, in light of the factual evidence presented to the Tribunal, the involvement of the Respondent Government did actually amount to.

(a) Facts and Events: Direct Involvement of the State (through the Minister) in the Bidding process, and at Various Stages of FWO's Dealings with Trinmar

190. It would seem that the Respondent acknowledges Petrotrin to be a "State Enterprise" under the direct control of the Minister of Finance (Corporation Sole) who is responsible for the management of the entire portfolio of State investments: the corporate function and the actual monitoring of the performance of the State Enterprises are, it would seem, carried out by the Investment Division of the Ministry of Finance on behalf of the Minister. The Minister of Energy as the Line Ministry provides the specialized technical analyses and statutory approvals for operations while ensuring adherence to the Government's sectoral policy guidelines.[80]

191. In his witness statement dated 14 August 2003, Mr Andrew Jupiter, Permanent Secretary to the Ministry of Energy and the Energy Industry, stated:

[80] http:/www.petrotrin.com/

- that Petrotrin was a fully-owned energy based company which fell under the portfolio of the Ministry of Energy and Energy Industries - its Line Ministry. It was also accountable to the Minister of Finance (Corporation Sole) – its shareholder;

- that a Performance Monitoring Manual[81] was issued by the Ministry of Finance which sought to outline the structure within which enterprises should operate; within the Ministry of Energy & Energy Industries, Government energy policy was communicated by the Line Minister who communicated this to the Board of Directors;

- that "in the hierarchy of state enterprise organizations such as Petrotrin and Trinmar", the Management was accountable to the Board, the Board was accountable to the Line Minister who in turn was accountable to the Government;

- that Petrotrin and Trinmar were State Enterprises in the oil and gas sector.

192. Mr Jupiter's evidence in his witness statement coincides substantially with the Claimant's case about State involvement in the award of the Project, and furnishes an uncontroverted factual account of the State's relationship with Petrotrin and Trinmar.

193. Trinmar's direct involvement in the bidding process, in declaring FWO as successful bidder at various subsequent stages has been established as shown below:

(1) The very first communication was an inquiry in July 1999 from Darin Bissoondatt (FWO's representative in Trinidad & Tobago) to Finbar Gangar, the Minister of Energy, in July 1999, inquiring whether his Ministry could assist in making appropriate contacts and appointments to facilitate "potential investors".[82]

(2) This was followed by a letter of 5 August from Wade of FWO to the Minister, expressing FWO's high level of interest and capabilities in performing economic enhancement programmes within the Energy Industries of Trinidad & Tobago; the Minister was informed that FWO had established a relationship with Millennium Energy Industries Ltd., a local Trinidad & Tobago company and anticipated using this relationship to establish and/or perform operations in Trinidad & Tobago.[83]

[81] Performance Monitoring Manual (see Petrotrin's Additional Document Vol.1 item #10).
[82] See RAD Vol.2 Exhibit 86.
[83] See Claimant's Vol-IIC-2 page 0003.

(3) This letter was passed on by the Minister to Trinmar, whose Chairman wrote to FWO on 27 August 1999 (with a copy to the Minister) expressing Trinmar's interest in working with FWO "subject to agreement" towards increasing the oil production from their lease acreage in the near term.

(4) In December that year we see Winston Millet telling Calvin Black (with reference to FWO's request) that it was the Minister who had directed that in order to inject transparency into the process RFPs should be issued to selected interested parties.[84]

(5) The evaluation of the Bids received was done by Ernst and Young, again on the instructions of the Minister.[85]

(6) Gordon Bartlett's letter of 26 June 2000 to Donald Baldeosingh (Petrotrin) states expressly that he had "obtained the concurrence of the Hon'ble Minister" to proceed with the tender proposals – stating that the Minister had expressed his great concern at Trinmar's negligence in allowing BS-25 to deteriorate to a point where it had to be decommissioned had impacted very severely on the country's revenue.[86]

(7) When the internal bickering between Baldeosingh and Bartlett had reached almost breaking point, it was the Minister personally who addressed a "private and confidential" reprimand to the Chairman of each of the Companies stating that he was totally dissatisfied about the complete breakdown of communication as between them and laying down a firm Government policy;[87] and indicated in express terms that he expected the two companies to be "guided accordingly".

(8) At the meeting on 7 September 2000, it was again the Minister who received a full report on the state of play, and the Record prepared by Mrs Pilgrim Bristol indicates unmistakeably that it was the Minister who gave detailed directions about how to proceed.[88]

(9) Subsequent proceedings of the Trinmar Board had as a full participant (including in the decision to award the Bid to FWO)

[84] See Claimant's Exhibit C0006, page 41.
[85] See T&T Vol 2 Tab 9, page 170 to 200.
[86] See paragraph 78 above, including the Minister's extreme concern at the effect on the national economy of the delays in resuming production.
[87] See paragraph 82 above.
[88] See paragraph 86 above.

Mr Rodney Chaitan, himself a Junior Minister in the Department of Energy.[89]

(10) Finally, after Trinmar decided to abandon their negotiations with FWO, it is again the Minister (by now Sen. Gillette) who directs that the project be put back out to tender on terms approved by him.[90]

(11) To the above, it might lastly be added that FWO's protests against their treatment were not just directed to Trinmar itself, but to the Minister (and to the Prime Minister).[91]

194. These elements in the handling of the Soldado Fields Project have been drawn together in summary form in this way, because in the Tribunal's view they rebut a persistent theme running through the Respondent's defence to FWO's claims, namely that the whole affair was simply a matter of commercial dealings between a foreign corporation and one or more Trinidad and Tobago corporations which had separate legal personality as companies under Trinidad and Tobago law, and for whose dealings the Government could not be held responsible. That the project was not a "mere" commercial deal is amply evidenced by the nature of the resource in question, and by the important place that production from the Soldado Fields obviously held in the minds of the Government of Trinidad and Tobago as a significant element in the national economy. Similarly, it appears to the Tribunal to be inconceivable that in any ordinary commercial deal, between ordinary commercial parties, the Government, in the shape of the responsible Minister, would or could have intervened as regularly – and, it may be added, as decisively – as happened in this case. Not merely that, but it seems to have been the settled expectation of all of the Trinidad and Tobago parties that the Minister would intervene in this way, and that he was entitled and expected to do so.

195. What the consequences of this state of affairs were, in legal terms, is however another matter, and we deal with that matter below.

[89] See paragraphs 94 to 98 above, including for Mr Chaitan's rather ostentatious change of position a short while later.
[90] See paragraph 100 above.
[91] See paragraphs 100 to 101 above.

196. Having recalled these facts, the Tribunal returns to the arguments of the Parties based upon them. To resume: the argument, as the Tribunal eventually understood it in the light of the post-Hearing written submissions, ran somewhat as follows:-

For the Claimant:-

(a) on the basis of their ownership and the exercise of actual control, both Trinmar and Petrotrin were to be regarded as State Enterprises within the definition in Article 1(f) of the BIT;

(b) it followed that the Government's obligations under the BIT extended to them expressly, in the light of its article XV(2), according to which "A Party's obligations under this Treaty shall apply to a state enterprise in the exercise of any regulatory, administrative or other governmental authority delegated to it by that Party";

(c) the condition in Article XV(2) was met, because, on the evidence given before the Tribunal, "Trinmar and Petrotrin operated within the State structure, implement[ed] state policy, and were subject to the instructions and control of government";

(d) moreover, under general international law, the actions (or omissions) of Trinmar and Petrotrin engaged the international responsibility of the Respondent because the two companies were either State organs, or were entities exercising elements of the governmental authority, or were acting pursuant to the instructions of the State, or under its direction or control, and the Claimant relied in this context on draft Articles 4, 5 and 8 of the ILC's draft Articles;

(e) finally, the Respondent was in any event responsible internationally for the conduct of Government Ministers.

For the Respondent:-

(aa) international law recognizes a clear distinction between governmental and commercial activities, and this distinction is equally reflected in the BIT, specifically in Article XV(2),and in ICSID jurisprudence;

(bb) Trinmar and Petrotrin do not meet the condition in Article XV(2), as their activities in the present dispute were purely commercial;

(cc) moreover, the Claimant's claims in the case are directed essentially against Trinmar and Petrotrin for their own actions, not against the State.

197. Had the Tribunal's decision turned in the end on breach of contract and its consequences, these questions would have acquired a particular importance. The Tribunal would no doubt have had to devote detailed attention to the now quite considerable number of decisions in investment arbitrations in which Tribunals have had to wrestle with the distinction between contract claims and claims under international law. As it is, given the conclusions the Tribunal has reached on the contractual questions and on the interpretation of the BIT, it is not necessary for the tribunal to go into those issues in any detail. Nevertheless, for completeness' sake, and to respond to certain elements of the argument not dealt with elsewhere, the Tribunal will deal briefly with one aspect of this matter, namely whether (granted the presence of an "investment") the conduct alleged and proved on the part of the various Trinidad & Tobago entities in respect of that investment would have been capable of giving rise to valid claims under the BIT.

198. It should be made plain at once that the Tribunal is not proposing to find, on a purely hypothetical basis, whether or not the substantive standards of the BIT were breached, i.e., whether the treatment meted out to the putative "investment" did, or did not, constitute "fair and equitable treatment", or "full protection and security", and so forth. On the view of the case taken by the Tribunal, those questions do not arise.[92] The present section of the Award deals solely with a different question, that of the legal responsibility, in general terms, of the Government of Trinidad & Tobago, looked at from the point of view of international law.

199. In this specific context, the Tribunal finds itself unable to follow the line of argument of either of the Parties.

200. The Respondent argues almost exclusively from the formal position under its internal law, namely whether Trinmar and Petrotrin were formally part of the apparatus of the State, carried out in a formal sense administrative functions on behalf of the State, or

[92] And would only arise if it was established that there was an "investment" – or its equivalent in the form of an "investment agreement."

were formally subject to Ministerial direction or control. While these considerations are certainly not irrelevant, and may in some cases be significant, as they were advanced by the Respondent they nevertheless belie the cardinal principle – on which the ILC lays repeated stress – that the position under the internal law of any given State is not, and cannot be, determinative of the responsibility of the State under international law. (cf., for example, para. (7) of the general Commentary to Chapter II of the draft Articles). Conversely, in seeking to bolster its argument by drawing on the distinction between commercial and sovereign activities that underlies the law on State immunity, the Respondent is guilty of introducing an element foreign to the quite different context of State responsibility – as the ILC has, once again, been at pains to point out (e.g., para. (6) of the Commentary to Article 4).

201. The Claimant, for its part, has, in the Tribunal's view, wholly failed to make out its case that Trinmar at least (whatever the position may be with respect to Petrotrin) is, or was at the material times, in a general sense, the State's alter ego – any more than it (the Claimant) has offered a sustainable justification for treating as a virtually undifferentiated whole the separate actions of Trinmar, of Petrotrin, and of Ministers of the Government of Trinidad & Tobago.

202. So far as its own view of the matter is concerned, the Tribunal offers the following observations. In doing so, the Tribunal draws heavily on the ILC's draft Articles, together with the Commentaries to them, which, although not in themselves binding, clearly reflect the underlying general legal principles.

203. The Tribunal thus observes that, where the operation of a State enterprise is at the core of an international dispute, it is theoretically possible that the enterprise's conduct (acts or omissions) may engage the responsibility of the State either as an organ of the State; or as a body exercising elements of the governmental authority of the State; or as a body which is in fact acting on the instructions of the State, or under its direction or control (ILC draft Articles 4-8). There is in other words a whole gamut of possibilities, whose application to particular situations depends upon an amalgam of questions of law and questions of fact which will vary from case to case according to the circumstances. The

internal law of the State will be the starting point, but not the end point. One obvious example may suffice, namely the question whether a State enterprise is or is not exercising the elements of the governmental authority; the example has been chosen because, to the eyes of the Tribunal, what the two Governments chose to lay down expressly in Article XV(2) of the BIT is to all intents and purposes indistinguishable from the position under general international law, as exemplified by Article 5 of the ILC's draft Articles. The Tribunal notes that the draft Articles contain no definition of the broad notion of "elements of the governmental authority" (any more than does the BIT for the equivalent phrase "other governmental authority delegated to it." Indeed the ILC consciously refrained from including in the draft even elements towards defining its application in particular cases. Rather, the Commission took the view, as expressed in paragraph (6) of the Commentary to draft Article 5, that the notion had to be judged in the round, in the light of the area of activity in question, and in the light of the history and traditions of the country in question. In short, the notion is intended to be a flexible one, not amenable to general definition in advance; and the elements that would go in its definition in particular cases would be a mixture of fact, law and practice. Moreover – and the point is of some importance – it is not the case that the same answer would necessarily emerge on every occasion; in some of its activities a State enterprise might fall on one side of the line, in others on the other. Considerations of a very similar kind would apply to the case lying on the outer edge of the spectrum of possibilities described above, that in which the State enterprise was not exercising "governmental authority" as such, but has to be regarded as acting in fact on State instructions, or under State direction, or under State control.

204. The Tribunal accordingly concludes that, although there must be serious doubt as to whether either Trinmar or Petrotrin constituted organs of the State of Trinidad and Tobago, it is by no means to be excluded that, for some of their individual activity at least, either of those two bodies might, in the particular circumstances established in evidence in this arbitration, have been acting sufficiently within the overall aegis of public authority as to engage the responsibility of the State for international law purposes. The possibility is given particular meaning by the general nature of the activity in question in this arbitration, namely the winning of a sovereign natural resource of undeniably major significance to the entire economy of the country. It would, self-evidently, be necessary to show, in addition

to the attributability of their conduct in this sense, that it also gave rise in substance to a breach of the international obligations of the State.

205. To say this leads the Tribunal to two features of the present case that are of special importance in this connection, the first being that the breaches alleged are of a BIT, and the second that the conduct alleged to found the breaches took place, quite unusually, at three levels: Trinmar, Petrotrin and the Respondent Government, all of them partly in their relations with one another, and partly in their direct relations with the Claimant. Why, however, are these features regarded as having special importance? A brief explanation may suffice.

206. That the substantive standards against which the Claimant puts forward its claims are those laid down in a specific treaty, not general international law, immediately opens up the possibility that particular standards of attributability may apply, as *lex specialis*, in substitute for or supplementation of the general rules of State responsibility – a possibility to which the ILC draws attention repeatedly in its draft Articles and the Commentaries (notably Article 55 & Commentary). Even if not (i.e., even if the applicable secondary rules of State responsibility remain unaffected), the fact that the treaty is a BIT opens up a further possibility at the level of primary obligation, specifically that the broad scope mutually agreed by the Contracting Parties for encouraging as well as protecting the investments of one in the territory of the other may have the effect of requiring (sc. as a matter of treaty obligation) the Government to adopt patterns of conduct in respect of its State organs and para-statal entities different from those that would ordinarily be required under general international law or treaty law. Or at least, i.e., even if there is in the particular situation no specific requirement on the State to act in particular ways, there may nevertheless be a framework of obligation within which, for example, if organs of Government choose to intervene in the operations of its para-statal entities (or if the State, for whatever reason, interferes in what would otherwise be purely commercial operations), an international tribunal ought to be ready to infer that by doing so they have engaged the international responsibility of the State for effects that, in substance, amounts to breaches of the standards expressly accepted by the State by treaty. The Tribunal considers that this conclusion is moreover in harmony with a series of arbitral decisions establishing that

interference by the State with the operation of a private contract is capable of constituting a breach of treaty.

207. It follows from the above that in the factual circumstances of the present arbitration, if the necessary "investment" had been present, the Tribunal – even while declining to accept either the Respondent's denial of State liability of any kind, or the Claimant's tendency to treat conduct at all three levels within Trinidad and Tobago as an undifferentiated lump – would have been prepared to find, on the facts, that the various admitted interventions by Trinidad & Tobago Government Ministers into the part-commercial/part-statal operations of Petrotrin and Trinmar were quite sufficient to raise serious issues as to answerable breaches of the BIT in relation to FWO.

208. For the reasons already given however, the question does not arise, and need not be further pursued.

209. It might finally be observed that the questions dealt with above are quite different from the question whether a breach of contract is at the same time automatically a breach of treaty (as in a whole series of cases, exemplified by Vivendi),[93] or the question whether, in the specific context of expropriation, the interference with the Claimant's rights was a matter of contract rather than the exercise of public powers (as in R.F.C.C v. Morocco)[94] and the decision in Impregilo v. Pakistan).[95] Neither of these questions has any bearing on the present case.

12 THE MUTUAL ALLEGATIONS OF CORRUPTION AND DISHONESTY

210. The Tribunal must now turn to another question that loomed large in the presentation of the case by each Party, but has not in the event figured largely in our decision. We have already drawn attention, in the Introduction to this Award, to the fact that, what had originally appeared in the Request for Arbitration, to be a case about breach of contract became transmute, on the filing of the Memorial, into a case revolving around serious allegations of corruption against highly placed persons in the service of the

[93] *Compañía de Aguas del Aconquija S.A. amd Vivendi Universal (formerly Compaignie Générale des Eaux) v. The Argentine Republic*, (ICSID Case No. ARB/97/3) Decision on Annullment, July 3, 2002.
[94] *Consortium R.F.C.C. v. Royaume du Maroc* (ICSID Case ARB/00/6) Award, December 22, 2003.
[95] *Impregilo S.p.A v. Islamic Republic of Pakistan* (ICSID Case No. ARB/0303) Award, December 22, 2003.

Respondent State in various capacities. The narrative portion of this Award also describes how these allegations were pursued in submissions and in evidence through the written and oral phases of the case, and describes the circumstances in which they were then ultimately withdrawn at the very end of the hearing, under pointed questioning from the Tribunal itself as to whether there was any real evidence to sustain allegations of that breadth and gravity. The narrative portion of this Award equally shows how some part of the case on the Respondent's side was based on generalized allegations of misconduct and dishonesty on the part of some of the leading personalities on the Claimant's side which, though they may not have been of quite the same degree of gravity, were nevertheless capable of being seriously damaging to professional or commercial reputation. There is fortunately no need to recall the substance of any of these allegations here, in view of the way in which the case ultimately rested. The Tribunal is simply obliged to note how substantial a part of the case as pleaded, as well as of the evidence led before it, revolved around these allegations before they were, in effect, abandoned by the Claimant, and not pursued by the Respondent.

211. The Tribunal was naturally much concerned from the outset about how these allegations and cross-allegations should be dealt with in its findings, not merely because of their serious nature, but as much because it was faced with the problems inherent in investment arbitrations (by contrast with proceedings in a court of law): no evidence on oath, and no compellability of witnesses. However, once the Parties abandoned their reliance on these allegations, there ceased to be any reason for the Tribunal to make findings upon them, and there was every reason why it should not. Yet simply to pass them over in silence would give a false picture of the proceedings, and moreover the events which the Claimant sought to portray as instances of dishonest conduct continue to be relevant, without their worst overtones, to the issues left for decision. Some account of them is therefore necessary in order to make the dispute intelligible. That being so, the Tribunal had for its own purposes, and with a view to possible incorporation into the Award, prepared an elaborate account of the documents and evidence devoted to every aspect of this unhappy history. In the end, the Tribunal decided that no useful purpose would be served by including it, and that to do so risked being positively harmful, since in the absence of an express finding by the Tribunal definitively rejecting the charges a reader might be tempted to assume, especially in relation to the two or three named persons who

were specially subjected to attack, that there was (as the saying goes) "no smoke without fire". The Tribunal must avoid the possibility of any such perceived but unintended unfairness. Accordingly, the Tribunal has included only such narrative as is necessary to explain how the remaining issues arise, and to set in context its decisions upon them. The Tribunal recalls in this context – and in the context of its substantive findings more generally – that it is no part of the function of a Tribunal such as this to pass moral judgement on the behaviour of one or another Party, or indeed both Parties, but simply to decide on the validity of the claims brought, and on their legal consequences.

212. We ought not, however, to leave the matter simply there without making it plain that this Tribunal (as, we assume, any ICSID Tribunal) is bound to take the most serious view of allegations of State corruption – if backed by proper evidence. This is not merely because of the potential effect of such claims on the persons involved, but equally because of the dire and pernicious effect that corruption has been shown to have on economic development, (notably so in developing countries), and economic development is after all the purpose which Bilateral Investment Treaties and the World Bank itself were created to serve. It follows that, if allegations of corruption had been made and had proved to be well founded, it would have had a most substantial effect on the view of the case taken by the Tribunal, and most particularly so if and when it came to the point at which the actions or omissions of the State came to be measured against the standard of treatment for foreign investment laid down in the BIT.

13 CONCLUSION

213. As the present dispute has developed through the course of argument and evidence before the Tribunal, both written and oral, it has become plain that at its core lies a relatively simple question, which wears nevertheless two faces. In presenting its one face, the question is: Did the Respondent (i.e., the Government of Trinidad and Tobago) breach the rights of the Claimant, and in such a way as to fall short of the standards laid down in the BIT? The other face of the question asks: Did the Claimant in fact have an "investment" which was the victim of the impugned treatment? The Tribunal is in no way deterred by the fact that, in this latter aspect, the dispute is less a dispute "arising out of an

investment"[96] than a dispute as to whether an investment came into existence, since that must also fall within the competence of an ICSID Tribunal, under the well-known doctrine of the "*compétence de la compétence*." To present the dispute in that light does however serve to bring out an important point, namely that the real complaint of the Claimant in this case is that it was prevented (by the actions of various parties on the Trinidad and Tobago side) from acquiring the investment to which it believed it had become entitled. As explained in the substantive portion of this Award, however, the Tribunal is unable to accept that FWO had acquired any legal right to that effect, either vis-à-vis Trinmar (and Petrotrin) or vis-à-vis the State. The Claimant's Application must therefore be dismissed.

14 COSTS

214. The Tribunal finally proceeds, in accordance with Rule 47(1)(j) of the Arbitration Rules and the requests contained in the Claimant's Memorial and the Respondent's Counter-Memorial, to apportion the costs of the Arbitration. It will be evident that, although the Claimant's contractual and quasi-contractual claims are bound to fail on the merits, and in doing so failed also to attain the necessary threshold for the establishment of an "investment" for the purposes of the Washington Convention and the BIT, that is by no means the same thing as saying that these claims were unarguable, still less as saying that the conduct of the various parties on the Trinidad and Tobago side, as established by the evidence led in the Arbitration, might not, in the presence of an "investment", have been sufficient to sustain the complaint of breaches of the substantive standards of protection laid down by the BIT. The story of the dealings between the two sides is not an edifying one, and neither emerges from it with great credit. That being so, it seems clear to the Tribunal that the fair and equitable outcome is that each Party should bear its own costs, and that the costs of the Arbitration as such should be borne equally by the two Parties.

[96] Cf. Article IX of the BIT and Article 25 of the Washington Convention

……/ signed /…….

Mr. Fali S. Nariman

President

Date: February 20, 2006

..……/ signed /……

Sir Franklin Berman

Arbitrator

Date: February 10, 2006

…….. signed /..……

Lord Mustill

Arbitrator

Date: February 10, 2006