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**ICSID:  
THE RELATIONSHIP BETWEEN FOREIGN  
INVESTMENT PROTECTION DISPUTE  
SETTLEMENT AND CONTRACTUAL CLAIMS**

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## Abstract

If a dispute arises with the host-State, in which an investment was made, the investor may face uncertainty, how a dispute will be characterised and therefore solved. Does the dispute arise out of an investment contract and has to be referred to the national courts in the host-State? Or is there a possibility to arbitrate these disputes before an international tribunal? What happens, if a dispute arises out of a bilateral investment treaty (BIT)? Could there also be the possibility of overlapping jurisdiction of an international and a national body? What impact do dispute settlement provisions, either in a contract between the investor and the host-State, or in a BIT between two States, have on the forum of the dispute? Are they exclusive or may they coexist? If they coexist, does one prevail over the other? Is it even possible that a contractual dispute settlement agreement is valid in terms of a BIT provision between the two States, that is, is it feasible to depart from such a provision? In this context, the present paper focuses on three recently rendered awards of the International Centre for Settlement of Investment Disputes (ICSID). Part I gives a brief introduction into the topic. Part II provides general principles of ICSID. Part III analyses the *Vivendi Univerisal v Argentine Republic* ICSID case. Part IV analyses the *SGS v Pakistan* ICSID case. Part V analyses the *SGS v the Philippines* ICSID case. Part VI concludes the topic.

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 12500 words.



## I INTRODUCTION

With the ratification of the International Convention for the Settlement of Investment Disputes (ICSID Convention) in 1965, for the first time a system was instituted under which non-State entities - corporations or individuals - can sue States directly. International law applies directly to the relationship between the host State and the investor, and the ICSID Tribunal's award is directly enforceable within the territory of the States.<sup>1</sup>

The cases discussed below arise from a "complex and often bitter dispute"<sup>2</sup> associated with the investor's right to opt for international arbitration under ICSID if there is a special dispute settlement agreement in an investment contract. They are significant as these cases answer this problem and generate general principles for the settlement of this kind of dispute. The awards were held within a short period and reveal a development in the tribunals' findings.

This paper will give an answer to when an investor has to submit the claim to a national court and when to international proceedings with ICSID. It will critically analyse the mentioned and recently rendered awards. It will draw comparisons between the awards themselves and show the development of the Tribunals' argument. A further goal is to illustrate the possibilities an investor has in relation to the host-State to achieve his objective.

The present author agrees with the opinion that an exclusively agreed forum selection clause in an investment contract is not overridden by a bilateral investment treaty (BIT) provision in terms of contractual breaches that do not amount to treaty claims in the same time. This is an important expression of the parties' autonomy. This paper also addresses the question when a claim, based on an infringement of an investment contract, amounts to a claim based on a BIT through a so-called "umbrella clause". The paper concludes by making alterna-

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<sup>1</sup> Lauterpacht Elihu "Foreword" to Schreuer Christoph H "The ICSID Convention: A Commentary" (Cambridge University Press, Cambridge, 2001) XI.

<sup>2</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding (2001) 40 ILM 426, 427 (ICSID Case No. ARB/97/3).



tive suggestions on the interpretation and solution of two problems the Tribunals had to deal with.

## **II CONTRACTUAL VERSUS NON-CONTRACTUAL ICSID ARBITRATION – INTRODUCTION TO THE PROBLEM**

ICSID arbitration arose traditionally out of investor-State contracts containing express reference to ICSID for dispute resolution, provided that both the host-State and the investor's country of origin were parties to the ICSID Convention and certain other jurisdictional limitations were met.<sup>3</sup> Besides this so called contractual arbitration, ICSID also accepts dispute settlements that arise not only from a direct agreement to arbitrate between an investor and host-State, but also arbitrations that arise from indirect consent to ICSID arbitration – so called non-contractual arbitration.<sup>4</sup> This indirect consent is mostly contained in the host-State's national investment legislation or BITs.

Problems arise if there is an overlap of jurisdiction, that is, if both contractual and non-contractual dispute settlement provisions exist and both provide for different dispute settlement forums. An investor on the one side might assert ICSID jurisdiction whereas the host-State argues in favour of jurisdiction of its domestic courts. That was the situation the three present ICSID Tribunals had to face.

### **A Contractual ICSID Arbitration**

#### **1 Jurisdiction and exclusive remedy rule**

In the context of contractual ICSID Arbitration, Articles 25 and 26 ICSID Convention contain the most relevant provisions for the settlement of investment

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<sup>3</sup> Blackaby Nigel, Paulson Jan, Reed Lucy *Guide to ICSID Arbitration* (Kluwer Law International, The Hague, London, New York 2004) 7.

<sup>4</sup> Blackaby, Paulson, Reed, above n 3, 7.



disputes. Article 25 defines the scope of ICSID jurisdiction. The first paragraph of that Article states that "the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally"<sup>5</sup>. The parties usually give their consent simultaneously in the arbitration clause or in a separate submission agreement.

Article 26 ICSID Convention as an exclusive remedy rule refers to a traditional concept of international law, that before relief can be sought before an international tribunal, local remedies have to be exhausted. It says that "consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to 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".<sup>6</sup>

It implies that there is no more need to exhaust local remedies before initiating ICSID arbitration "unless otherwise stated". On the other hand, it states "the host State's right to insist on the exhaustion of local remedies as a condition of its consent to arbitration".<sup>7</sup> Hence, whether domestic court proceedings are offered as an alternative to ICSID arbitration, or as a preliminary remedy before the institution, depends on the terms of the agreement between the parties.<sup>8</sup> Nevertheless, it has to be stated, that "Article 26 [ICSID Convention] creates a presumption that the parties intended to resort to ICSID arbitration to the exclusion of all other means of dispute settlement".<sup>9</sup>

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<sup>5</sup> Art 25 (1) ICSID Convention.

<sup>6</sup> Art 26 ICSID Convention.

<sup>7</sup> Schreuer Christoph H *The ICSID Convention: A Commentary* (Cambridge University Press, Cambridge, 2001) art 26 para 5.

<sup>8</sup> Schreuer, above n 7, art 26 para 36.

<sup>9</sup> Schreuer, above n 7, art 26 para 50.



The exhaustion of local remedies as a condition may only be expressed up to the time consent to arbitration is perfected.<sup>10</sup> Once consent to ICSID arbitration has been given, the parties have lost their right to seek relief in another forum and are restricted to pursuing their claim through ICSID.<sup>11</sup>

Consent to the jurisdiction of domestic courts in derogation of the exclusive remedy rule of Article 26 ICSID Convention need not to be given explicitly. Tacit consent may be seen in pleading on the merits before the non-ICSID forum without invoking ICSID's exclusive jurisdiction.<sup>12</sup>

On the other hand, Delaume says, "if a court in a contracting State becomes aware of the fact that a claim before it may call for adjudication under ICSID, the court should refer the parties to ICSID to seek a ruling on the subject. Until such a ruling is made, if the possibility exists that the claim may fall within the jurisdiction of ICSID, the court must stay the proceedings pending proper determination of the issue by ICSID".<sup>13</sup>

Once the ICSID arbitration process has been instituted, Article 26 ICSID Convention ensures that the arbitration process will not be interfered with.<sup>14</sup> "The Convention provides for an elaborate process designed to make arbitration independent of domestic courts. Even in the face of an uncooperative party, ICSID arbitration is designed to proceed independently without the support of domestic courts".<sup>15</sup>

## 2 *Contractual claims*

Investment contracts, or also called concession contracts, are contracts between the investor and the host-State. They often contain dispute settlement

<sup>10</sup> Schreuer, above n 7, art 26 para 99.

<sup>11</sup> Schreuer, above n 7, art 26 para 2.

<sup>12</sup> Schreuer, above n 7, art 26 para 44.

<sup>13</sup> Delaume G R "ICSID Arbitration in Practice" (1984) 2 International Tax and Business Lawyer 68.

<sup>14</sup> Schreuer, above n 7, art 26 para 3.

<sup>15</sup> Schreuer, above n 7, art 26 para 3.



clauses referring contractual disputes either to domestic or international proceedings. Article 25 ICSID Convention requires that the dispute arises "directly" out of an investment. If a contract refers to international arbitration under ICSID and the legal basis of the dispute is an infringement of the investment contract, it has to be asked if and to which degree ICSID can have jurisdiction over the claim. As this is one of the main questions of the present paper this chapter intends to focus introductorily on the arbitrability of contractual claims, under the auspices of ICSID, based on the mere breach of an investment contract.

Schreuer states that "an investment operation involves a number of ancillary transactions and legal contracts. They include financing, the lease of property, purchase of various goods, marketing of produced goods and tax liabilities. In economic terms, these transactions are all more or less linked to the investment. But whether these peripheral activities arises directly out of an investment for purposes of ICSID's jurisdiction may be subject to doubt".<sup>16</sup>

The ICSID Convention's first draft foresaw the Centre's jurisdiction for all legal disputes "arising out of or in connection with any investment".<sup>17</sup> These words were criticised as granting a tribunal a wide and too indefinite authority.<sup>18</sup> Consequently, the term "directly" was included in the Convention. This requirement is one of the objective criteria and therefore not at the disposition of the parties.<sup>19</sup> "This means that, no matter what the parties have agreed, the dispute must not only be connected to an investment but must also be reasonably closely connected".<sup>20</sup>

Therefore, disputes arising from ancillary or peripheral aspects of an investment operation are likely to be objected to the basis that they do not arise directly out of an investment and are not covered by the consent agreement.<sup>21</sup> Later on in this paper, this distinction will become more relevant as respondents to the

<sup>16</sup> Schreuer, above n 7, art 25 para 64.

<sup>17</sup> ICSID History, Volume I, 166.

<sup>18</sup> Schreuer, above n 7, art 25 para 65.

<sup>19</sup> Schreuer, above n 7, art 25 para 67.

<sup>20</sup> Schreuer, above n 7, art 25 para 67.

<sup>21</sup> Schreuer, above n 7, art 25 para 67.



discussed awards objected to the claims being contractual in nature and therefore not subject to ICSID's scope.

In *Holiday Inns v Morocco*, the Tribunal emphasised the general "unity of an investment operation" and claimed jurisdiction over questions arising out of a loan contract. At the same time, it held that certain aspects of the contracts could be "isolated" and that questions affecting the indirect or secondary aspects of an investment can properly fall within the jurisdiction of local courts.<sup>22</sup>

Article 2 (b) of the Additional Facility Rules authorises proceedings for the settlement of disputes that are not within the scope of ICSID's jurisdiction as they do not directly arise out of an investment. "Therefore, where the connection between the investment and the dispute appears too remote to satisfy ICSID Convention's requirements of directness, the Additional Facility could serve as an alternative method of dispute settlement".<sup>23</sup>

#### **B Non-contractual ICSID Arbitration**

As already mentioned, consent in local investment laws of the host-State and BITs make it possible for investors to initiate ICSID Arbitration against host-States even if there is no contractual agreement between the parties. This so called "arbitration without privity" is possible because Article 25 ICSID Convention requires that the parties only "consent in writing" to the jurisdiction of the Centre, but not how the consent has to be given.<sup>24</sup> So long as the consent is clear, mutual and in writing, it is sufficient to establish ICSID jurisdiction.<sup>25</sup> The number of ICSID arbitrations under BITs has arisen dramatically due to the proliferation of some 2000 treaties providing for this dispute settlement as of the year 2003.

<sup>22</sup> *Holiday Inns v Morocco* (12 May 1974) ICSID Case No. ARB/72/1.

<sup>23</sup> Schreuer, above n 7, art 25 para 69.

<sup>24</sup> Blackaby, Paulson, Reed, above n 3, 35.

<sup>25</sup> Blackaby, Paulson, Reed, above n 3, 35.



## 1 *Bilateral investment treaties*

BITs are concerned with the relationship between an investor, either a national or a company of one contracting party (home-State), and the other contracting party (host-State) in connection with an 'investment', taken in a very broad sense, in the territory of the latter.<sup>26</sup>

BITs are conceived as generating reciprocal rights and duties among state parties.<sup>27</sup> Those state rights and duties concern the rights and duties of private investors of one country, in the territory of the other. In the formulation of basic principles that will control the relationship between a private foreign investor and a host state, the private investor was absent and replaced by its own state throughout BITs negotiations.<sup>28</sup>

The preamble of most BITs express the States' desire to create favourable conditions for greater investment by investors of one State in the territory of the other State.<sup>29</sup> It also recognizes that the encouragement and reciprocal protection under an international agreement will be conducive to stimulating individual business initiatives and increasing prosperity to state parties.<sup>30</sup>

At the same time, every modern BIT includes provisions on the settlement of investment disputes, as part of the guarantees assumed by the host-State, in relation to the foreign investment made by nationals of the other contracting State.<sup>31</sup> In nearly all the treaties, the host-State gives its consent to international arbitration of any investment dispute, subject to the treaty.<sup>32</sup>

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<sup>26</sup> *Fedax NV v Venezuela* (1997) 37 ILM 1378, (ICSID Case No. ARB/96/3) para 32.

<sup>27</sup> Sacerdoti Giorgio "Bilateral Treaties and Multilateral Instruments on Investment Protection" (1997) 269 *Recueil des Cours* 253, 436-438.

<sup>28</sup> Vinuesa, Raúl Emilio "Bilateral Investment Treaties and the Settlement of Investment Disputes under ICSID: The Latin American Experience" (2002) *Law and Business Review of the Americas* 501, 504.

<sup>29</sup> Lowenfeld *International Economical Law* (International Economic Law Series, Oxford University Press, Oxford, 2002) 474.

<sup>30</sup> Vinuesa, above n 28, 505.

<sup>31</sup> Lowenfeld, above n 29, 484.

<sup>32</sup> Lowenfeld, above n 29, 484.



BITs may also contain blanket provisions obligating the host-State to observe, or guarantee the observance of, specific undertakings towards investors. These clauses are referred to as “umbrella clauses”. The present Swiss Pakistan and Swiss Philippine BIT contained such, albeit slightly different, clauses. In each case, the central question was whether the “umbrella clause” enabled an investor’s claim against the host-State, based on a breach of the investment contract, to be ‘elevated’ to a BIT claim and resolved under the arbitration provisions of the applicable BIT, rather than under the dispute resolution provisions of the investment contract under dispute.<sup>33</sup> The effect of this clause was addressed by the *SGS v Pakistan* ICSID Tribunal that had to deal the first time with the clause’s interpretation. Its relevance will be dealt with below.

## 2 *Bilateral investment treaty claims*

When an objection is raised to ICSID’s arbitral jurisdiction provided under a BIT, it follows that jurisdiction should be tested by the Tribunal, which is accomplished through two different sets of legal requirements. First, BIT jurisdictional requirements must be met. Second, ICSID Convention jurisdictional requirements must be also met. Both sets of requirements perform a sort of double filter in order to confirm ICSID’s jurisdiction.<sup>34</sup>

In general terms, BITs require the parties to attempt, as far as possible through direct negotiations between the parties, to settle the dispute amicably. If a solution is not reached within a certain period, the dispute may be submitted either to a competent domestic tribunal of the contracting party in whose territory the investment was made, or to international arbitration like ICSID.

The procedural dispute resolution mechanism in BITs may give both parties, or sometimes the investor alone, a series of options ranging from pursuing the claim in the local courts of the host-State, to bringing ICSID arbitration, or to

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<sup>33</sup> Asian Arbitration “Briefing” (Freshfields Bruckhaus Deringer, May 2004) <<http://www.freshfields.com/places/asia/publications>> (last accessed 4 August 2004) 1.

<sup>34</sup> Vinuesa, above n 28, 503.



resorting to another form of international arbitration. Some BITs state, that once an investor has submitted the dispute to the courts of the contracting party concerned or to international arbitration, the choice of one or the other of those procedures is final.<sup>35</sup> Such a mechanism is commonly called a “fork in the road” provision.<sup>36</sup> The French Argentine BIT contained such a provision and the Tribunal, as well as the ad hoc Committee, had to deal with the question when this provision was activated. The Tribunal’s finding will be discussed below.

### C *Overlap of Contractual and Non-contractual ICSID Jurisdiction*

As a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the domestic and the international legal orders. BIT claims and investment contract claims appear reasonably distinct in principle.<sup>37</sup> Complexities, however, arise particularly where each party claims that one legal body has jurisdiction over both types of claims which are alleged to co-exist.<sup>38</sup>

This can raise fundamental questions in terms of the competing jurisdiction of the dispute settlement systems under ICSID and those of the domestic courts. If a claim is based on a breach of a foreign investment contract, the investor may also try to settle the dispute through ICSID instead of lodging the claim according to a stipulated dispute settlement clause before the domestic courts. This can be based on the investor’s reasoning that the dispute relates, besides purely investment contractual questions, to ones of an investment dispute. The investor could further argue that a dispute purely contractual in nature amounted to an investment dispute. As it will be seen in the following cases, the investors always argued in favour of dispute settlement through ICSID rather than domestic proceedings. Due to various reasons, an international forum might be seen to

<sup>35</sup> See art 8 (2) Argentine French BIT.

<sup>36</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, 439.

<sup>37</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (2003) 18 ICSID Review: Foreign Investment Law Journal 307 (ICSID Case No. ARB/01/13) para 147.

<sup>38</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 148.



be more attractive for an investor than a domestic one. On the other hand, a host-State as the respondent in a dispute is likely to object that the dispute relates solely to questions of an investment contract and is therefore purely contractual in nature and has to be decided through the domestic courts.

As will be discussed in the following, the three present ICSID Tribunals had to face such a situation where both a contractual and a non-contractual forum selection clause and an overlap of jurisdiction existed. The findings of the Tribunals were highly significant insofar as they not only decided the cases but also developed general principles governing future decisions of this subject matter, though, the findings were not beyond doubt. The present paper will discuss the cases and raise critical thoughts.

### *III VIVENDI UNIVERSIAL v ARGENTINE REPUBLIC*

#### *A Introduction*

The case arose from a dispute associated with the Concession Contract for Water and Sewage Service in the Province of Tucumán (Concession Contract) that the French company Vivendi Universal - formerly Compagnie Générale Des Eaux (CGE), and its Argentine affiliate Compãnia De Aguas Del Aconquija S.A. (CAA; both hereinafter referred to as claimants) made with Tucumán in 1995, a province of Argentina, and with the investment in Tucumán resulting from that agreement. The Republic of Argentina (respondent) was not a party to the Concession Contract or to the negotiations that led to its conclusion.

The Argentine Republic is a party to a BIT of July 1991 with the Republic of France (French Argentine BIT).<sup>39</sup> Both the Argentine Republic and France are also parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which entered

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<sup>39</sup> Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments of July 1991.



into force for both states prior to signature of the Concession Contract by CGE and Tucumán.

The Concession Contract does not refer to either the French Argentine BIT or ICSID Convention or to the remedies that are available to a French foreign investor in Argentina under these treaties. Under Article 16 (4), it refers disputes, concerning both the interpretation and application of the contract, to the exclusive jurisdiction of the contentious administrative courts of Tucumán. Article 8 of the French Argentine BIT as the relevant provision provides that:

[I]f an investment dispute arises between one contracting party and an investor from another contracting party and that dispute cannot be resolved within six months through amicable consultations, then the investor may submit the dispute either to the national jurisdictions of the contracting party involved in the dispute or, at the investor's option, to arbitration under the ICSID Convention or to an ad hoc tribunal [pursuant to the arbitration rules of the United Nations Commission on International Trade Law]. (...) Once an investor has submitted the dispute to the courts of the contracting party concerned or to international arbitration, the choice of one or the other of those procedures shall be final.

In terms of the actions of the federal government of Argentina as well as those of the provincial authorities of Tucumán, CGE contended that the Argentine Republic itself had violated its obligations under the French Argentine BIT by virtue of the attribution to that central government of the acts of the Province of Tucumán.<sup>40</sup> CGE and CAA had made claims solely under the French Argentine BIT and not contractual claims under the Concession Agreement.<sup>41</sup>

With regard to the question of jurisdiction, Argentina was, inter alia, of the opinion that the Tribunal lacked jurisdiction because the claims related to rights and obligations under the Concession Contract, and that, accordingly, Article 16 (4) required the claimants to bring those claims before the Contentious

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<sup>40</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, 438.

<sup>41</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, para 53.



Administrative Tribunals of Tucumán.<sup>42</sup> Argentina in fact regarded Article 16 (4) of the Concession Contract as a waiver of ICSID jurisdiction.<sup>43</sup>

## **B The Tribunal's Finding in the Original Arbitration Proceeding**

### **1 Jurisdiction over the claim**

On 21 November 2000 the Tribunal rendered its award.<sup>44</sup> Due to the close relationship between the jurisdictional issue and the underlying merits of the claims, the Tribunal decided that it would not be able to resolve the jurisdictional question without a full presentation of the factual issues relating to the merits.<sup>45</sup> Accordingly, the Tribunal, after receiving memorials from the parties and hearing oral argument, joined the jurisdictional issue to the merits.<sup>46</sup> It held that it had jurisdiction to hear the claims of CGE against the Argentine Republic for violation of the obligations under the French Argentine BIT.<sup>47</sup> Neither the forum-selection provision of the Concession Contract, nor the provisions of the ICSID Convention and the BIT on which the Argentine Republic relied, precluded CGE's recourse to this Tribunal on the facts presented.<sup>48</sup>

One could have expected the Tribunal to discuss Article 16 (4) of the Concession Contract in this context but it did not do so. The Tribunal's statements are rather held in general terms at this point saying that "those claims are not based on the Concession Contract but allege a cause of action under the

<sup>42</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, 434 para 41.

<sup>43</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, 437 para 47.

<sup>44</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, 428.

<sup>45</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, 428.

<sup>46</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, 428.

<sup>47</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, 428.

<sup>48</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, 428.



BIT”.<sup>49</sup> The Tribunal returned to the question of competing jurisdiction at the merit stage.

Here, it distinguished between claims which concerned acts of the provincial authorities of Tucumán and the “Federal Claims” which alleged violations of the BIT through the respondent. In terms of the first group of claims, the Tribunal did not consider itself competent to hear the case. These claims were purely related to the performance or non-performance of the Concession Contract.<sup>50</sup>

In addressing the claims against Argentina, the Tribunal found that the nature of the facts supporting most of the claims made it “impossible (...) to distinguish or separate violations of the French Argentine BIT from breaches of the Concession Contract without first interpreting and applying the detailed provisions of that agreement”.<sup>51</sup> By Article 16 (4) of the Concession Contract, its parties assigned that task expressly and exclusively to the Contentious Administrative Courts of Tucumán.<sup>52</sup> Because of this crucial connection between the terms of the Concession Contract and the alleged violations of the French Argentine BIT, the Tribunal was of the opinion that the “[A]rgentine Republic could not be held reliable unless and until the claimants have, following Article 16 (4) of the Concession Contract, asserted their rights in proceedings before the Courts of Tucumán and have been denied their rights, either procedurally or substantively”.<sup>53</sup> That means that, unless the domestic courts denied its jurisdiction, the Tribunal thought that ICSID’s jurisdiction over breaches of an investment contract was subordinate to that of the domestic courts in terms of the interpretation of a concession contract – even if a breach of the BIT appeared possible.

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<sup>49</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, para 53.

<sup>50</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, 443 para 77.

<sup>51</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, 428.

<sup>52</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, 429.

<sup>53</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, 443 para 78.



Without expressly discussing the problem of competing jurisdiction between contractual and treaty claims, the award shows that the parties can select a national forum for the dispute settlement in terms of the violation of an investment contract. The Tribunal wanted to respect this forum in the Concession Contract independent of the possibility that both the Concession Contract and the BIT could be breached. In the eyes of the Tribunal, the BIT did not prevail over the Concession Contract in terms of possible breaches of both these provisions. Confusion arises as the Tribunal first claimed jurisdiction over the claim and then denied to address it. Hence, the Tribunal seemed to have worked with a general understanding of the term "jurisdiction" and the admissibility of a claim on the other side.

## 2 *Waiver of rights to pursue the claim: "fork in the road" provision*

The Tribunal adjudicated that claims by CGE in the Contentious Administrative Courts of Tucumán for breach of the terms of the Concession Contract, as Article 16 (4) required, would not have constituted a waiver of claimants' rights under the French Argentine BIT and the ICSID Convention.<sup>54</sup> It emphasized that this decision did not impose an exhaustion of the remedies under the BIT because such requirement would be incompatible with Article 8 of the BIT and Article 26 of the ICSID Convention.<sup>55</sup> To support this opinion, the Tribunal referred to the former ICSID award *Lanco International Inc. v Argentine Republic*.<sup>56</sup> In that case the contract in question contained an exclusive jurisdiction clause referring contractual disputes to a federal contentious administrative court. The *Lanco* Tribunal denied that this clause could exclude ICSID jurisdiction. It said:<sup>57</sup>

<sup>54</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, 428.

<sup>55</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, 444 para 81.

<sup>56</sup> *Lanco International Inc. v Argentine Republic* (1998) 40 ILM 457 (ICSID Case No. ARB/97/6).

<sup>57</sup> *Lanco International Inc. v Argentine Republic*, above n 56, 469 paras 39 – 40.



A State may require the exhaustion of domestic remedies as prior condition for its consent to ICSID arbitration. This demand may be made (i) in a bilateral investment treaty that offers submission to ICSID arbitration, (ii) in domestic legislation, or (iii) in a direct investment agreement that contains an ICSID clause. (...) In effect, once valid consent to ICSID arbitration is established, any other forum called on to decide the issue should decline jurisdiction.

In *Vivendi Universal v Argentine Republic*, the Tribunal held that the claims against the respondent were not subject to the jurisdiction of the contentious administrative tribunals of Tucumán, “if only because, *ex hypothesi*, those claims [were] not based on the Concession Contract but [alleged] a cause of action under the French Argentine BIT”.<sup>58</sup>

This problem arose in the present case as, under the French Argentine BIT, the investor had the choice between a national and an international forum for dispute settlement. In this context, one has to clearly point out the legal grounds of the claim – contractual or treaty ones. According to the Tribunal, the “fork in the road” provision can therefore only be enabled if an investor intends to pursue a claim on the same legal basis before both a national and an international forum.

## **C The Annulment Proceeding**

### **1 Background**

On March 2001, the claimants filed an application with the Secretary General of ICSID requesting partial annulment of the above Tribunal’s award. Claimants argued on three out of the five different grounds provided by article 52 of ICSID Convention, in support of its request for partial annulment. The application was based on the fact that the Tribunal had exceeded its powers. There had been a serious departure from a fundamental rule of procedure; and the award failed to state the reasons on which it was based.

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<sup>58</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Original Arbitration Proceeding, above n 2, 438.



The appointed ad hoc Committee agreed with the Tribunal in characterising the dispute as one "relating to investments made under this agreement" regarding Article 8 of the French Argentine BIT.<sup>59</sup> It held likewise that "the fact that the Concession Contract referred contractual disputes to the Contentious Administrative Court of Tucumán did not affect the jurisdiction of the Tribunal with respect to a claim based on the provisions of the BIT. Article 16 (4) of the Concession Contract did not in terms purport to exclude the jurisdiction of an international tribunal arising under Article 8 (2) of the BIT".<sup>60</sup> The *Lanco International Inc. v Argentine Republic* award, cited by the Tribunal, supported its finding on jurisdiction.<sup>61</sup>

## 2 *Excess of power*

However, the Committee concluded that the Tribunal had exceeded its powers. It had jurisdiction over the Tucumán claims and failed to decide these.<sup>62</sup> The Committee considered the relationship between the responsibility of Argentina under the French Argentine BIT and the rights and obligations of the parties to the Concession Contract. As to the relationship between breach of contract and breach of treaty in the present case, the Committee emphasised that some Articles of the French Argentine BIT did not relate directly to breach of a municipal contract but, rather, they set an independent standard.<sup>63</sup> The Committee held:<sup>64</sup>

A state may breach a treaty without breaching a contract, and vice versa, and this is certainly true of these provisions of the BIT. (...) Each of these claims will be terminated by reference to its own proper applicable law – in the case of the BIT, by international

<sup>59</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Annulment Proceeding (2002) 41 ILM 1135 (ICSID Case No. ARB/97/3) 1150.

<sup>60</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Annulment Proceeding, above n 59, 1151.

<sup>61</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Annulment Proceeding, above n 59, 1151.

<sup>62</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Annulment Proceeding, above n 59, 1158.

<sup>63</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Annulment Proceeding, above n 59, 1154.

<sup>64</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Annulment Proceeding, above n 59, 1154.



law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of Tucumán.

In a case where the essential basis of a claim brought before an international tribunal was a breach of a concession contract, a tribunal will give effect to any valid forum selection clause in a concession contract.<sup>65</sup> This principle applies unless the treaty otherwise provides, i.e. the effect of a forum selection clause in a bilateral or multilateral investment treaty can override exclusive jurisdiction clauses in contracts underlying investments to which the treaty in question applies<sup>66</sup>. “On the other hand, where the fundamental basis of the claim is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent State or one of its subdivisions cannot operate as a bar to the application of the treaty standard”.<sup>67</sup>

Creating this rule, the Tribunal remained abstract in its reasoning. It did not say on which factors it depended, whether the basis is treaty or contract based. This is rather remarkable as it is the key element for claiming the right to address the claim. It simply considered the essential basis of the present claim as being a BIT one. Hence, the Committee created a general rule but failed to explain how this rule applies. Hereby it argued in favour of an exclusive dispute settlement – either under ICSID, or before domestic courts.

Further on, the Committee was of the opinion that it was not open to an ICSID Tribunal, having jurisdiction under a BIT in terms of a claim based upon substantive provisions of that treaty, to dismiss the claim on the ground that it could or should have been dealt with by a national court.<sup>68</sup> In such a case, the inquiry to be undertaken by the ICSID Tribunal is governed by the ICSID Conven-

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<sup>65</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Annulment Proceeding, above n 59, 1155.

<sup>66</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Annulment Proceeding, above n 59, 1162 footnote 69.

<sup>67</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Annulment Proceeding, above n 59, 1155 para 101.

<sup>68</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Annulment Proceeding, above n 59, 1156 para 102.



tion, by the BIT and international law.<sup>69</sup> The Committee held that it “[d]id not understand how, if there had been a breach of the [French Argentine] BIT in the present case (a question of international law), the existence of Article 16 (4) of the Concession Contract could have prevented its characterisation as such. A State cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty”.<sup>70</sup>

The Tribunal in the original proceedings declined to decide key aspects of the claimants’ treaty claims on the ground that they involved issues of contractual performance or non-performance. The Committee was of the opinion that the Tribunal would have had jurisdiction over a decision in terms of the concession contract, “at least so far as necessary in order to determine whether there had been a breach of the substantive standards of the [French Argentine] BIT”.<sup>71</sup> The Committee concluded:<sup>72</sup>

The Tribunal, in dismissing the (...) claims as it did, actually failed to decide whether or not the conduct in question amounted to a breach of the [French Argentine] BIT. (...) The conduct alleged by Claimants, if established, could have breached the [French Argentine] BIT. The claim was not simply reducible to so many civil or administrative law claims concerning so many individual acts alleged to violate the Concession Contract. It was open to the claim (...) that these acts taken together, or some of them, amounted to a breach of Articles 3 and/or 5 of the [French Argentine] BIT.

Having regard to these considerations, the Committee seemed to deny any impact of a contractual forum selection clause in international proceedings. It therefore goes further than the Tribunal’s finding in the original proceeding, which wanted to respect the contractual forum in terms of the application of the Concession Contract. With its finding, the Committee crucially extended the scope of ICSID’s jurisdiction.

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<sup>69</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Annulment Proceeding, above n 59, 1156 para 102.

<sup>70</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Annulment Proceeding, above n 59, 1156 para 103.

<sup>71</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Annulment Proceeding, above n 59, 1157 para 110.

<sup>72</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v Argentine Republic* Annulment Proceeding, above n 59, 1157 paras 111, 112.



It pointed out that concession contracts could be breached without breaching a BIT and vice versa. On the other hand, contractual breaches could also amount to BIT breaches. It has to be stressed, that the present BIT did not include an “umbrella clause” allegedly transferring contractual breaches to treaty breaches. The Committee was of the opinion that several acts “taken together” could breach provisions in an investment contract and in a BIT, and hence could amount to a treaty claim under ICSID. This indicates that the proper forum of the claim depends on the legal basis of the breach. In the Committee’s opinion, an overlap between contractual and treaty infringements would have to be solved in favour of ICSID arbitration.

The Committee mentioned casually in a footnote, that a forum selection clause in a bilateral or multilateral investment treaty could override exclusive jurisdiction clauses in contracts underlying investments to which the treaty in question applies. By focussing on the essential legal basis of a claim, either treaty or contractual based, it created a solution with exclusive jurisdiction of the legal bodies. Hence, the Tribunal did not need to consider what would happen if both dispute settlement clauses applied – a question which is still has to be dealt with in this paper.

#### **IV     *SGS v PAKISTAN***

##### **A     *Introduction***

The proceedings, instigated by Société Générale de Surveillance S.A. (SGS / claimant) in 2001 under the Swiss Pakistan bilateral investment treaty from 1995, arose out of the termination of the contract with the Islamic Republic of Pakistan (Pakistan / respondent) relating to pre-shipment inspections services concerning goods to be exported from certain countries to Pakistan (PSI Agreement).

SGS had originally sued Pakistan in the Swiss courts, alleging wrongful termination of the agreement. These proceedings were dismissed on the ground



that the parties had agreed to resolve disputes under the contract by arbitration in Pakistan.<sup>73</sup> The contract, which dated back to 1994, contained a dispute settlement provision in Article 11, which stated:<sup>74</sup>

Any dispute, controversy or claim arising out of, or relating to this Agreement, or breach, termination or invalidity thereof, shall as far as it is possible, be settled amicably.

Failing such amicable settlement, any such dispute shall be settled by arbitration in accordance with the Arbitration Act of the Territory as presently in force. The place of arbitration shall be Islamabad.

Pakistan subsequently commenced local arbitration proceedings, in which SGS counter-claimed for damages for wrongful termination of the contract and defamation. Having initiated the present ICSID arbitration, SGS took steps to oppose the PSI Agreement arbitration. On 4 January 2002, it filed an application with the Senior Civil Judge, Islamabad, for an injunction against the PSI Agreement arbitration. SGS further appealed to the Supreme Court of Pakistan on 5 March 2002. On 3 July 2002, the Supreme Court of Pakistan rendered its final decision allowing the respondent to proceed with the PSI Agreement arbitration and restraining the Claimant from pursuing or participating in the ICSID arbitration.<sup>75</sup> Nevertheless, SGS disregarded the anti-suit injunction by the Pakistani Supreme Court ordering it to desist from pursuing or participating in the case before ICSID. While the arbitration in Pakistan was underway, SGS pursued ICSID arbitration proceedings.

Shortly after the constitution of the Tribunal, the claimant submitted a request for provisional measures seeking, among other things, a stay of 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

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<sup>73</sup> Asian Arbitration "Briefing", above n 33, 1.

<sup>74</sup> Art 11 PSI Agreement.

<sup>75</sup> *Société Générale de Surveillance S.A. v. Pakistan* (2002), Judgment of the Supreme Court of Pakistan (Appellate Jurisdiction) on Civil Appeal Nos. 459 through Secretary Ministry of Finance, Revenue Division, para 78.



contractual claims resolved pursuant to the dispute settlement clause in their contract.<sup>76</sup> 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.<sup>77</sup>

### ***B The Tribunal's Jurisdiction over the Swiss Pakistan BIT Claims***

The Tribunal held that it had jurisdiction over claims about violation of the BIT provisions.<sup>78</sup> Referring to disputes between a contracting Party and an investor of the other Contracting Party Article 9, of the Swiss Pakistan BIT reads as follows:<sup>79</sup>

For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party (...) consultations will take place between the parties concerned. If (...) consultations do not result in a solution within twelve months (...) the dispute shall be submitted to the arbitration of the International Centre for Settlement of Investment Disputes.

It is significant that this dispute settlement clause neither refers to disputes based on claimed violations of the BIT, nor to disputes based on claimed violations of contract between the investor of one contracting party and the other contracting party. The Tribunal held that if Article 9 of the BIT "[r]elates to any dispute at all between an investor and a Contracting Party, it must comprehend disputes constituted by claimed violations of BIT provisions establishing substantive standards of treatment by one contracting party of investors of the other contracting party. Any other view would tend to erode significantly those substantive treaty standards of treatment".

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<sup>76</sup> Polasek Martina "Introductory Note" on *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) 18 ICSID Review: Foreign Investment Law Journal 290, 291-292.

<sup>77</sup> Polasek, above n 76, 291.

<sup>78</sup> Polasek, above n 76, 291.

<sup>79</sup> Art 9 of the Bilateral Investment Treaty between Switzerland and the Islamic Republic of Pakistan, July 11, 1995.



Article 9 of the BIT only arranges for recourse to a tribunal constituted under the ICSID Convention. No other option is given to the investor by the BIT in question. The Tribunal held that there was 'no fork-in-the road provision' in Article 9 of the BIT requiring an investor to stay with the forum it has opted for, whether in respect of BIT claims or of any other kind of claims.<sup>80</sup> At the same time, the Swiss Pakistan BIT did not require prior recourse to the municipal courts of the Contracting Party involved.

Even if the investor had had a choice in terms of the forum, in accordance with the *Vivendi v Argentina* award, the "fork in the road provision" would not have been activated by the fact that an investment contract had referred contractual disputes to domestic proceedings. It would therefore not have affected the jurisdiction of the Tribunal with respect to a claim based on the provisions of the BIT.

The PSI Agreement was concluded by the parties on 29 September 1994, whereas the Swiss Pakistan BIT was signed by the claimant and respondent on 11 July 1995. On this chronological order, the Tribunal concluded that "[i]t could not have been reasonably assumed that the parties to the PSI Agreement intended to vest in an arbitrator appointed under that Agreement and the Pakistan Arbitration Act, 1940, Section 20, authority to pass upon and decide claimed violations of the BIT which was then still hidden in the future".<sup>81</sup> The Tribunal therefore denied the possibility that access to ICSID could be refused in an investment contract concluded prior to a BIT. By this general statement it went further than necessary as the relevant provision in the PSI Agreement only referred to disputes "arising out of, or relating to this Agreement" and hence did not include claims based on a breach of the BIT.

On the contrary, Pakistan argued that the arbitrator in the domestic proceedings of claims on violations of the PSI Agreement would have had jurisdiction not only over such contract claims but also over the BIT claims. The Tribu-

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<sup>80</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 151.

<sup>81</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 153.



nal was not of the opinion that SGS's BIT claims against Pakistan were subject to the jurisdiction of the Islamabad arbitrator, if only because such claims were based not on the PSI Agreement, but rather alleged a cause of action under the BIT.<sup>82</sup> "[E]ven if BIT claims were somehow brought before the PSI Agreement arbitrator, and the arbitrator were to take cognizance of them, such filing [would] not divest the [ICSID] Tribunal of its jurisdiction to determine the claimant's BIT claims".<sup>83</sup>

In talking of "BIT claims" the Tribunal seemed to have thought of a situation where a BIT claim was brought before domestic proceedings while both investment agreement and BIT existed. It has to be reiterated that the Swiss Pakistan BIT did not include a provision giving the investor the choice between two forums for the settlement of a treaty claim. It was only scheduled for ICSID's dispute resolution.<sup>84</sup> As already discussed, the typical "fork in the road" provision could therefore not have been activated. The present Tribunal's finding is even more far reaching than the finding in the *Vivendi* Case as, in the absence of such a choice, BIT claims before a national court could apparently not have precluded ICSID's jurisdiction.

### C *The Tribunal's Jurisdiction over the Contractual Claims*

Having jurisdiction over SGS's BIT claims, the Tribunal denied its jurisdiction over claims under the PSI Agreement.<sup>85</sup> However, SGS had asserted the Tribunal's jurisdiction not only over the BIT claims of SGS, but also over SGS's claims that Pakistan had breached the PSI Agreement.

In this context, the Tribunal approached the problem that the PSI Agreement was concluded before the Swiss Pakistan BIT. "Does the prior contractual

<sup>82</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 154.

<sup>83</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 154.

<sup>84</sup> Art 9 of the Swiss Pakistan BIT.

<sup>85</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 162.



dispute settlement mechanism take priority over the BIT for some or all of the disputes between the parties, or does the BIT take priority over the PSI Agreement's mechanism for some or all of the disputes between the parties?"<sup>86</sup>

The Tribunal held that disputes arising from claims based on alleged violations of the PSI Agreement and of the BIT could both be described as 'disputes with respect to investments' as Article 9 of the BIT requires.<sup>87</sup> However, it went on to state that this characterization of disputes under the BIT "while descriptive of the factual subject matter of the disputes, does not relate to the legal basis of the claims, or the cause of action asserted in the claims".<sup>88</sup> Based on this opinion the Tribunal concluded that "both BIT claims and purely contractual claims" are not supposed to be covered by Article 9 of the Swiss Pakistan BIT.<sup>89</sup>

Accordingly, Article 9 of the BIT did not supersede or set at naught all otherwise valid non-ICSID forum selection clauses in earlier agreements between the Swiss investor and the respondent.<sup>90</sup> By this means, the Tribunal declined to decide the problem in general terms resulting out of the chronological order of the PSI Agreement and the Swiss Pakistan BIT. While the approach to the problem was general, the solution was specific.

However, the position of the Tribunal relating to purely contractual disputes was clear: "[I]t did not see anything in Article 9 or in any other provision of the BIT that could be read as vesting this Tribunal with jurisdiction over claims resting ex hypothesi exclusively on contract. (...) [A]rticle 11 of the PSI Agreement was a valid forum selection clause so far as concerned the claimant's contract claims which did not also amount to BIT claims"<sup>91</sup>

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<sup>86</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 159.

<sup>87</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 161.

<sup>88</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 161.

<sup>89</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 161.

<sup>90</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 161.

<sup>91</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 161.



The Tribunal realized that a contractual claim could also amount to a treaty claim. While it held that disputes arising from claims based on alleged violations of the PSI Agreement and the BIT could both be described as “disputes with respect to investments”, one could have expected a more detailed statement from the Tribunal as to why contractual claims did not fall within the scope of ICSID. The reasoning mainly based on the Tribunal’s “belief” in terms of a literal analysis of Article 9 BIT does not resolve all doubts. On the other hand, this finding makes clear that the Tribunal wanted to respect the dispute settlement provision in the PSI Agreement. It can be seen as a reduction of ICSID’s scope in comparison to the *Vivendi* Committee’s finding.

The Tribunal’s reference to BITs that ‘supersede and set at naught’ previously agreed forum selection clauses and its holding that the latter clauses are valid, so far as the claimant’s contractual claims do not amount at the same time to treaty claims, indicated that treaty claims may not validly be subjected to a forum or arbitration clause.<sup>92</sup>

At the end of its considerations on its jurisdiction over claims under the PSI Agreement, the Tribunal highlighted that parties can grant an ICSID Tribunal jurisdiction over contractual claims by agreement.<sup>93</sup> This emphasizes the importance the Tribunal gave individual dispute settlement agreements in the investment contracts - as far as purely contractual claims are concerned. It might also be seen as adhering to the general principle *pacta sunt servanda* since the special forum selection clause is regarded in this way.

#### *D Transformation of Contractual Claims into Treaty Claims by virtue of Article 11 Swiss Pakistan BIT (“Umbrella Clause”)?*

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<sup>92</sup> Spiermann Ole “Individual Rights, State Interests and the Power to Waive ICSID Jurisdiction under Bilateral Investment Treaties (2004) 20 *Arbitration International* 179, 188.

<sup>93</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 161.



Furthermore, the Tribunal found that it did not only have to refuse jurisdiction over claims under the parties' contract on the basis of Article 9 of the Swiss Pakistan BIT but also over claims based on the "umbrella clause" in the BIT.<sup>94</sup> Article 11 as the relevant provision of the Swiss Pakistan BIT says, that "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".

SGS contended that, through Article 11, SGS's claims grounded on alleged violation of the PSI Agreement had been transmuted or "elevated" into claims grounded on alleged breach of the BIT. The claimant acknowledged that this interpretation was 'far-reaching', but asserted that nevertheless this is what the article means.<sup>95</sup> However, the Tribunal did not accept this reading. It highlighted that it was the first time that a Tribunal had to examine the legal effects of an "umbrella clause".<sup>96</sup> Textually it did not appear to the Tribunal that Article 11 does set forth the consequences or inferences the Claimant had sought to spell out.<sup>97</sup> "[A]rticle 11 would have to be considerably more specifically worded before it can reasonably be read in the extraordinarily expansive manner submitted by the claimant".<sup>98</sup>

In this context, the Tribunal also considered the principle that, under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law.<sup>99</sup> According to the claimant's interpretation, "[a]ny alleged violation of [investment] contracts and other instruments would be treated as a breach of the BIT."<sup>100</sup> The

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<sup>94</sup> Polasek, above n 76, 291.

<sup>95</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 163.

<sup>96</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 164.

<sup>97</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 164.

<sup>98</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 171.

<sup>99</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 167.

<sup>100</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 168.



reading of the claimant was too far-reaching in scope, too automatic and unqualified.<sup>101</sup>

In the Tribunal's opinion, the claimant's interpretation of Article 11 tended to make other Articles of the Swiss Pakistan BIT substantially superfluous.<sup>102</sup> "[T]here would have been no real need to demonstrate a violation of those substantive treaty standards if a simple breach of contract, or of municipal statute or regulation, by itself, had sufficed to constitute a treaty violation on the part of a contracting party and engaged the international responsibility of the party".<sup>103</sup> A further consequence of the claimant's reading would have been the possibility that an investor could unilaterally and "at will nullify any freely negotiated dispute settlement clause in a State contract".<sup>104</sup> The Tribunal corroborated its persuasion as well with the location of Article 11 in the BIT. It was not placed together with the substantive obligations undertaken by the contracting parties.<sup>105</sup> "[G]iven the (...) structure and sequence of the rest of the Treaty, it considered that, had Switzerland and Pakistan intended Article 11 to embody a substantive 'first order' standard obligation, they would logically have placed Article 11 among the substantive 'first order' obligations set out in Articles 3 to 7 of the BIT".<sup>106</sup>

What the Tribunal wanted to stress in this case is that there is no clear and persuasive evidence that the claimant's reading was in fact both Switzerland's and Pakistan's intention in adopting Article 11 of the BIT. Remarkably, the Tribunal stated that it "is not saying that States may not agree with each other in a BIT that henceforth, all breaches of each State's contracts with investors of the other State are forthwith converted into and to be treated as breaches of the

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<sup>101</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 167.

<sup>102</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 168.

<sup>103</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 168.

<sup>104</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 168.

<sup>105</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 168.

<sup>106</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 170.



BIT".<sup>107</sup> It therefore accepted the possibility of an "umbrella clause" turning contractual into treaty breaches but refused Article 11 of the present BIT fulfilling these essential requirements.

This stipulates, generally speaking, the possibility that a purely contractual claim can amount, under an effective "umbrella clause", to a treaty claim. The approach is different to the *Vivendi* Case as, there, substantive provisions of the BIT would have had to be infringed for such an amount, whereas an "umbrella clause" following the present Tribunal would transform the claim by itself to a treaty claim.

Nevertheless, the Tribunal's adjudication in terms of the alleged present "umbrella clause" is consequent in terms of its interpretation of Article 9 BIT regarding contractual claims. The Tribunal had a high standard for the requirements of an effective "umbrella clause", as it says that it is in general possible to agree on such in the BIT, but that these requirements are not met in the present case. On the other side, the Tribunal did not point out which requirements have to be generally met for an effective umbrella clause, as it only says it is open to an agreement between the parties in a BIT. According to the present adjudication, a BIT should clearly stipulate the "elevation" effect from contractual to treaty claims.

In not addressing the claim in terms of the PSI Agreement, the Tribunal expressed its respect towards the contractual forum selections and underlined the parties' contractual freedom. However, in holding that only the specific requirements are not met for an effective "umbrella clause", the general relation between competing dispute settlement clauses in investment agreements and BIT was left open. As will be seen, the Tribunal dealt with this question in the following case.

## V *SGS v PHILIPPINES*

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<sup>107</sup> *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, above n 37, para 173.



### **A Introduction**

On 26 April 2002, ICSID received from SGS (claimant) a request for arbitration against the Republic of the Philippines (the Philippines / respondent). On 23 August 1991, SGS concluded an agreement with the Philippines regarding the provision of comprehensive import supervision services (CISS Agreement), under which SGS would provide specialized services to assist in improving the customs clearance and control processes of the Philippines. A dispute having arisen between the parties concerning alleged breaches of the CISS Agreement, SGS invoked in the request for arbitration the provisions of a bilateral agreement of 1997 between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments (Swiss Philippine BIT).

The Tribunal approached the question of its jurisdiction on the basis that in the request for ICSID arbitration, “SGS made credible allegations of non-payment of very large sums due under the CISS Agreement and claimed that the Philippines’ failure to pay these was a breach of the BIT”.<sup>108</sup>

### **B Jurisdiction under the “Umbrella Clause”: Article X(2) of the Swiss Philippines BIT**

The Tribunal in *SGS v Philippines* had to revert to similar questions as had arisen in *SGS v Pakistan*. As will be shown, it did not in all respects agree with the conclusions drawn by the latter Tribunal on issues of the interpretation of “arguably similar language” in the Swiss Philippines BIT.<sup>109</sup>

<sup>108</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (2004) (ICSID Case No. ARB/02/6) para 43.

<sup>109</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 97.



The Tribunal held that Article X (2) of the Swiss Philippines BIT “means what it says”.<sup>110</sup> It makes it 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. But it does not convert the issue of the extent or content of such obligations into an issue of international law”.<sup>111</sup>

Having made an investment in the territory of the Philippines, SGS contended that the respondent breached Article X (2) of the BIT, as services, made under the CISS Agreement, were not paid. This failure would grant jurisdiction to arbitration under the ICSID Convention.<sup>112</sup> In this context, Article X (2) of the Swiss Philippines BIT states that “each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party”.

The Philippines denied that Article X (2) BIT had the effect of turning a contractual breach into a treaty claim, relying *inter alia* on the decision of the *SGS v Pakistan* Tribunal on a similar BIT provision. In the opinion of the Tribunal, “[t]he actual text of Article X(2) would appear to say, and to say clearly, that each contracting party shall observe any legal obligation it has assumed, or will in the future assume, with regard to specific investments covered by the BIT”.<sup>113</sup> The object and purpose of the BIT supported an effective interpretation of this Article.<sup>114</sup> The Tribunal held:<sup>115</sup>

The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended ‘to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other’. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of cov-

<sup>110</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 119.

<sup>111</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 128.

<sup>112</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 113.

<sup>113</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 115.

<sup>114</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 116.

<sup>115</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, paras 116 – 117.



ered investments. (...) If commitments made by the State towards specific investments do involve binding obligations or commitments under the applicable law, it seems entirely consistent with the object and purpose of the BIT to hold that they are incorporated and brought within the framework of the BIT by Article X (2).

This conclusion is contrary to the interpretation of the "umbrella clause" of the Tribunal in *SGS v. Pakistan*. This is based on other circumstances to the latter case as well as a different interpretation of the clause of this Tribunal. "It should be noted that the 'umbrella clause' in the Swiss Pakistan BIT was formulated in different and rather vaguer terms than Article X (2) of the Swiss Philippines BIT".<sup>116</sup> Further on, the Tribunal in *SGS v Pakistan* relied on the principle that a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law. Contrary to this argument, the *SGS v Philippines* Tribunal found that this principle was applied inappropriately, as the circumstances were different:<sup>117</sup>

[This principle] was affirmed by the *ad hoc* Committee in the *Vivendi* case, cited by the [*SGS v Pakistan*] Tribunal. But the [French] Argentine BIT considered in the *Vivendi* case did not contain any equivalent to Article 11 of the Swiss-Pakistan BIT, and the *ad hoc* Committee therefore did not need to consider whether a clause in a treaty requiring a State to observe specific domestic commitments has effect in international law.

Having narrowed the scope of the "umbrella clause", the Tribunal did not have any concerns about opposing the interpretation found in *SGS v Pakistan*. The latter Tribunal was afraid of "a full-scale internationalisation of domestic contracts".<sup>118</sup> Relating to these concerns, the present Tribunal held:<sup>119</sup>

[Article X (2)] does not convert non-binding domestic blandishments into binding international obligations. It does not convert questions of contract law into questions of treaty law. In particular it does not change the proper law of the CISS Agreement from the law

<sup>116</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 119.

<sup>117</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 122.

<sup>118</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 126.

<sup>119</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 126.



of the Philippines to international law. Article X (2) addresses not the scope of the commitments entered into with regard to specific investments.

A more generous interpretation of the "umbrella clause" in *SGS v Pakistan* might have been refused, as the Tribunal did not want to adjudicate the contractual claims without a specific accreditation. By reference to this Tribunal's view, it has to be called into question whether the Tribunal can exercise jurisdiction over contractual disputes concerning an investment, by virtue of the dispute settlement clause in the Swiss Philippines BIT, irrespective of any breach of the substantive provisions of the BIT.

### *C The Tribunals Jurisdiction over Contractual Claims under Article VIII of the Swiss Philippines BIT*

Article VII of the Swiss Philippines BIT contains the relevant provision for the settlement of disputes between a contracting party and an investor of the other contracting party. It reads as follows:<sup>120</sup>

1. For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party (...) consultations will take place between the parties concerned.
2. If these consultations do not result in a solution within six months from the date of request for consultations, the investor may submit the dispute either to the national jurisdiction of the Contracting Party in whose territory the investment has been made or to international arbitration.

The Tribunal held, that "interpreting the text of Article VIII in its context and in the light of its object and purpose, the Tribunal accordingly concludes that in principle (and apart from the exclusive jurisdiction clause in the CISS Agreement) it was open to SGS to refer the present dispute, as a contractual dispute, to

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<sup>120</sup> Art VIII of the Bilateral agreement on the Promotion and Reciprocal Protection of Investments, March 31, 1997 (Swiss Philippines BIT).



ICSID arbitration under Article VIII (2) of the BIT".<sup>121</sup> But at the same time it wanted to give effect to the contractual forum selection as BIT provisions should not "unless clearly expressed to do so, override specific and exclusive dispute settlement arrangements made in the investment contract itself".<sup>122</sup>

Supporting its finding, the Tribunal mentioned earlier in the award, that it was "[c]lear from the general language of Article 25(1) ICSID Convention that ICSID jurisdiction could extend to disputes which were purely contractual in character. There was no distinction drawn in Article 25 (...) between purely contractual and other disputes (e.g. claims for breach of treaty)".<sup>123</sup>

The Tribunal regarded Article VIII to be "an entirely general provision, allowing for submission of all investment disputes by the investor against the host State."<sup>124</sup> 'Disputes with respect to investments' were not "limited by reference to the legal classification of the claim that is made."<sup>125</sup> A dispute arising from an investment contract such as the CISS Agreement was, in the opinion of the Tribunal, a dispute with respect to investments.<sup>126</sup>

It was crucial that each of the forums named in Article VIII (2) BIT were competent to apply the law of the host State, including its law of contract.<sup>127</sup> If the parties to the BIT had intended to limit investor-State arbitration to claims concerning breaches of the substantive BIT standards, "they would have said so expressly, using this or similar language".<sup>128</sup> Allowing the investor a choice of

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<sup>121</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 135.

<sup>122</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 134.

<sup>123</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 29.

<sup>124</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 131.

<sup>125</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 131.

<sup>126</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 131.

<sup>127</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 132.

<sup>128</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 132.



forum is consistent with the goals of the BIT.<sup>129</sup> This interpretation is required to avoid “overlapping proceedings and jurisdictional uncertainty”.<sup>130</sup> It may be necessary to draw distinctions in terms of the forum selection in some cases, “but it should be avoided to the extent possible, in the interests of the efficient resolution of investment disputes by the single chosen forum”<sup>131</sup>.

Therewith, the Tribunal took a different view of the matter than the Tribunal in *SGS v Pakistan* which refused jurisdiction over contractual claims under the Swiss Pakistan BIT while both the relevant provisions in the BITs referred to “disputes with respect to investments”. Nevertheless, the present Tribunal emphasised that it agreed with the concern in *SGS v Pakistan* that the general provisions of BITs should not, as mentioned above, override specific and exclusive dispute settlement arrangements made in the investment contract itself, unless clearly expressed to do so.<sup>132</sup> It thought that it was hard to believe that an investor could bring a contractual claim to ICSID in breaching the investment contract at the same time.<sup>133</sup> In terms of its finding, the Tribunal explained that there are two different questions: the interpretation of the general phrase “disputes with respect to investments” in BITs, and the impact on the jurisdiction of BIT tribunals over contract claims.<sup>134</sup> This concluding remark raises the question whether it is possible for an ICSID tribunal to give effect to a contract between the investor and the host-State “while respecting the general language of BIT dispute settlement provisions”.<sup>135</sup>

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<sup>129</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 132.

<sup>130</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 132.

<sup>131</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 132.

<sup>132</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 134.

<sup>133</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 134.

<sup>134</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 134.

<sup>135</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 134.



*D Contractual Claims under the Dispute Settlement Clause of the CISS Agreement*

The Tribunal found that the BIT did not override the exclusive jurisdiction clause in the CISS Agreement, or give SGS an alternative route for the resolution of contractual claims, which it was bound to submit to the Philippine courts under that agreement.<sup>136</sup> It could not “accept that standard BIT jurisdiction clauses automatically override the binding selection of a forum by the parties to determine their contractual claims”.<sup>137</sup> The CISS Agreement contains with Article 12 the relevant dispute settlement clause:

“The provisions of this Agreement shall be governed in all respects by and construed in accordance with the laws of the Philippines. All actions concerning disputes in connection with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila.”

The Agreement was concluded on 23 August 1991. Its duration was extended from 1995 to 1998, then until end of 1999 and, finally, from 31 December 1999 to 31 March 2000. The Swiss Philippines BIT on the other side was concluded on 31 March 1997.

The Tribunal held “[p]rima facie Article 12 CISS Agreement is a binding obligation, incumbent on both parties, to resort exclusively to one of the named Regional Trial Courts in order to resolve any dispute ‘in connection with the obligations of either party to this Agreement’”.<sup>138</sup> The Article did not constitute mere acknowledgement of a jurisdiction already existing by virtue of the non-derogable law.<sup>139</sup> It was evident that the substance of SGS’s claim fell within the

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<sup>136</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, above n 108, para 143.

<sup>137</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 153.

<sup>138</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 137.

<sup>139</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 137.



scope of Article 12 as being a claim of payment for services supplied under the CISS Agreement.<sup>140</sup>

Moreover, Article VIII is a "general provision, applicable to investment arrangements whether concluded prior to or after the entry into force of the Agreement".<sup>141</sup> In this context, the Tribunal referred to the maxim *generalia specialibus non derogant*. The BIT between Switzerland and the Philippines itself was not concluded with any specific investment or contract in view.<sup>142</sup> "It is not to be presumed that such a general provision has the effect of overriding specific provisions of particular contracts, freely negotiated between the parties".<sup>143</sup> It referred to Schreuer that "[a] document containing 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."<sup>144</sup>

A further consideration on which the Tribunal based its finding derived from the character of a BIT. "[A]s a framework treaty, a BIT is intended by the States Parties to support and supplement and not to override or replace the actually negotiated investment arrangements made between the investor and the host State".<sup>145</sup>

As the Swiss Philippines BIT was concluded after the CISS Agreement, it had to be discussed, by application of the maxim *lex posterior derogat legi priori*, while BIT provisions for investor-State arbitration do not override exclusive jurisdiction clauses in later investment contracts, if they had this effect for earlier contracts.<sup>146</sup> The Tribunal found that:<sup>147</sup>

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<sup>140</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 137.

<sup>141</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 141.

<sup>142</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 141.

<sup>143</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 141.

<sup>144</sup> Schreuer, above n 7, art 26 para 34.

<sup>145</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 141.

<sup>146</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 142.



The decisive point is that the *lex posterior* principle only applies as between instruments of the same legal character. By contrast what we have here is a bilateral treaty, which provides the public international law framework for investments between the two States, and a specific contract governed by national law.

Contrary to the Tribunal's finding, Professor Crivellaro, a member of the present Tribunal, was of the opinion that the dispute settlement clause in the BIT, postdating the CISS Agreement, was intended to override an exclusive jurisdiction clause in the investment contract, so far as contractual claims are concerned.<sup>148</sup>

Crivellaro claimed that the BIT had "created a completely new law and has conferred on SGS new or additional rights of forum selection".<sup>149</sup> In his understanding, Article VIII (2) of the BIT intends to offer the investor the unconditioned right to submit the dispute 'either to the national jurisdiction (...) or to international arbitration'.<sup>150</sup> Emphasizing the words 'either ... or ...' he is of the opinion that it was the host-State's intention to offer an additional forum option, left to the investor's choice<sup>151</sup>. He asserts, the practical significance of the BIT being able to choose a preferential forum amongst those offered by the host-State would "seriously diminish if such particular privilege, which is the most attractive to foreign investors, is put into doubt or denied"<sup>152</sup>.

He expressed his doubts whether the maxims *generalia specialibus non derogant* and *lex posterior derogat legi priori* could be extended to the comparison between a treaty and a contract.<sup>153</sup> Crivellaro contended Article VIII(2) of the Swiss Philippines BIT grants the investor more favourable treatment in re-

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<sup>147</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 142.

<sup>148</sup> Crivellaro Antonio "Declaration" referring to *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6), January 29, 2004.

<sup>149</sup> Crivellaro, above n 148, para 2.

<sup>150</sup> Crivellaro, above n 148, para 3.

<sup>151</sup> Crivellaro, above n 148, para 3.

<sup>152</sup> Crivellaro, above n 148, para 6.

<sup>153</sup> Crivellaro, above n 148, para 9.



spect of the CISS Agreement in matter of dispute settlement.<sup>154</sup> In this context he asserted:<sup>155</sup>

If a rule of interpretation is needed, this should be found in another principle of law: when a provision which is intended to confer an advantage to a certain party, here Article VIII (2), may have two meanings, one should retain the meaning which is less restrictive or more favourable to the beneficiary. The grantor and, respectively, the beneficiary of the more favourable treatment are still the same parties who agreed on Article 12 of the CISS Agreement, the Philippines and SGS. As between these two parties, the rule giving prevalence to the most favourable treatment certainly applies. It is in this principle that one should find the rule of interpretation which best harmonizes with the BIT essential purposes.

In this author's opinion the Tribunal's finding is correct. The dispute settlement clause in the BIT, postdating the CISS Agreement, does not override the exclusive jurisdiction clause in the investment contract, so far as contractual claims are concerned.

Some of Crivellaro objections are certainly arguable but do not necessarily confute the Tribunal's argument. The basic principles he referred to in terms of the most favourable treatment are generally applicable. However, the present author does not believe that this principle fits to the drawn comparison, as an investment contract and BIT are two completely different sources and hardly comparable. Further, it is arguable if his interpretation harmonized best with BIT essential purposes, which lie in the protection of investment – a purpose that cannot unilaterally be seen in the protection of the investor's interests.

Crivellaro also stated that the Tribunal's finding diminished the practical significance of the BIT. This argument is not convincing as the practical significance of the BIT was the topic of the present case. Hence, his conclusion was based on an *inter se* argument. The objection was only appropriate in terms of contractual claims since it was beyond controversy that the BIT claim was not affected by the CISS Agreement.

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<sup>154</sup> Crivellaro, above n 148, para 10.

<sup>155</sup> Crivellaro, above n 148, para 10.



However, the Tribunal's approach is not always free from contradiction either. It is not convincing to derive its decision from the character of a BIT as a treaty framework which cannot override or replace the investment arrangements negotiated between the investor and the host State. This ignores the fact that the BIT contains a specific dispute resolution provision. In another context, the Swiss Philippines BIT provisions are given "substantive" effect. Therefore, the BIT is not merely a framework.

To the contrary, the *posterior derogat legi priori* argument is convincing. From a lay man's point of view only things of the same kind are comparable. The Tribunal also raised the question of what would happen if the BIT or the contract were renewed. From this point of view, it could no longer be said which one would be the prior and which one the latter. This indicates that the *maxim lex posterior* does not necessarily fit the comparison of a BIT and an investment contract. "A distinction between earlier and later exclusive jurisdiction clauses in contracts cannot therefore be accepted—unless expressly provided for, which is not the case with the BIT which the Tribunal has to interpret".<sup>156</sup>

In addition, the present author is of the opinion that it would be contradictory if the BIT provision overrode the one in the CISS Agreement. First, it would deprive the contractual provision of relevance. Second, it would be inconsistent with the general principle *venire contra factum proprium*. Based on the claimant's argument, the investor could on the one side agree a special dispute settlement clause with the host-State and ignore the same one later relying on the different BIT dispute settlement clause.

Finally, the present author holds the opinion that it would be in contradiction to Article 25 ICSID Convention if a BIT provision overrode a special contractual dispute settlement agreement in terms of contractual breaches. As already discussed above, Article 25 ICSID Convention requires a dispute arising "directly" out of an investment. "This means that, no matter what the parties

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<sup>156</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 142.



have agreed, the dispute must not only be connected to an investment but must also be reasonably closely connected".<sup>157</sup> This requirement is one of the objective criteria and therefore not at the disposition of the parties.<sup>158</sup> If the BIT provision overrode the contractual one, the first one would be the only effective dispute settlement clause. As the Tribunal stated that contractual claims are disputes "with respect to an investment"<sup>159</sup> ICSID's jurisdiction would be all-embracing as there would be no other effective dispute settlement clause. Such a result would be incompatible with the non-dispositional objective criteria that a dispute has to arise "directly" out of an investment.

*E Is Article 12 CISS Agreement Overridden by the ICSID Convention?*

SGS argued that, when the present proceedings were commenced in 2002, consent was thereby given by the parties to ICSID jurisdiction "to the exclusion of any other remedy", including that provided for in the CISS Agreement.<sup>160</sup> This raises the question whether Article 26 ICSID Convention has to be interpreted differently.

The Tribunal held that "Article 12 of the CISS Agreement and the later agreement to ICSID Arbitration constituted by the terms of Article VIII of the BIT in association with the request for arbitration" are of the same character between the parties.<sup>161</sup> In respect of the above discussion it tended to say that SGS's objection had not already been precluded by principle considerations.

However, the Tribunal did not share SGS's point of view. The *travaux préparatoires* of Article 26 ICSID Convention stipulated that the Article was intended "as a rule of interpretation, not a mandatory rule"<sup>162</sup>. The view that Arti-

<sup>157</sup> Schreuer, above n 7, art 25 para 67.

<sup>158</sup> Schreuer, above n 7, art 25 para 67.

<sup>159</sup> As required by art VIII of the Swiss Philippines BIT.

<sup>160</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, paras 144 – 145.

<sup>161</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 145.

<sup>162</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 146.



cle 26 provided a mandatory overriding of the previously agreed dispute settlement clauses would lead to contradictory results as well: “[A] party to a contract containing an exclusive jurisdiction clause would obtain an override if it opted for ICSID arbitration by virtue of Article 26, but not if it opted for UNCITRAL arbitration since the UNCITRAL Rules contain no equivalent provision”.<sup>163</sup> Therefore the Tribunal correctly dismissed the respondent’s objections. A new approach to Article 26 ICSID Convention’s reading was not established.

*F Effect Given to Exclusive Jurisdiction Clauses in Arbitral Practice – Distinction between Jurisdiction and Admissibility*

With regard to the *Vivendi* case the Tribunal found that it was “doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law”.<sup>164</sup> It clearly distinguished the admissibility of a claim and ICSID’s jurisdiction. Having jurisdiction granted by the BIT the question was “whether a party should be allowed to rely on a contract as the basis of its claim when the contract itself refers that claim exclusively to another forum” and not to ICSID.<sup>165</sup> The conclusion reached by the Tribunal was that it could not, save in exceptional circumstances.<sup>166</sup>

Referring to the above considerations, the Tribunal held that its jurisdiction in the current case was defined by reference to the BIT and the ICSID Convention.<sup>167</sup> But it “should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and

<sup>163</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 148.

<sup>164</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 154.

<sup>165</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 154.

<sup>166</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 154.

<sup>167</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 155.



have done so exclusively".<sup>168</sup> As the dispute raised no questions of breach of the BIT independently of a breach of a contract, which was different in the *Vivendi* case, the Tribunal stayed the proceedings.

### *G Remarks on the Present Adjudication*

Both *SGS v Pakistan* and *SGS v Philippines* arrived at the same result – although by different reasoning. Both gave effect to the contractual dispute settlement clause in terms of purely contractual claims. However, the result in *SGS v Philippines* is surprising. While in the case against Pakistan, the Tribunal refused to give effect to the “umbrella clause” and to claim jurisdiction over purely contractual claims, the present Tribunal held that ICSID had jurisdiction and that the “umbrella clause” was effective. Having made this effort, it appeared surprising, but not necessarily inconsistent, that both Tribunals came to the same result in not addressing the contractual claim and respecting the dispute settlement clause in the investment contract. However, the present finding is outstandingly valuable as it finally cleared controversial positions in general terms as it “outshines previous decisions in clarity and consistency”.<sup>169</sup> It created a clear system of dispute settlement but gave the parties the autonomy to depart from these axioms by special agreement either in the investment contract or in the BIT itself.

Contractual claims do not, by virtue of an “umbrella clause” automatically amount to treaty breaches. Issues of the extent or content of contractual obligations are not converted by such a clause. The mere function of an “umbrella clause” was to make it 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.

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<sup>168</sup> *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, above n 108, para 155.

<sup>169</sup> Spiermann, above n 92, 189.



## VI CONCLUSION

The *Vivendi* Tribunal exceeded the scope of investment arbitration in relation to dispute settlement through domestic proceedings. This scope was limited again through the findings of the *SGS v Pakistan* and *SGS v Philippines* awards – albeit the circumstances were slightly different. The latter awards clearly defined and strengthened the role of domestic courts and show a development in terms of the interpretation of an “umbrella clause”. Specifically the *SGS v Philippines* award will be important for further arbitration proceedings of this kind as it is clear in its language and straightforward in its reasoning. The relationship of contractual and non-contractual ICSID arbitration has been thereby significantly clarified. This made the solution of problems in this specific area for the parties more predictable and also the individually agreed forum selection clause in investment contracts has kept its relevance.

After the analysis of these awards the question remains why this area is so bitterly disputed, that is, why an investor tends to settle an investment dispute preferably through ICSID than domestic proceedings? It is not just a question of forum shopping. Besides some practical advantages of international arbitration, investment arbitration under ICSID has one big advantage, that “no Contracting State shall give diplomatic protection”.<sup>170</sup> Shany writes that through this rule “the Convention bars inter-state adjudication over disputes that parties have agreed to submit to ICSID, and regards the right of claim of the individual as exhaustive”.<sup>171</sup> The purpose was to ‘remove disputes from the realm of diplomacy and bring them back to the realm of law’.<sup>172</sup> As a consequence, the dispute settlement process is depoliticized and the investor obtains a direct access to an international remedy.<sup>173</sup>

However, clear rules are required in order to avoid competing jurisdiction of international and domestic bodies. As shown, the Tribunals created a system

<sup>170</sup> Art 27 ICSID Convention.

<sup>171</sup> Shany Yuval *The Competing Jurisdiction of International Courts and Tribunals* (Oxford University Press, New York, 2003) 194.

<sup>172</sup> Shany, above n 171, 194 footnote 48.

<sup>173</sup> Schreuer, above n 7, art 27 para 4.



how to deal with such problems. Nevertheless, the present author is of the opinion that these rules are not beyond doubt. This paper therefore suggest that a more uniform approach supports a certain harmonization, constancy and clearer solution within the overlap of contractual and BIT dispute settlement. There are three different possible starting points in order to achieve such harmonization: first the creation of a generally binding multilateral investment treaty, second the reformation of ICSID into a system comparable to a court system where a constant tribunal exists and third, harmonization through a clearer and more consistent adjudication. Whereas the first two approaches are not basically new in approach and have already been discussed in literature<sup>174</sup>, the third approach aims to modify the present Tribunals' findings by making alternative suggestions.

Though this paper agrees with the outcome of the *SGS v Philippines* award for the discussed reasons, attaching more importance to the "umbrella clause" and less to the agreed forum selection in the investment contract would enlarge the scope of ICSID, even if it signified a limitation of the parties' contractual freedom. This would grant the investor a broader access to an international dispute settlement remedy and ensure a clearer approach to the solution of the problem.

Another starting point would be to modify the *Vivendi* Tribunal's finding in terms of the "basis of the claim" rule. As criticised, the Tribunal did not mention why it held that the basis was a treaty one. Approving this rule in general terms to avoid competing jurisdiction and therefore ensuring a clearer approach, this paper suggests relying on the definition of the term "investment" in the BIT to assess whether the basis is a BIT or an investment contract. If the basis of the claim is covered by an "investment", as stipulated in the BIT, the subject matter shall be a BIT one, that is, ICSID would have jurisdiction and vice versa. Such an interpretation would make the application of the rule more distinct and more predictable.

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<sup>174</sup> Compare Sornarajah M *The Settlement of Foreign Investment Disputes* (Kluwer Law International, The Hague, 2000) 163; Williams David "International Commercial Arbitration and Globalization – Review and Recourse against Awards Rendered under Investment Treaties" (2003) *The Journal of World Investment* 251, 273.







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