On January 29, 2004, the Arbitral Tribunal in the case of SGS Société Générale de Surveillance SA v. Republic of the Philippines (ICSID Case No. ARB/02/6) rendered the Decision on Objections to Jurisdiction deciding that the Tribunal had jurisdiction over the dispute, but the proceedings should be stayed.

The dispute was brought by SGS Société Générale de Surveillance SA ("SGS" or "the Claimant"), a Swiss corporation, against the Republic of the Philippines ("the Respondent") in April 2002 under the 1997 Agreement between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments (the BIT). The Tribunal was constituted in September 2002 with three members: Professor James Crawford (Australia), Professor Antonio Crivellaro (Italy) and Dr. Ahmed S. El-Kosheri, who was the presiding arbitrator. The proceedings were conducted under ICSID Convention and Rules.

The dispute arose out of alleged breaches of a service agreement concluded between the SGS and the Philippines on 23 August 1991 (the CISS Agreement). Under this Agreement, SGS would provide comprehensive import supervision services in exchange of a fee paid by the Philippines. The CISS was subsequently amended by agreement on two occasions. In accordance with its amended terms, SGS submitted claims for unpaid amount of CHF 202,413,047.36 (approximately US $140m) plus interest. After the Respondent refused to pay this amount, on 24 April 2002, the Claimant filed a notice of arbitration under Article 25 of the ICSID Convention invoking Article IV, VI, VIII and X (on the deprivation of returns, fair and equitable treatment, compliance of contractual payment obligations and expropriation) of the BIT.

In objecting to the Tribunal’s jurisdiction over the dispute, the Respondent argued that there was no investment in the Philippines within the meaning of the BIT. However, the Tribunal agreed with the reasoning in SGS v. Pakistan, where SGS’s pre-inspection services were found to be provided “in the territory of the host State” because there had been an injection of funds into the territory of Pakistan for the carrying out of SGS’s engagement under the pertinent service agreement. In this case, the Tribunal observed that the focal point of SGS’s services under the CISS Agreement was the provision, in the Philippines, of a reliable inspection certificate on which import clearance could be expedited and appropriate duties could be charged. A substantial and non-severable aspect of the overall service provided by SGS was
provided in the Philippines. Further, the process of inspection were arranged through the Manila Liaison Office itself was unquestionably an investment “in the territory” of the Philippines.

As to the Respondent’s argument that the dispute was purely contractual in nature, the Tribunal found the SGS v. Pakistan Tribunal’s rejection of a broad interpretation for the reason that it would involve a full-scale internationalization of domestic contracts was unconvincing. In making a contrary decision, this Tribunal observed that although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, each tribunal must exercise its competence in accordance with the applicable law, which would be different for each BIT and each Respondent State. It then held that the “umbrella clause” contained in Article X(2) of the BIT required each Contracting Party to fulfill any legal obligations it had assumed with regard to specific investments covered by the BIT, including contractual commitments made by the host State. Nonetheless, Article X(2) did not convert the issue of the extent or content of such obligations into an issue of international law; instead, it addressed the performance of these commitments. The issue of how much is payable for services under the CISS Agreement is still governed by the contract.

The Respondent also alleged that the issues in dispute were governed by a dispute resolution provision in the CISS Agreement requiring submission of all contractual disputes to a specified Philippine court. The Tribunal found that pursuant to Article VIII(2) of the BIT, it had jurisdiction with respect to a claim arising under the CISS Agreement, even though it might not involve any breach of substantive standards of the BIT. The exclusive jurisdiction clause contained in Article 12 of the CISS Agreement was not overridden by Article VIII(2) of the BIT or by Article 26 of the ICSID Convention (on the exclusion of any other remedy). The effect of the exclusive jurisdiction clause was a matter of admissibility rather than jurisdiction and the Tribunal should not exercise its jurisdiction over a contractual claim when the parties had already agreed on how such a claim was to be resolved and had done so exclusively. Until the scope or extent of the Philippines’ obligation to pay SGS was clarified, a decision by the Tribunal on SGS’s claim for payment was premature.

On the merits, in the Tribunal’s view, on the material presented by the Claimant no case of expropriation under Article VI has been raised. A mere refusal to pay a debt is not an expropriation of property where there is an unresolved dispute as to the amount payable. Regarding to Article IV (fair and equitable treatment) and Article X(2) (umbrella clause), the Tribunal reached the same conclusion that pending the determination of the amount payable, a decision by the Tribunal on these claims was premature. These claims fell within the temporal scope of the BIT and were not excluded on the grounds of retrospectivity because the failure to observe the obligations arising under the CISS Agreement arose well after the entry into force of the BIT.
An arbitrator in the Tribunal, Professor Crivellaro declared that the Tribunal had erred in staying the proceedings since the BIT dispute clause and the contract dispute clause survived and co-existed. It should have proceeded to examine the merits.

On 17 December 2007, the Tribunal issued an order confirming the lifting of the stay stated in its Order on 26 September 2007 to decide the case and directed the parties to submit written pleadings. However, the parties reached a negotiated settlement and requested this settlement to be recorded at in the form of an award which was rendered on April 11, 2008, pursuant to ICSID Arbitration Rule 43(2).

The texts of the Decisions and Order are posted on the websites (the Award is not published):

- Decision on Objections to Jurisdiction: http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf
- Supplementary declaration by one of the arbitrators: http://ita.law.uvic.ca/documents/SGSvPhil-declaration_000.pdf

Bibliography:


ICSID Reports Volume 8, pp.515-571.


