School of International Arbitration, Queen Mary,
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International Arbitration Case Law

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SGS SOCIÉTÉ GÉNÉRALE DE SURVEILLANCE S.A.
v.
ISLAMIC REPUBLIC OF PAKISTAN
(ICSID CASE NO. ARB/01/13)
DECISION ON OBJECTIONS TO JURISDICTION

Case Report by Ileana M. Smeureanu and Lucía Druetta[**]
Edited by Ignacio Torterola[***]

An Award rendered on August 3, 2003, under the Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments ("BIT") and in accordance with the ICSID Arbitration Rules.

Tribunal:	Judge Florentino P. Feliciano (President), Mr. André Faurès and Mr. J. Christopher Thomas Q.C.
Claimant's counsel:	Messrs. Francois Stettler and Andrea Rusca of SGS Société Générale de Surveillance S.A.; Messrs. Emmanuel Gaillard and John Savage of Shearman & Sterling.
Defendant's Counsel:	Mr. Makhdoom Ali Khan, Attorney General for Pakistan Messrs. Jan Paulsson and Nigel Blackaby of Freshfields Bruckhaus Deringer; Mr. Salman Talibuddin of M/s Kabraji & Talibuddin.

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1. Facts of the Case

In 1994, the Islamic Republic of Pakistan ("Pakistan" or "Respondent") and Société Générale de Surveillance S.A. ("SGS" or "Claimant") executed a contract (the "PSI Agreement"), which entered into force as of January, 1995. The PSI Agreement aimed to increase the efficiency of Pakistan's customs revenue collection and to contribute to the national treasury.

Under the PSI Agreement, SGS undertook to provide "pre-shipment inspection" services for goods exported from certain countries to Pakistan. SGS was required to submit monthly reports related to, among others, the orders received, the incremental value of taxes and duties realized by Pakistan, and a description of SGS's findings in the inspection process.[1] SGS was also permitted to open liaison offices in Pakistan. Pursuant to the PSI Agreement, the parties had the right to terminate the agreement at the end of the first full financial year with three months notice. Failing amicable settlement, pursuant to Article 11, "any dispute, controversy or claim arising out of, or relating to [the PSI] Agreement, or breach, termination or invalidation thereof … [are to be submitted to] arbitration in accordance with the Arbitration Act of Pakistan". [2]

In December 1996, Pakistan notified SGS that the PSI Agreement was terminated as of March 1997. In response, SGS filed a commercial claim in the courts of Switzerland seeking relief for the alleged "unlawful termination" of the PSI Agreement. Pakistan contested the jurisdiction of the Swiss courts invoking the parties' prior arbitration agreement and state immunity. The Court of First Instance rejected SGS's application in June 1999. The Geneva Court of Appeal affirmed in November 2000.

In September 2000, the Respondent initiated arbitration proceedings in Pakistan under the PSI Agreement (the "PSI Arbitration"). SGS objected to the PSI Agreement arbitration and filed a counter-claim for alleged breaches of the contract.

On October 12, 2001, SGS filed a Request for Arbitration with ICSID under the Agreement on the Promotion and Reciprocal Protection of Investments between the Swiss Confederation and the Islamic Republic of Pakistan (the "BIT"), signed by the parties on July 11, 1995. SGS's claims were based on the PSI Agreement

[1] Award ¶ 13.
[2] Award ¶ 15.

and on Articles 3(1), 4(1), 4(2) and 6(1) of the BIT. Respondent challenged the jurisdiction of the ICSID Tribunal (the "Tribunal") claiming that the PSI Agreement arbitrator was competent to resolve the dispute.
In January 2002, SGS applied for an injunction with the Senior Civil Judge in Islamabad to stay the PSI Arbitration proceedings until the ICSID Tribunal rendered a decision on jurisdiction. The application was dismissed and SGS appealed to the Supreme Court of Pakistan. Meanwhile, Pakistan filed an application for an injunction to restrain SGS from pursing the ICSID arbitration.

The Supreme Court of Pakistan dismissed SGS's appeal and allowed Pakistan to proceed with the PSI Arbitration. Mr. Justice (Retd.) Nasir Aslam Zahid was appointed as sole arbitrator, and Pakistan submitted its Statement of Claim. However, following a recommendation of the ICSID Tribunal, the PSI Agreement arbitrator agreed to stay the arbitration until the Tribunal's determination of jurisdiction.

In this decision, the Tribunal addresses Pakistan's jurisdictional objections in respect of the ICSID arbitration.

2. Legal Issues Discussed in the Award

(a) Whether Claimant made an "investment" in the Respondent's territory (¶¶ 132-140)

In addressing Respondent's objections to jurisdiction, the Tribunal examined first whether Claimant made an investment under Article 25 of the ICSID Convention by entering into the PSI Agreement.

The BIT defined the investments in the Pakistani territory as "every kind of asset and particularly … claims to money or to any performance having economic value … [and] concessions under public law … as well as other rights given by law, by contract or by decision of the authority in accordance with law".[3]

The Tribunal held that the BIT definition was sufficiently broad to include the services carried out under the PSI Agreement. First, Claimant's right to perform pre-shipment inspection services gave rise to "claims of money". Second, by granting SGS powers normally exercised by the Pakistani Customs, Respondent in effect gave Claimant a "concession under public law". Third, these were "rights given by law" and "by contract".[4]

[3] Award ¶ 134.
[4] Award ¶ 135.

In addition, in the earlier proceedings before the Swiss courts, Respondent acknowledged that the character of *jure imperii* attached to Claimant's rights: "[T]he right to levy Customs duties is a right belonging to the State sovereignty by essence" by which "the activity of SGS was meant to increase the Customs revenue of the State."[5] Thus, the PSI Agreement was in effect a "concession of public law … [which gave SGS] the right … to be active – to the exclusion of any other public entity – in a field … normally left to the public power of the State."[6]

The Tribunal concluded that Claimant made an investment in the Respondent's territory. It also held that the requirement of a legal dispute arising out of an "investment" under the ICSID Convention also was satisfied.[7]

(b) Whether the Tribunal has jurisdiction over Claimant's BIT claims (¶¶ 146-155)

The Tribunal further examined whether it had jurisdiction over Claimant's claims based on the BIT violations by Pakistan, over the claims grounded on certain breaches of the PSI Agreement or over both types of claims.

The Tribunal examined first the general nature of the claims and recalled the analysis in the *Vivendi Annulment* decision,[8] where the Annulment Committee noted that "[a] state may breach a treaty without breaching a contract, and vice versa".[9] The same set of facts could therefore lead to different claims, grounded on either domestic or international legal orders, or on both. The ensuing separate claims are determined by their own proper law: the BIT claims are governed by international law; the contract claims are governed by contract law.[10] In the words of *Vivendi*, "where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect any valid choice of forum clause in the contract. … [W]here the fundamental basis of the claim is a treaty laying down an independent standard … the existence of an exclusive jurisdiction clause in a contract … cannot operate as a bar to the application of the treaty standard".[11]

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[5] Award ¶ 139.

[6] *Id*.

[7] Award ¶ 140.

[8] *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ("*Vivendi*") Case No. ARB/97/3, Decision on Annulment of 3 July 2002, 41 ILM 1135 (2002).

[9] *Id. at* ¶ 95, cited in Award ¶ 147.

[10] *Id.* at ¶ 96, cited in Award ¶ 147.

[11] *Id.* at ¶¶ 98-101, cited in Award ¶ 148.

Moving to the instant case, the Tribunal noted that, by its letter, Article 9 of the BIT neither referred to disputes arising out of BIT violations, nor to disputes based on contract.[12] But, to be effective, Article 9 had to be interpreted as referring to "disputes constituted by claimed violations of BIT provisions establishing substantive standards of treatment".[13] Moreover, Article 9 did not contain a fork-in-the-road provision. Instead, it only provided for recourse to a tribunal constituted under the ICSID Convention. No other prior recourse to domestic courts was required.

The Tribunal rejected Respondent's contention that the PSI Agreement arbitrator had jurisdiction over the BIT claims. The PSI Agreement had been concluded in 1994, while the BIT entered into force in 1996. Because of the time gap, it was difficult to assume that at the time the parties entered into the PSI Agreement, they contemplated to defer jurisdiction to a BIT "still hidden in the future". Nonetheless, because the BIT provided that it covered investments made in Respondent's territory as of 1954, any ICSID tribunal constituted under the BIT could determine pre-BIT disputes for the designated period. In light of these facts, even if BIT claims could have been raised before the PSI Agreement arbitrator (which did not happen in this case), the Tribunal still had the authority to determine them.[14]

Therefore, the Tribunal concluded that it had jurisdiction over BIT violation claims.

(c) Whether the Tribunal has jurisdiction to determine the Claimant's contractual claims under the PSI Agreement (¶¶ 156-162)

Besides the BIT claims, Claimant asked the Tribunal to assert jurisdiction over the claims arising out of the PSI Agreement. Relying on the "umbrella clause" in Article 11 of the BIT,[15] Claimant argued that the BIT had the effect of elevating

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[12] Article 9 of the BIT ("Disputes between a Contracting Party and an investor of the other Contracting Party") read as follows:

> "If [the] consultations [between a Contracting Party and an investor of the other Contracting Party] do not result in a solution … and if the investor concerned gives a written consent, the dispute shall be submitted to the arbitration of the International Centre for Settlement of Investment Disputes…."

[13] Award ¶ 150.

[14] Award ¶¶ 153-154.

[15] Article 11 of the BIT read as follows:

> "Either Contracting Party shall constantly guarantee the observance of commitments it has entered into with respect to the investments of the investors of the other Contracting Party."

breach of contract claims into treaty claims under international law. Accordingly, each time a party infringed a contractual provision, it also violated norms of international law and treaty provisions.[16]

The Tribunal disagreed. To define the scope of its jurisdiction, the Tribunal examined whether the dispute settlement mechanism under the PSI Agreement took precedence over the ICSID procedure under Article 9, or whether the BIT trumped any contractual mechanism for some or all the disputes between the parties. The Tribunal noted that Article 11.1 of the PSI Agreement was a valid forum selection clause. Article 11.1 encompassed at a minimum contractual and other "non-treaty-related disputes".[17] Article 9 of the BIT, on the other hand, could not be understood necessarily to cover both BIT claims and violations of contractual clauses not amounting to breaches of substantive BIT standards. Thus, even if both disputes arising out of BIT and PSI Agreement potentially qualified as "disputes with respect to investments", Article 9 of the BIT could not, without more, be read to supersede all prior non-ICSID forum selection clauses. In light of these findings, the Tribunal concluded that it did not have jurisdiction over purely contractual claims under the PSI Agreement.[18]

(d) Whether Article 11 of the BIT transformed purely contractual claims into BIT claims (¶¶ 163-174)

The Tribunal vigorously rejected Claimant's submissions that Article 11 of the BIT elevated purely contractual claims under the PSI Agreement into breaches of the BIT.

Under international customary rules of treaty interpretation, the Tribunal was bound to give effect to the object and purpose of the treaty. In the instant case, the BIT's purpose and object were reflected by Article 11 and by the BIT as a whole. By its letter, Article 11 was phrased in general terms, thus being prone to an "almost indefinite expansion". In particular, the "commitments" that any Contracting Party had to "constantly guarantee" under this article were not limited to contractual commitments. They could encompass other types of undertakings. Moreover, they not only bound the State as a legal person, but also "any office, entity or subdivision (local government units) or legal representative thereof whose acts [were], under the laws of state responsibility, attributable to the State itself".[19]

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[16] Award ¶¶ 98-99.
[17] Award ¶¶ 159-160.
[18] Award ¶¶ 161-162.
[19] Award ¶ 166.

This wide interpretation made it difficult for the Tribunal to find that Article 11 had the effect of automatically elevating breaches of contracts between an investor and the State to international law infringements. Clear and convincing evidence of the parties' shared intent to confer this effect upon Article 11 could have triggered nonetheless such consequences. However, in the case at hand, the Claimant failed to produce evidence in support thereof.[20]

Moreover, Claimant's interpretation potentially incorporated an "unlimited number of State contracts, as well as other municipal law instruments setting out State commitments".[21] Any contract violation would have amounted to a breach of the BIT, effectively rendering superfluous other provisions setting clear standards of substantive BIT infringements. In the same understanding, any investor could have discretionarily nullified any mutually-agreed dispute settlement clause in a State contract, thus defeating the State's ability to proceed under the contract. Ultimately, while the investor reserved the right to resort to arbitration either under the contract or under the BIT, the State was stuck with the BIT system.[22] The Tribunal found these unilateral advantages unacceptable.
Last, the location of Article 11, towards the BIT's end, apart from the substantive obligation provisions in Articles 3-7, reflected its general nature.[23]

For all the reasons above, the Tribunal concluded that Article 11 did not have the effect of transforming purely contractual claims under the PSI Agreement into BIT claims.

(e) Whether Claimant's conduct in the Swiss legal proceedings and in the PSI Agreement arbitration gave rise to estoppel or amounted to a waiver of rights under the BIT (¶¶ 175-181)

Unlike other bilateral investment treaties, the BIT did not contain a fork-in-the-road provision. Thus, the Tribunal refused to read the BIT as precluding alternative remedies in respect of contractual claims prior to the execution of BIT rights. Moreover, since SGS did not advance BIT claims before the Swiss courts or the PSI Agreement arbitrator, the Tribunal hesitated to imply estoppel under the BIT.

[20] Award ¶¶ 168, 173.
[21] Award ¶ 168.
[22] *Id.*
[23] Award ¶¶ 169-171.

The Tribunal was also reluctant to find that, by objecting to the PSI Agreement arbitrator's jurisdiction and by filing a counter-claim, Claimant waived its rights under the BIT. SGS's objections in the earlier proceedings were made without prejudice to its rights under international law. Absent a specific ban on referring damage claims to other fora in order to invoke ICSID jurisdiction, the Tribunal refused to read such consequences into the BIT. Thus, the Tribunal was entitled to decide Claimant's BIT claims.

(f) The effect of lis pendens (¶ 182)

As the Tribunal found that it had no concurrent jurisdiction over the PSI Agreement claims, the *lis pendes* doctrine did not apply.

(g) The effect of the consultation between the parties under the BIT (¶¶ 183-184)

Article 9 of the BIT provided that once a dispute arose, parties had to engage in a consultation process. Failure to reach a solution within twelve months triggered ICSID arbitration proceedings, provided that investor's consent had been previously obtained. SGS disregarded this requirement and filed its Request for Arbitration only two days after consenting to ICSID arbitration under the BIT. Respondent promptly objected to this procedural flaw.

The Tribunal held that the preliminary consultations were only "directory and procedural rather than … mandatory and jurisdictional in nature".[24] In its view, compliance with the consultation procedure did not amount to a condition precedent for vesting jurisdiction. Moreover, since in this case the parties did not indicate any intention to enter into negotiations or consultations, observing these procedures was inutile.

(h) Dismissal or stay of ICSID proceedings until the contract claims are addressed (¶¶ 185-189)

Since the Tribunal asserted jurisdiction over the BIT claims but declined to rule on the purely contractual PSI Agreement claims, the Tribunal refused to dismiss or stay the proceedings until the contract claims were decided. The determination of the PSI Agreement arbitrator in respect of Respondent's alleged contractual infringements was not dispositive of whether the latter observed its BIT obligations; therefore, the completion of the PSI Agreement arbitration was not a pre-condition for the resolution of the BIT claims.

[24] Award ¶184.

3. Decision

In conclusion, the Tribunal found it competent to decide the BIT claims, but declined jurisdiction over the breach of the PSI Agreement. The Tribunal declined to stay the ICSID proceedings pending the PSI Agreement arbitration, and proceeded to the merits.