Siemens v Argentina, ICSID Case No. ARB/02/8, Award

**Summary:** Argentina suspended its contract with Siemens and commenced renegotiations of the contract. However, while there was agreement, nothing was formalised. Pursuant to the Economic-Financial Emergency Law, a new draft non-negotiable proposal was issued to Siemens which was inconsistent with the earlier renegotiated but non-formalised agreement. The contract was terminated by Decree because Siemens did not agree to the proposal.
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

SIEMENS A.G.
(CLAIMANT)

AND

THE ARGENTINE REPUBLIC
(RESPONDENT)

ICSID CASE No. ARB/02/8

AWARD

Members of the Tribunal

Dr. Andrés Rigo Sureda, President
Judge Charles N. Brower, Arbitrator
Professor Domingo Bello Janeiro, Arbitrator

Secretary of the Tribunal

Ms. Claudia Frutos-Peterson

Representing the Claimant

Dr. Guido Santiago Tawil
M. & M. Bomchil
Buenos Aires
Argentina

and

Dr. Peter Gnam
Siemens A.G.

Representing the Respondent

H.E. Osvaldo César Guglielmino
Procurador del Tesoro de la Nación Argentina
Buenos Aires
Argentina

Procuración del Tesoro de la Nación Argentina
Buenos Aires
Argentina
Emergency Law and Resolution ME No. 3/2001. Argentina also questions the statement of Siemens that Argentina had never raised the issue of compliance with Article 10.12. Argentina in fact requested the source codes at the request of the TTN and SITS breached Article 10.12 by not providing them. Argentina explains that the value of the source codes has been included in the assessment carried out by the TTN.

VI. Merits of the Dispute

195. Argentina has based its defense on its submission that the claim of Siemens is grounded on issues of contractual performance, while Siemens maintains that its claim is based on breaches of the Treaty, including the breach of the umbrella clause – Article 7(2) of the Treaty. The Tribunal will address this question first and, before turning its attention to the other specific claims related to expropriation, fair and equitable treatment, and arbitrary and discriminatory measures, it will consider the relevance of SITS’ and Siemens’ agreement to the Contract Restatement Proposal and alleged agreement of SITS and Siemens to include the revision of the Contract under the framework of the 2000 Emergency Law.

1. Umbrella Clause

a) Positions of the Parties

196. The Tribunal will start by recalling the specific arguments of the parties on the meaning of Article 7(2) of the Treaty. This article reads as follows:

“Each Contracting Party shall observe any other obligation it has assumed with regard to investments by nationals or companies of the other Contracting Party in its territory.”

197. Siemens argues that Argentina breached Article 7(2) of the Treaty by failing to comply with its obligations with regard to Siemens’ investment. According to Siemens, such obligations may be contractual obligations in agreements between States and investors or broader undertakings contained in the States’ national investment legislation. The effect of Article 7(2) is to protect investments against interferences with contractual rights and licenses elevating
them to violations of the Treaty regardless of breaches of Articles 2 and 4. Siemens observes that this conclusion is even more compelling if the State does so in bad faith, for political reasons and lacking public purpose. Siemens also finds that this conclusion is confirmed by Article 10(1), which covers all “[d]isputes concerning investments in the sense of this Treaty between a Contracting Party and a national or company of the other Contracting Party […]”

198. In its Counter-Memorial, Argentina reviews the history of the umbrella clauses and in particular refers to the concept of the essential base of the claim introduced in Woodruff v. Venezuela and used in Vivendi II for purposes of determining the validity of the forum choice in the contract. Argentina finds further support in its argumentation in Ronald S. Lauder v. the Czech Republic, Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. the Republic of Estonia, CMS Gas Transmission Company v. Argentine Republic and SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan. In the latter case, Argentina points out that the tribunal insisted that the text of the clause has to be unambiguous and that there must be clear and convincing evidence of the purpose of the umbrella clause to elevate contractual claims to treaty claims. Argentina also finds support in SGS Société Générale de Surveillance S.A. v. Republic of the Philippines since both SGS tribunals were moved by the goal of preventing the transformation of contractual claims into international claims.

199. Argentina points out that the tribunal in SGS v. Philippines restricts the commitments to which the clause is applicable: “For Article X(2) to be applicable, the host State must have assumed a legal obligation, and it must have been assumed vis-à-vis the specific investment – not as a matter of the application of some legal obligation of a general character. This is very far from

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40 Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. the Republic of Estonia, ICSID Case No. ARB/99/2, Award (June 25, 2001), AL RA No. 73.
41 CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award (May 12, 2005), AL RA No. 64.
42 SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, 18 ICSID Review 307, para. 163, AL RA No. 74.
elevating to the international level all ‘the municipal, legislative or administrative or other unilateral measures of a Contracting Party.’ Furthermore, according to Argentina, if there is an exclusive contractual forum selection clause, the forum specified in the contract is the forum with jurisdiction over contractual matters.

200. Applying these considerations to the instant case, Argentina argues that “the clause can only be invoked vis-à-vis an Investment Agreement in the case of breach of the Agreement and not vis-à-vis a concession contract governed by domestic administrative law and containing an agreed upon forum clause. Siemens intentionally confuses the Investment Agreement with the investment, terms that are not equivalent and cannot be merged.”

201. In its Reply, Siemens affirms that Article 7(2) includes obligations arising from a contract. Siemens finds that the attempt by Argentina to distinguish between an investment agreement and domestic utility contracts has no support under the terms of investment treaties or in their ordinary meaning. Siemens points out that Articles 7(2) and 10(1) use the term “investments”, which is broadly defined and that claims raised under an umbrella clause are additional to and independent of claims based on the other protections under the Treaty. According to Siemens, under an umbrella clause, “any violation of a contract thus covered, becomes a violation of the BIT. The consequence is that the BIT’s clause on dispute settlement becomes applicable to a claim arising from the breach of the contract.”

202. Siemens argues that case law supports its claims under article 7(2) of the Treaty. First, it refers to the criticism of the SGS v. Pakistan in SGS v. Philippines which termed that decision unconvincing because it failed to give any clear meaning to the umbrella clause. Siemens points out that the facts of the instant case are different because SGS v. Pakistan did not involve any allegation of sovereign interference with the Contract. Second, Siemens recalls the conclusion of the tribunal in the Philippines case: “[the umbrella clause] makes it

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43 SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/03/10, Decision on Objections to Jurisdiction (January 29, 2004), para. 121, cited in the Counter-Memorial, para. 1039.
44 Counter-Memorial, para. 1047.
45 Reply, para. 591, citing Professor Schreuer’s legal opinion.
a breach of the BIT for the host state to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments.”46 Third, Siemens rebuts the argument of Argentina that a more specific provision shall take precedence over a more general one. Relying on the opinion of Professor Christoph Schreuer, Siemens contends that this argument in fact favors Siemens’ position:

“The dispute settlement clause in the BIT is merely a standing offer to investors. By accepting that offer an investor perfects a specific arbitration agreement. The ICSID arbitration agreement, as perfected through the institution of proceedings, applies only to the specific dispute. By contrast, the dispute settlement clause in the Contract refers to any dispute arising from the Contract. It follows that the ICSID arbitration agreement is the more specific one. The principle generalia specialibus non derogant, should work against the contractual forum selection clause and in favor of ICSID.”47

Fourth, Siemens rejects the arguments on the essential claim base and the contractual forum clause for having been already rejected by the Tribunal in its decision jurisdiction.

203. Argentina in its Rejoinder denies as a primary submission that there were any breaches of its obligations towards the Claimant and, if the Tribunal would consider otherwise, then these would be a contractual matter to be determined by the proper law of the Contract and not international law. Furthermore, Argentina contests the meaning attributed by the Claimant to the umbrella clause, and points out that, in the case of SGS v. Philippines, the wording of the clause was different and it referred to “specific” investments, and that, in any case, the tribunal found that the umbrella clause did not “convert the issue of the extent or content of such obligations into an issue of international law.”48 Argentina explains that the case law provides very little authority to

46 SGS v. Philippines, para. 128, quoted in the Reply, para. 599.
47 Legal opinion of Professor Schreuer, quoted in the Reply, para. 603.
support the approach embraced by the Claimant and that SGS v. Pakistan and Salini v. Jordan\textsuperscript{49} are evidence of the unwillingness of arbitral tribunals to embark on the resolution of contractual disputes. Argentina concludes by reminding the Tribunal that the approach proposed by the Claimant would re-write the Treaty, depart from the classical approach to the arbitral function under international law, and bring into play the provisions of Article 52 of the Convention.

\textbf{b) Considerations of the Tribunal}

204. The Tribunal considers that Article 7(2) has the meaning that its terms express, namely, that failure to meet obligations undertaken by one of the Treaty parties in respect to any particular investment is converted by this clause into a breach of the Treaty. Whether an arbitral tribunal is the tribunal which has jurisdiction to consider that breach or whether it should be considered by the tribunals of the host State of the investor is a matter that this Tribunal does not need to enter. The Claimant is not a party to the Contract and SITS is not a party to these proceedings.

205. In regards to the scope of Article 10(1), the Tribunal concurs with the submission that reference to disputes related to investments would cover contractual disputes for purposes of the consent of the parties to arbitration given the wide meaning of the term “investments” and the terms of Article 7(2). However, to the extent that the obligations assumed by the State party are of a contractual nature, such obligations must originate in a contract between the State party to the Treaty and the foreign investor as, for instance, in the SGS cases.

206. The Tribunal does not subscribe to the view of the Respondent that investment agreements should be distinguished from concession agreements of an administrative nature. Such distinction has no basis in Article 7(2) of the Treaty which refers to “any obligations”, or in the definition of “investment” in the Treaty. Any agreement related to an investment that qualifies as such under the Treaty would be part of the obligations covered under the

\textsuperscript{49} SGS v. Islamic Republic of Pakistan, quoted in the Rejoinder, para. 673; Salini v. Kingdom of Jordan, ICSID Case No. ARB/02/13, Award (January 31, 2006), quoted in the Rejoinder, para. 673.
umbrella clause. The Tribunal does not find significant, for purposes of the ordinary meaning of this clause, that it does not refer to “specific” investments. The term “investment” in the sense of the Treaty, linked as it is to “any obligations”, would cover any binding commitment entered into by Argentina in respect of such investment.

2. **Consent of Siemens and SITS**

207. The positions of the parties related to the argument advanced by Argentina to the effect that SITS or Siemens agreed to the measures taken by Argentina have already been described. The Tribunal recalls that such argument is based on the fact that SITS and Siemens agreed to the Contract Restatement Proposal in November 2000, that no administrative appeal was filed by SITS except with respect to Decree 669/01, and that they did not object to the ministerial Resolution placing the Contract under the regime of the 2000 Emergency Law.

208. As regards the agreement to the Contract Restatement Proposal, Argentina itself contends that it was a preliminary agreement that was not binding. In any case, Argentina modified the proposal and SITS did not accept certain terms of the revised proposal. Thus it is difficult to understand how it can be held that SITS or Siemens have agreed to the Contract Restatement Proposal if its terms were not an agreement but, as argued by Argentina, an internal document in which the views of the private party were expressed and Argentina did not accept them.

209. The argument on the consent of Siemens and SITS to the application of the 2000 Emergency Law to the Contract is even more puzzling to the Tribunal. It is expected that individuals and companies will obey the law; it is not a question of choice, as would be the option to accept a negotiated proposal.

210. It is a matter of dispute between the parties as to whether Siemens or SITS did not object to the application of the 2000 Emergency Law regime to the Contract because they were led to believe by the Respondent that this would speed up the administrative processing of the Contract Restatement Proposal. Whatever the reasons for not objecting, Argentina always had the