

SGS Société Générale de Surveillance S.A.
v. Islamic Republic of Pakistan

(ICSID Case No. ARB/01/13)

Introductory Note

The Procedural Order No. 2 on Provisional Measures of October 16, 2002 and Decision on Jurisdiction of August 6, 2003, reproduced below, were rendered in an arbitration proceeding between a Swiss company, SGS Société Générale de Surveillance S.A. (SGS) and the Islamic Republic of Pakistan. The dispute, brought to ICSID on the basis of the provisions of the 1995 bilateral investment treaty between Switzerland and Pakistan, concerns SGS's provision of services relating to the customs clearance and control processes in Pakistan. In 1994, SGS and the Government of Pakistan concluded a contract for "pre-shipment inspection," which later gave rise to claims by both parties. Pakistan initiated an arbitration in Pakistan on the basis of the dispute settlement clause in the contract, and SGS commenced ICSID arbitration under the bilateral investment treaty.

The ICSID Arbitral Tribunal was composed of Judge Florentino P. Feliciano (President), Mr. André Faurès and Mr. J. Christopher Thomas, Q.C. (appointed following the resignation of Mr. Toby Landau). Shortly after the constitution of the Tribunal on April 25, 2002, the Claimant submitted a request for provisional measures seeking, among other things, to stay the arbitration in Pakistan. The Respondent, on the other hand, raised objections to the jurisdiction of ICSID arguing that the local arbitration was the proper forum to hear the parties' claims. Among other grounds for its objections, Pakistan argued that SGS's claims were contractual in nature and that the parties had agreed to have contractual claims resolved pursuant to the dispute settlement clause in their contract. In its request for arbitration, SGS had stated

that the scope of ICSID's jurisdiction under the bilateral investment treaty encompassed alleged violations of the treaty as well as breaches of the contract.

In its Procedural Order No. 2 on Provisional Measures of October 16, 2002, the Tribunal found that the legal issues arising from the question of jurisdiction were intertwined with those concerning the request for provisional measures. Without prejudging the Respondent's objections to jurisdiction, it recommended two measures requested, including the stay of the local arbitration. This was justified by the fact, the Tribunal concluded, that "it would be wasteful of resources for two proceedings relating to the same or substantially the same matter to unfold separately while the jurisdiction of one tribunal awaits determination." (p. 304 of this issue)

The recommendation to stay the arbitration in Pakistan was later withdrawn in the Arbitral Tribunal's Decision on Jurisdiction of August 6, 2003. The Tribunal held that it had jurisdiction over claims for violation of the bilateral investment treaty provisions. The Tribunal found, however, that it did not have jurisdiction over claims under the parties' contract, neither on the basis of the so-called "umbrella clause" in the bilateral investment treaty (Article 11), by which SGS contended that the alleged contractual breaches had been elevated to breaches of the treaty, nor by virtue of the dispute settlement clause in the treaty (Article 9). In this respect, the Tribunal concluded that "[it] has no jurisdiction with respect to claims submitted by SGS and based on alleged breaches of the PSI Agreement which do not also constitute or amount to breaches of the substantive standards of the BIT" (para. 162 of the Decision on Jurisdiction).

In allowing the arbitration in Pakistan to continue, the Tribunal found that its jurisdiction did not concur with that of the local arbitrator. The Tribunal stated that "[t]he right to exercise [its jurisdiction over treaty claims] 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" (para. 186 of the Decision on Jurisdiction).

The issue of the relationship between a contractual dispute settlement clause and a general offer made by a State in a treaty to arbitrate covered disputes has previously been discussed in ICSID cases *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (Case No. ARB/97/3), Decision of the *ad hoc* Committee of July 3, 2002 (41 ILM 1135 (2002)), *Lanco International, Inc. v. Argentine Republic* (Case No. ARB/97/6), Decision on Jurisdiction of July 23, 2001 (40 ILM 457 (2001)) and *Salini*

Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (Case No. ARB/00/4), Decision on Jurisdiction of July 16, 2001 (129 *Journal du Droit International* 196 (2002), 42 *ILM* 606 (2003)). However, this was the first time that an ICSID tribunal analyzed in more detail an “umbrella clause” in a treaty (see paras. 163 through 174 of the Decision on Jurisdiction).

The texts of the Decisions on Provisional Measures and on Jurisdiction, issued in English, are reproduced with the parties’ consent and are also posted in PDF format on ICSID’s website at www.worldbank.org/icsid.

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