

SGS v Pakistan, ICSID Case No. ARB/01/13, Decision of the Tribunal
on Objections to Jurisdiction

Summary: SGS claimed in respect of Pakistan's wrongful repudiation or unlawful termination of the contract for SGS's provision of pre-shipment inspection services.

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
Washington, D.C.

CASE No. ARB/01/13

SGS Société Générale de Surveillance S.A.
(Claimant)

versus

Islamic Republic of Pakistan
(Respondent)

DECISION OF THE TRIBUNAL
ON OBJECTIONS TO JURISDICTION

Members of the Tribunal

Judge Florentino P. Feliciano, President
Mr. André Faurès, Arbitrator
Mr. J. Christopher Thomas Q.C., Arbitrator

Secretary of the Tribunal

Ms. Martina Suchankova

Representing the Claimant

Messrs. François Stettler and
Andrea Rusca, SGS Société
Générale de Surveillance S.A.
Messrs. Emmanuel Gaillard and
John Savage, Shearman & Sterling

Representing the Respondent

Mr. Makhdoom Ali Khan
Attorney General for Pakistan
Messrs. Jan Paulsson and
Nigel Blackaby, Freshfields
Bruckhaus Deringer
Mr. Salman Talibuddin,
M/s Kabraji & Talibuddin

contract, and the Claimant when it filed its ICSID request was already participating in contract arbitration proceedings with overlapping claims concerning the same facts and circumstances and seeking the same relief. As a result, the application of the *lis pendens* doctrine requires dismissal of the second proceeding.⁵² Pakistan urges the Tribunal to follow the “clearly expressed intention of the parties as set forth in the PSI Agreement” and dismiss all claims in the Request for “breach of contract.”⁵³

53. Pakistan refers to SGS’s having previously argued that this Tribunal has concurrent jurisdiction over the “Contract Claims” by virtue of Article 11 of the BIT. That article states:

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

54. SGS has argued that Article 11.1 of the BIT “elevates” all contract claims to the level of claims of a breach of the BIT. Pakistan submits that claims under this Article are “second order” claims (*i.e.*, claims that will not ripen until after a prior determination has been made of a “first order” claim that a contract commitment has been breached).⁵⁴ In its submission, the tribunal with the authority to make that primary determination is the PSI Agreement arbitrator.⁵⁵

55. Even if SGS were correct, Pakistan argues, the BIT’s general provisions would be superseded by the PSI Agreement’s specific agreement to arbitrate. If the Tribunal accepted SGS’s view of Article 11, it would eviscerate the parties’ specific arbitration agreement in this case. Previous cases have recognized that ICSID tribunals should avoid interpretations of contract provisions, in particular, arbitration clauses, that would render the clauses totally ineffective or violative of “common sense.”⁵⁶

56. If the Tribunal accepted SGS’s logic, it would negate routine forum selection clauses in thousands of State-investor contracts where States subject to BITs make routine commitments to investors.⁵⁷

⁵² *Id.*, at paragraph 97.

⁵³ *Id.*, at paragraph 84.

⁵⁴ Transcript, Volume 1, at pp. 15-16, p. 112, lines 2-7.

⁵⁵ Objections at paragraphs 87.

⁵⁶ *Id.*, at paragraph 88. *Holiday Inns S.A. and others v. Morocco* (“*Holiday Inns*”), Case No. ARB/72/1 (an unpublished ICSID award discussed in Pierre Lalive, “The First ‘World Bank’ Arbitration (*Holiday Inns v. Morocco*)—Some Legal Problems”, 1 ICSID Reports 645) also affirmed the principle of *ut res magis valeat quam pereat*.

⁵⁷ *Id.*, at paragraph 89.

62. In Pakistan's view, the "essential basis" of the "BIT Claims" is contractual; those claims are also therefore subject to the PSI Agreement arbitrator's exclusive jurisdiction. For four years SGS has argued that Pakistan's acts or omissions were alleged breaches of contract and no reference was made to a claim of expropriation, failure to provide fair and equitable treatment, or failure to promote or protect an investment under the BIT.⁶⁴ SGS filed contractual claims in the Swiss courts and contractual counter-claims in the PSI Arbitration. Pakistan argues that SGS then "re-labeled" its claims as "BIT Claims."⁶⁵ However, nothing in the Washington Convention or in ICSID jurisprudence requires the Tribunal to accept that a particular claim arises under a treaty simply because a claimant says so.⁶⁶

63. According to the *Vivendi Annulment* decision, the test of whether the claim sounded in contract or treaty turned on the claim's "essential" or "fundamental basis."⁶⁷ To Pakistan, the essential nature of SGS's claims "is and always will be contractual."⁶⁸ From December 1996 to October 2001, no mention was made of a possible treaty claim; yet the BIT was in force from May 1996. The "Contract," "Defamation" and five "BIT Claims"⁶⁹ are based on "the same limited factual allegations."⁷⁰ In addition, the prayers for relief in the Request for ICSID Arbitration and the PSI counter-claim are virtually identical. No special relief is sought for alleged BIT breaches. The Request itself states: "this dispute arises out of Pakistan's actions and omissions with respect to the Pre-Shipment Program and the PSI Agreement."⁷¹ Further, SGS specifically admits that "most or all of Pakistan's acts and omissions...qualify as breaches of the PSI Agreement as well as violations of the BIT."⁷² Accordingly, Pakistan submits that the Tribunal should treat the "BIT Claims" as contract claims and dismiss them.⁷³

⁶⁴ Transcript, Volume 1, pp. 95-96.

⁶⁵ *Id.*, Volume 1, p. 104, lines 7-8.

⁶⁶ Objections at paragraph 102. During the hearing, counsel for Pakistan reviewed the Request for Arbitration and asserted that it "does not allege facts which if proven would rise to a level of a breach of the BIT; accordingly, they fall to be determined by the PSI Agreement to arbitration as contract claims where they currently stand, and not before this Tribunal." Transcript, Volume 1, p. 84, lines 10-14 *et seq.*

⁶⁷ *Vivendi Annulment*, pp. 38-39, at paragraphs 98-101.

⁶⁸ Objections, at paragraph 104.

⁶⁹ The BIT claims are: failure to promote SGS's investment, failure to protect its investment, failure to provide fair and equitable treatment, expropriation, and failure constantly to guarantee the observance of Pakistan's commitments to SGS.

⁷⁰ Objections at paragraph 105.

⁷¹ Request, at paragraph 61.

⁷² *Id.*, at paragraph 36.

⁷³ Objections, at paragraphs 105-109. At the hearing, counsel for the Respondent stated: "...what the Tribunal has to look at is the claim as stated by the Claimant, and to ask itself the question, the facts as alleged, which we say are purely contractual breaches, it's all they have alleged, is that sufficient if they prove everything that they claim they wish to prove, is that sufficient to bring them into ... the breach of the BIT?" Transcript, Volume 1, p. 106, lines 11-17.

64. Pakistan submits further that even if SGS has separate “BIT Claims,” Article 11.1 of the PSI Agreement is sufficiently broad to encompass claims for breach of a treaty.

65. The principle of *generalia specialibus non derogant* (general words do not derogate from special words) should apply: the specific agreement takes precedence over the general agreement in the BIT.⁷⁴

66. Pakistan asserts that the “arising out of or relating to” formula used in Section 11.1 is a universally regarded broad arbitration clause. Courts and tribunals have consistently held that the “arising out of or relating to” formulation encompasses any and all disputes touching on the contract in question regardless of whether they sound in contract, tort, statute or treaty.⁷⁵ Thus, Pakistan argues, SGS’s “BIT Claims” are subject to arbitration before the PSI Agreement arbitrator.

67. In Pakistan’s submission, since the PSI Agreement encompasses the “BIT Claims,” the only remaining question is whether this Tribunal has concurrent jurisdiction over them or whether it must dismiss them in favour of the PSI Agreement arbitration. In its submission, the Tribunal does not have concurrent jurisdiction and must dismiss the “BIT Claims” in favour of the PSI Agreement arbitration.⁷⁶

⁷⁴ Objections at paragraph 112. The Respondent cites the *Holiday Inns, Amco Asia, Lanco*, and *Salini* cases in support of this proposition to determine whether a claim is subject to a particular dispute resolution clause. At the hearing, extensive argument was devoted to the point that the PSI Agreement arbitrator could consider claims that Pakistan breached the Treaty. Transcript, Volume 1, pp. 23-27.

⁷⁵ Pakistan refers to various texts and to such cases as *Pennzoil Exploration and Production Co. v. Ramco Energy Ltd.*, *Partial Award in ICC Case No. 7319 of 1992*, and *Judgment No. 8375 of 16 November 1987* in this regard. It also cites *J.J. Ryan & Son Inc. v. Rhone Poulenc Textile, S.A* for the proposition that an arbitral clause that is worded “all disputes arising in connection with the present contract” must be construed to encompass a broad scope of arbitral issues and every dispute between the parties that has a significant relationship to the contract *regardless of the label* attached to the dispute. *Id.*, at paragraph 113, citing *J.J. Ryan & Son Inc. v. Rhone Poulenc Textile S.A.* 863 F.2d 315, 321 (4th Cir.1988). [Pakistan’s emphasis.] Pakistan also cites both Redfern and Hunter and Fouchard Gaillard Goldman who, it says, agree that the phrase “arising out of” will embrace all disputes capable of being submitted to arbitration and arbitrators have jurisdiction as long as the terms of arbitration are wide enough to demonstrate the parties intended it to be so.

⁷⁶ Objections at paragraphs 120-128.

Pakistan cites *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (“SPP”), Case No. ARB/84/3, for the proposition that “a specific agreement between the parties to a dispute would naturally take precedence with respect to a bilateral treaty between the investor’s State and [a particular sovereign] ... [This hierarchy] reflects the maxim *generalia specialibus non derogant*.” It also cites Professor Schreuer’s *Commentary* which states that a document with a dispute settlement clause which is more specific in relation to the parties and to the dispute should be given precedence over a document of more general application such as the BIT. Pakistan asserts that, contrary to SGS’s assertion that the specific agreement of the parties should be rendered valueless, the PSI Agreement is a specific agreement regarding dispute resolution and should be given precedence over the more general provisions of the BIT.

Pakistan also distinguishes the *Vivendi Annulment* decision from the present case by noting that although both cases present superficially similar facts, in that the *Vivendi Annulment* Committee held that a contractual choice of forum clause did not supersede the parties’ choice of ICSID to resolve the BIT claims, that case differs from the present one in that the clause in the operative contract provided only that “for purposes of interpretation and application of this Contract the parties submit themselves to the [local courts].” This was a narrow clause clearly limited to contract

68. Pakistan argues further that this Tribunal should defer to the PSI Agreement arbitrator because even if, *status quo ex ante*, this Tribunal could have had concurrent jurisdiction, “that ship has sailed.”⁷⁷ The PSI arbitrator: (i) was seized with jurisdiction over the claims of both parties first; and (ii) has a broader ability to resolve the entire dispute among the parties.⁷⁸

69. Pakistan then addresses the effect of Article 26 of the ICSID Convention on this case. Article 26 provides that:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

70. Pakistan argues that Article 26, which the negotiating history shows is merely a rule of interpretation, precludes parties from pursuing their claims in multiple *fora* simultaneously.⁷⁹ Once the choice of the forum for dispute resolution has been made, the parties are bound by it. Pakistan argues that SGS has clearly made its choice to resolve the dispute by PSI Agreement arbitration and its submission to ICSID is seeking “another remedy in the same matter” in that the counter-claims in the PSI Arbitration are identical to the relief sought before this Tribunal. SGS thus seeks “another remedy in the same matter.” SGS is clearly precluded from bringing a claim before ICSID and cannot benefit from the ICSID exclusivity rule.⁸⁰

71. Pakistan asserts that SGS could have raised its “BIT Claims” in the PSI Agreement arbitration. Under the general principles of *ne bis in idem* and *res judicata*, the fact that it did not do so is irrelevant.⁸¹ It

claims and not to BIT claims, whereas the clause in the PSI Agreement is a broad form of arbitration clause.

Similarly, in *Lanco* and *Salini*, Pakistan says that those cases turned either on a more narrowly drafted clause or on one that was not a true choice of forum clause since it vested jurisdiction over disputes in local courts who, as a matter of law, already had compulsory jurisdiction over the disputes. These are in contrast with the broad clause in question because it is not limited to “interpretation and application” of the contract but extends to any and all claims “arising out of or relating” thereto.

⁷⁷ Objections at paragraph 128.

⁷⁸ *Id.*

⁷⁹ At the hearing, counsel for Pakistan directed the Tribunal to the negotiating history of what became Article 26 of the Convention. The Tribunal was given excerpts from the ICSID’s *History of the ICSID Convention*, a two volume work that reproduces the *travaux préparatoires* of the Convention. Counsel observed that the records show that the delegates to the negotiations were assured that the proposed convention would not operate so as to disrupt settled expectations or pre-existing arrangements. Transcript, Volume 1, pp. 38-47, p. 69, lines 13-16.

⁸⁰ Objections at paragraphs 130-131.

⁸¹ *Id.*, at paragraph 132.

was for this reason that the Supreme Court of Pakistan held SGS was estopped from pursuing its claims before ICSID.⁸²

72. SGS has made its choice by filing first in the PSI Agreement arbitration and cannot avoid the consequences of this choice.⁸³

73. Pakistan notes that SGS has already argued that even if there is concurrent jurisdiction, the tribunal with narrower jurisdiction should defer to the tribunal with broader jurisdiction. Pakistan submits that the forum with the most comprehensive jurisdiction is the PSI Agreement arbitration because:

- (a) only the PSI Agreement arbitrator has jurisdiction over SGS's "Contract" and "Defamation Claims";
- (b) only the PSI Agreement arbitrator has jurisdiction over Pakistan's claims against SGS for breach of the PSI Agreement; and
- (c) at most, the PSI Agreement arbitrator and ICISD have concurrent jurisdiction over the "BIT Claims."⁸⁴

74. Accordingly, SGS's claims should be dismissed in their entirety.

75. Pakistan then advances a separate argument against jurisdiction: SGS's activities under the PSI Agreement did not constitute an investment within the territory of Pakistan within the meaning of Article 2(1) of the BIT because SGS's obligations were performed outside Pakistan.

76. Pakistan argues that the pre-inspection of goods being imported into Pakistan was conducted by pre-existing SGS controlled or affiliated entities outside Pakistan and while SGS may have invested in offices and personnel in various ports around the world in order to be able to perform its obligations under the PSI Agreement, this does not involve an investment in the territory of Pakistan.⁸⁵

77. The liaison offices established in Pakistan which SGS presents as evidence of its investment were simply to process and convey information and to bill; there was no revenue-generating activity in Pakistan,

⁸² Judgment of the Supreme Court of Pakistan, in *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Exhibit P21 to Respondent's Objections to Jurisdiction, at p. 33, paragraph 54.

⁸³ Objections at paragraph 133.

⁸⁴ *Id.*, at paragraph 136.

⁸⁵ *Id.*, at paragraph 139.

jurisdiction.⁹⁸

89. Pakistan ignores the basic principle that it is a claimant's prerogative to formulate the claims that it is asking the judges to resolve, a principle consistently applied by ICSID tribunals.⁹⁹

90. In SGS's view, it is only at the merits phase that the Tribunal will have to consider whether SGS's characterization of its claims is correct, and whether its claims succeed as a result.¹⁰⁰ The Tribunal must decide whether claims alleging violations of the BIT, including violations of Article 11, are within its jurisdiction. It will also have to decide whether it has jurisdiction over SGS's claims alleging only breaches of the PSI Agreement, pleaded in the alternative to the alleged breaches of Article 11. What the Tribunal cannot do at this stage is decide whether SGS's claims alleging violations of the BIT are in fact, as Pakistan alleges, "contractual claims" or claims of any sort other than as stated by SGS.¹⁰¹

91. SGS observes that the BIT sets forth international law obligations of the Contracting Parties.¹⁰² An alleged violation of the BIT is therefore a breach of international law, requiring a determination based on international law standards. A breach of contract, on the other hand, is usually determined by reference to national law standards.

92. Even though a claim for breach of contract and a claim for violation of the BIT may be based on similar or identical facts, they rely on fundamentally different legal bases and are assessed according to different standards. SGS refers in this regard to the *Vivendi* Annulment Committee which accepted that questions of breach of contract and violation of the BIT could be closely related:

A state may breach a treaty without breaching a contract, and *vice versa*... The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.¹⁰³

93. However, SGS submits that this does not mean that a tribunal may not consider contractual issues

⁹⁸ *Id.*, at paragraph 41.

⁹⁹ *Id.*, at paragraph 44. Transcript, Volume 1, pp. 135-139.

¹⁰⁰ *Id.*, at paragraph 48.

¹⁰¹ *Id.*, at paragraph 49.

¹⁰² *Id.*, at paragraph 50.

¹⁰³ *Vivendi Annulment*, at paragraphs 95-96, quoted in the Reply at paragraph 53.

when determining if there has been a breach of the BIT.¹⁰⁴

94. SGS submits that Pakistan concedes that Article 9 of the BIT covers claims alleging violations of the BIT. Such claims fall within the parties' consent to ICSID arbitration and this Tribunal has jurisdiction over them. Pakistan's position is that only contractual claims rather than claims alleging violations of the BIT fall outside the Tribunal's jurisdiction and claims alleging violations of the BIT remain within it.¹⁰⁵

95. SGS submits that it is perfectly proper for a tribunal to interpret a contract and consider issues of contractual performance in order to determine whether there has been a breach of international law.

96. An ICSID tribunal can make determinations based on the contract and on national law in order to decide whether a State has committed a violation of its international law obligations through a breach of the BIT. SGS alleges that Pakistan's actions relating to the PSI Agreement are a breach of Articles 3(1), 4(1), 4(2) and 6(1) of the Treaty. These obligations, related to the promotion of investments, the protection of investments, the fair and equitable treatment of investments, and expropriation, are international law obligations. The fact that they are in relation to the performance of a contract does not detract from the qualification of SGS's claims as international law claims. In deciding those BIT claims, the Tribunal must consider the terms and performance of the PSI Agreement.¹⁰⁶

97. This is also the case regarding SGS's claim that Pakistan breached the "umbrella clause" at Article 11 of the BIT. That provision states:

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.¹⁰⁷

98. In SGS's view, the inclusion of an "umbrella clause" such as Article 11 of the BIT has the effect of elevating a simple breach of contract claim to a treaty claim under international law.¹⁰⁸ SGS's claim of a

¹⁰⁴ Reply, at paragraph 55.

¹⁰⁵ *Id.*, at paragraph 58. SGS cites *Salini* and *Vivendi* for the "uncontroversial principle" that a tribunal constituted under a BIT has jurisdiction over claims alleging violations of that BIT. *Vivendi* adds that even if the contract in question refers contractual disputes to the courts of a domestic jurisdiction, it does not affect the jurisdiction of the Tribunal to consider a claim based on the provisions of a BIT.

¹⁰⁶ *Id.*, at paragraphs 61 and 62.

¹⁰⁷ *Id.*, at paragraph 63.

¹⁰⁸ *Id.*, at paragraph 64 and Transcript, Volume 1 at pp. 140-183 and Volume 2 at pp. 74-106. SGS refers to, among others, R. Dolzer and M. Stevens, who commented in their book, *Bilateral Investment Treaties*, on the

breach of Article 11 of the BIT is formulated as an international law claim alleging a breach of the Treaty. In deciding this, however, the Tribunal must consider whether Pakistan breached the PSI Agreement.¹⁰⁹ Nothing prevents this Tribunal from “taking into account and interpreting the PSI agreement and its performance” when it considers whether the Respondent has breached the BIT.¹¹⁰

99. Article 11 of the Treaty is characterized by the Claimant as an “umbrella clause which says that each time you violate a provision of the contract,..., you also violate norms of international law, you violate the treaty by the same token.”¹¹¹ Counsel later elaborated on this characterization of Article 11 as follows:

...I myself prefer to call it a mirror effect clause, because in fact it is a mirror effect which it creates.

You have a violation of the contract, and the Treaty says, as if you had a mirror, that this violation will also be susceptible to being characterized as a violation of the Treaty. So the same facts, the same breach will be a violation of the contract in itself, and a violation of the Treaty.¹¹²

And,

If I am the government and if I breach a contract, by the same token I will breach a treaty, so the useful effect of this is to create this mirror effect, to say that I will elevate in essence, and that’s what it does, it may be far-reaching but that’s what it does, to elevate breaches of contract as breaches of a treaty.¹¹³

100. SGS also maintains that the Tribunal has jurisdiction over claims by SGS which allege breach of contract as opposed to a violation of the BIT. These claims are raised in the alternative, to be decided only

importance of umbrella clauses in protecting the investor’s contractual rights against any interference which might be caused by either a simple breach of contract or by administrative or legislative acts. Umbrella clauses are included because it “is not entirely clear under general international law whether such measures constitute breaches of international obligations.” (Dolzer and Stevens at p. 82.) SGS also refers in this regard to a comment of the late Ibrahim Shihata (former Secretary-General of ICSID) and to Professor Schreuer’s opinion.

¹⁰⁹ Reply, at paragraph 68.

¹¹⁰ *Id.*, at paragraph 72.

¹¹¹ Transcript, Volume 1, p. 130, lines 23-25, p. 131, lines 1-3, pp. 140-168.

¹¹² *Id.*, Volume 1 at p. 141, lines 15-23.

¹¹³ *Id.*, Volume 1 at p.146, lines 16-21.

if the Tribunal rejects the claims that Pakistan violated the “umbrella clause.”¹¹⁴ This jurisdiction to decide contract claims results from the broad terms of Article 9 of the BIT which refers to “disputes with respect to investments.”¹¹⁵

101. In light of the terms of Article 9 of the BIT, Pakistan is bound to submit all disputes to ICSID arbitration including SGS’s claims for breach of contract as distinct from a breach of the BIT.¹¹⁶

102. SGS argues that Pakistan’s contention that Article 11.1 of the PSI Agreement excludes or diminishes this Tribunal’s jurisdiction under Article 26 of the ICSID Convention is without merit. The question to be confronted is whether there was any stipulation contrary to ICSID’s exclusive jurisdiction in the consent to arbitration.

103. Pakistan consented to ICSID’s exclusive jurisdiction in Article 9 of the BIT which contains no reservations or “statement otherwise.” SGS’s consent comes from its Request for Arbitration. SGS argues that “the consent of each of the parties to submit to the exclusive jurisdiction of this Tribunal was unequivocal, and at no time did either of the parties ‘otherwise state’.”¹¹⁷

104. SGS goes on to submit that a long line of ICSID decisions shows that a forum selection clause in a contract will not apply to the exclusion of ICSID jurisdiction.¹¹⁸ SGS points out that in every case on which Pakistan relies (*Klöckner*, *Tradex Hellas*, *Lanco*, *Salini* and *Vivendi Annulment*), the ICSID tribunal retained jurisdiction.

105. SGS concludes that in conformity with the text of the ICSID Convention and the weight of ICSID precedent, the Tribunal must hold that the forum selection clause in the PSI Agreement does not and cannot exclude the jurisdiction of this Tribunal with respect to SGS’s claims. At the very most, the Islamabad arbitrator may have, *prima facie*, concurrent jurisdiction over some aspects of the current dispute relating to the interpretation and performance of the PSI Agreement. However, even then, this Tribunal’s jurisdiction must prevail.¹¹⁹

¹¹⁴ Transcript, Volume 1, p. 130, lines 12-16.

¹¹⁵ Reply at paragraphs 74-79.

¹¹⁶ *Id.*, at paragraph 81.

¹¹⁷ *Id.*, at paragraph 93.

¹¹⁸ *Id.*, at paragraph 97.

¹¹⁹ *Id.*, at paragraph 113.

106. This Tribunal must prevail because the BIT's dispute resolution provision supersedes the PSI Agreement's forum selection clause, to the extent they both cover the same ground.¹²⁰ International methods of dispute settlement take precedence over domestic arbitration. BITs are intended to promote and protect investments and ensure their equitable treatment which gives investors substantive rights under international law, such as the right to have their disputes heard by an international tribunal.¹²¹

107. In SGS's submission, Pakistan's argument that the Islamabad arbitrator has jurisdiction over the "BIT Claims" is flawed:

- (a) Although some BITs include a matrix of *fora* available to claimants, this BIT does not. Article 9(2) speaks only of ICSID jurisdiction and Article 26 of the Convention gives this Tribunal exclusive jurisdiction;
- (b) A contract forum selection clause cannot extend the jurisdiction of a domestic court or tribunal to claims of breach of a treaty (see *Vivendi* both in its discussion of *Lanco* and the case before it);
- (c) At the time that the PSI Agreement was concluded, the BIT did not exist and therefore the parties could not have intended to cover claims that could not have been made at the time; and
- (d) Finally, the Supreme Court of Pakistan concluded that the BIT had not been incorporated into the law of Pakistan and no court could enforce any treaty rights arising from the BIT. Moreover, the Supreme Court stated that the PSI Arbitration shall be confined to the claims based on the terms and conditions of that agreement.¹²²

108. In respect of the Respondent's arguments that this Tribunal has no jurisdiction over SGS's "Defamation Claims" or Pakistan's potential counterclaims, SGS argues that this Tribunal has jurisdiction over all ancillary claims and counter-claims that arise directly out of the subject-matter of the dispute as long as they are within the scope of the consent of the parties.¹²³ Such consent extends to all "disputes with

¹²⁰ *Id.*, at paragraph 115.

¹²¹ *Id.*, at paragraphs 117-118.

¹²² *Id.*, at paragraphs 131-135.

¹²³ Article 46 of the ICSID Convention states that:

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are

of the unfolding dispute. Finally, it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant's BIT claims to this Tribunal.

10. Should this Tribunal dismiss or stay the proceeding as urged by the Respondent until the contract claims are addressed?

185. The Respondent urges the Tribunal to dismiss or stay this proceeding because all of SGS's BIT claims will require a prior finding that Pakistan has breached Sections 10.4 and 10.6 of the PSI Agreement.¹⁸⁷ Pakistan asserts that in such circumstances, international tribunals have either dismissed or stayed the claims, without prejudice to the claimant's right to re-file its case when the underlying factual claims are resolved or to stay proceedings until such factual issues can be resolved.¹⁸⁸

186. This Tribunal has jurisdiction over the Treaty claims. The right to exercise that jurisdiction does not depend upon the findings of the PSI Agreement arbitrator; that is, such findings are not a factual or legal predicate for the consideration of whether Pakistan violated the Treaty obligations to which SGS points.¹⁸⁹ This Tribunal can and must consider all facts relevant to determination of the BIT causes of action, including facts relating to the terms of the PSI Agreement. In doing so, we shall not seek to determine the claims asserted under the PSI Agreement; we will determine only the BIT claims of the Claimant. As the *Vivendi Annulment Committee* observed:

105. ... *it is one thing to exercise contractual jurisdiction* (arguably exclusively vested in the administrative tribunals of Tucumán by virtue of the Concession Contract) *and another to take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law...*¹⁹⁰ (Emphases added)

187. We agree with the above observation. This Tribunal is bound to exercise its jurisdiction and proceed to consider the BIT claims that are properly before it. Accordingly, we cannot grant the request for a stay of these proceedings.

¹⁸⁷ Transcript, Volume 1, at pp. 115-124.

¹⁸⁸ Reply at paragraphs 113-114. Transcript, Volume 2, pp. 1126-128.

¹⁸⁹ While SGS contended that the Tribunal was the judge of the contract breaches in light of Articles 9 and 11, it went on to say that "in any event if you were not, you don't need to be the judge of the contract in order to be the judge of the violation of the treaty, be it the classic violations or be it the violations because of the observance of commitments provision." Transcript, Volume 2, p. 114, lines 3-7.

¹⁹⁰ *Vivendi Annulment*, *supra*, at paragraph 105.

188. The Claimant can proceed with the BIT claims that are within the subject-matter jurisdiction of this Tribunal without having the factual predicate of a determination by the PSI Agreement arbitrator that either party breached that Agreement. SGS would be in the same position as the claimant in the *Vivendi* case. It is entitled to assert that the acts complained of, individually or collectively, rise to the level of a breach of the BIT, but must make a clear showing of conduct which is, in the circumstances, contrary to the relevant BIT standard.¹⁹¹

189. The determination of the PSI Agreement arbitrator as to whether the Respondent (or the Claimant, for that matter) acted in accordance with that Agreement is in any event not dispositive of whether Pakistan acted consistently with its BIT obligations. The completion of the PSI Agreement arbitration is thus not a necessary pre-condition to the resolution of SGS's BIT claims.

PART V: DECISION

190. In light of the foregoing, the Tribunal decides as follows:

- (a) This Tribunal has jurisdiction over SGS's claims that Pakistan breached the Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments of 11 July 1995;
- (b) This Tribunal does not have jurisdiction over SGS's claims that Pakistan breached the PSI Agreement or over Pakistan's claims that SGS breached the PSI Agreement;
- (c) The Tribunal's second recommendation in its Procedural Order No. 2, dated 16 October 2002, that the PSI Agreement arbitration be stayed pending a resolution of this jurisdictional objection is hereby withdrawn;
- (d) The balance of Procedural Order No. 2 remains fully in effect;
- (e) Pakistan's request that this Tribunal stay this arbitration pending a resolution of the PSI Agreement arbitration is denied; and
- (f) The Tribunal will proceed to the merits phase of the proceeding.

191. Both parties requested an award of costs. The Tribunal declines to issue such an award at this time.

¹⁹¹ *Id.*, at paragraph 113.