

**INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES**

Washington D.C.

Case N° ARB/02/6

**SGS Société Générale de Surveillance S.A.**

**(Claimant)**

**versus**

**Republic of the Philippines**

**(Respondent)**

**DECISION OF THE TRIBUNAL ON OBJECTIONS TO JURISDICTION**

**Members of the Tribunal**

Dr. Ahmed S. El-Kosheri, President

Professor James Crawford, Arbitrator

Professor Antonio Crivellaro, Arbitrator

**Secretary of the Tribunal**

Ms. Martina Polasek

**Representing the Claimant**

Messrs. Jean-Pierre Méan and  
Andrea Rusca, SGS Société Générale  
de Surveillance S.A.

Messrs. Emmanuel Gaillard and  
John Savage, Shearman & Sterling

**Representing the Respondent**

Ms. Judith Gill and  
Mr. Matthew Gearing  
Allen & Overy

Professor Christopher Greenwood, QC

Undersecretary Mr. Manuel A. J. Teehankee  
Department of Justice, Philippines

Assistant Secretary Mr. Emmanuel P. Bonoan  
Department of Finance, Philippines

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## I. PROCEDURAL BACKGROUND

1. On 26 April 2002, the International Centre for Settlement of Investment Disputes (ICSID) received from SGS Société Générale de Surveillance S.A. (SGS) a request for arbitration dated 24 April 2002 against the Republic of the Philippines (hereafter the Philippines or the Respondent, as the context requires). SGS is a large Swiss corporation providing verification, testing, monitoring and certification services in respect of various products, to the private sector as well as to governments and international institutions. On 23 August 1991, SGS concluded an agreement with the Philippines regarding the provision of comprehensive import supervision services (the 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 (the BIT).<sup>1</sup>

2. The request for arbitration was registered on 6 June 2002 by the Secretary-General of ICSID, in accordance with Article 36(3) of the ICSID Convention. On the same date, the Secretary-General notified the parties of the registration and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

3. On 24 June 2002, the parties agreed that the Tribunal should consist of three arbitrators, one appointed by the Claimant and the second appointed by the Respondent within 30 days thereafter. They further agreed that the third arbitrator, the President of the Tribunal, be appointed by agreement between the parties, or in the absence of such an agreement within 30 days of the appointment of the second arbitrator, by the Secretary-General of ICSID.

4. On the same date, 24 June 2002, the Claimant appointed Professor Antonio Crivellaro, a national of Italy, as arbitrator. Professor Crivellaro accepted his appointment on 27 June 2002. On

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<sup>1</sup> Swiss Confederation-Republic of the Philippines, Agreement on the Promotion and Reciprocal Protection of Investments, 31 March 1997 (in force, 23 April 1999).

18 July 2002, the Respondent appointed Professor James Crawford, a national of Australia, as arbitrator. Professor Crawford accepted his appointment on 23 July 2002.

5. On 5 September 2002, the parties informed the Centre that they were unable to reach an agreement on the appointment of the President of the Tribunal. It therefore fell to the Secretary-General of ICSID to proceed with the appointment of the President. Having consulted with the parties regarding the appointment, on 16 September 2002 the Secretary-General appointed Dr. Ahmed S. El-Kosheri, a national of Egypt, as President of the Tribunal. On 18 September 2002, the Acting Secretary-General informed the parties that Dr. El-Kosheri had accepted his appointment and that, as a result, in accordance with Rule 6(1) of the Arbitration Rules of the Centre, the Tribunal was deemed to have been constituted and the proceedings to have begun on that day. The parties were further informed that Ms. Martina Polasek, counsel, would serve as Secretary of the Tribunal.

6. On 5 November 2002, the Respondent filed an Initial Submission on Jurisdiction, raising objections to the jurisdiction of the Tribunal.

7. The first session of the Tribunal with the parties was held on 13 November 2002 at the World Bank offices in Paris. At the session the parties expressed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the ICSID Convention and the Arbitration Rules. The parties also agreed on a number of procedural matters reflected in written minutes signed by the President and Secretary of the Tribunal.

8. The Respondent confirmed at the first session that it objected to the jurisdiction of the Tribunal and that it regarded its initial submission of 5 November 2002 as the Respondent's Memorial on Jurisdiction. Considering the Respondent's objections, the President announced the Tribunal's decision to suspend the proceeding on the merits pursuant to Rule 41(3) of the Arbitration Rules and to deal with the objections as preliminary questions. In this regard, the parties agreed on the following procedural calendar for the written phase of the proceedings on jurisdiction: the Claimant would file a Counter-Memorial by 31 January 2003; the Respondent would file a Reply by 14 March 2003 and the Claimant would file a Rejoinder by 25 April 2003. It was also agreed that an oral hearing on jurisdiction would be held in Paris on 26-27 May 2003.

9. The Counter-Memorial and Reply having been filed within the agreed time limits, the Claimant, upon request granted by the Tribunal, filed its Rejoinder on 6 May 2003. The hearing was held as scheduled on 26-27 May 2003, during which Messrs Gaillard and Savage addressed the Tribunal on behalf of the Claimant and Ms. Judith Gill, Mr. Mathew Gearing and Professor Christopher Greenwood QC addressed the Tribunal on behalf of the Respondent. A sound recording and a verbatim transcript were made of the hearing and deposited in the archives of the Centre.

10. By letter of 8 August 2003, SGS's Counsel forwarded to the Tribunal a copy of the Decision rendered by another ICSID Tribunal in the sister case between SGS and Pakistan. That decision has since been published.<sup>2</sup> Taking into account suggestions made by counsel for both parties in correspondence exchanged on 11-12 August 2003, the Tribunal allowed the parties simultaneously to file their comments on *SGS v. Pakistan* by 8 September 2003. Both parties duly did so.

11. The Tribunal did not consider it necessary to hold a further oral hearing on the question of the implications for the present case of the decision of the Tribunal in *SGS v. Pakistan*. It has carefully considered the parties' written and oral submissions, as well as their post-hearing comments. It reaches the following decision on the question of its jurisdiction.

## II. FACTUAL INTRODUCTION

12. SGS is part of a large group providing, *inter alia*, certification services based on pre-shipment inspections carried out on behalf of the governmental authorities of the importing country in the country of export. Pre-shipment inspection not only covers quality, quantity and export market price, but also seeks to verify compliance with import regulations, the declared value of goods and their classification for customs purposes. In addition SGS provides assistance in the modernization of customs and tax infrastructures in the country of import.

13. In the 1980s, the Philippines decided to appoint an inspector in its countries of supply to provide a comprehensive import supervision service (CISS), including verification of the quality,

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<sup>2</sup> *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ARB 01/13), decision of 6 August 2003, (2003) 18 *ICSID Review-FILJ* 307 (hereafter *SGS v. Pakistan*).

quantity and price of imported goods prior to shipment to the Philippines. The Philippines entered into two successive CISS contracts with SGS in 1986 before putting the subsequent contract out to tender. A number of companies were short-listed in a bidding process conducted on 6 November 1990, which led to a new agreement entered into with SGS on 23 August 1991 (the CISS Agreement) for an initial period of three years. Conclusion of the CISS Agreement was approved by the President of the Philippines.

14. Before the end of the three year period, the parties agreed on the extension of the CISS Agreement, with certain modifications, for a further three year term (the First Addendum). Subsequently, they agreed to introduce further amendments and to extend the duration of the CISS Agreement from 15 March 1998 to 31 December 1999 (the Second Addendum). By a document dated 22 December 1999, the Philippines asked SGS and the latter agreed to extend the provision of services under the CISS Agreement as amended. This further extension lasted from 31 December 1999 to 31 March 2000, at which point SGS's services under the CISS Agreement were discontinued. In the early years there was some opposition to the CISS system, but this seems to have dissipated by the time of the First and Second Addendums. In any event the Tribunal has no evidence that the discontinuance in 2000 was due to any overall dissatisfaction on the part of the Philippines Bureau of Customs (BOC) with the service provided by SGS. It seems that it was primarily motivated by changes to customs arrangements associated with the implementation of the GATT-WTO Valuation System, in accordance with which customs duty would be chargeable on transaction values rather than assessed values, reducing the need for physical inspection of imports.<sup>3</sup>

15. SGS submitted to the Philippines certain monetary claims which were subject to various attempts for amicable settlement. In substance its claim was for monies unpaid under the amended CISS Agreement, amounting to CHF202,413,047.36 (approximately US\$140m), in addition to which SGS sought interest on the amount unpaid.

16. In commencing the present proceedings SGS alleged that, in refusing to pay the amount claimed (most of which was conceded by the BOC to be payable), the Philippines is in breach of Articles IV(1), IV(2), VI(1) and X(2) of the BIT. SGS bases its Request for Arbitration on Article

25(1) of the ICSID Convention, considering that (a) there is a dispute of legal nature; (b) arising directly out of an Investment; (c) between a contracting State and a National of another Contracting State; and (d) the parties have consented in writing to ICSID Arbitration.

17. The Philippines objected to the jurisdiction of the Tribunal pursuant to Rule 41(2) of the ICSID Rules on the basis that it had not consented to submit the dispute to ICSID arbitration as required by Article 25 of the ICSID Convention. In particular it argues that there was no investment in the Philippines as required by the BIT, that the dispute is purely contractual in character, and that the issues in dispute are governed by a subsisting dispute resolution provision in the CISS Agreement requiring submission of all contractual disputes to the courts of the Philippines.

18. Before dealing with these and related issues, it is necessary to set out relevant provisions of the CISS Agreement and the BIT, and to say something more about the evolution of the dispute.

### III. THE RELEVANT CONTRACTUAL PROVISIONS

19. According to Article 1 of the CISS Agreement of 23 August 1991, SGS accepted to carry out, on an exclusive basis, pre-shipment inspection in any country of export to the Philippines. Inspections would cover quality, quantity and price comparisons. Article 5 required SGS to maintain a liaison office in the Philippines. Under Article 16, SGS also agreed to provide the Philippines with the assistance set out in Schedule II. This assistance was to be provided free of cost; on the other hand it was stated to be a “special condition” which “shall govern the other services to be conducted by SGS”. The assistance to be provided included:

- training courses to be conducted by SGS for various Philippines agencies, in particular the BOC;
- the provision to the BOC of customs equipment and the maintenance of that equipment;
- the provision of customs consultants to carry out feasibility studies and evaluation of the BOC’s computerisation needs;

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<sup>3</sup> See the letter of the Secretary, Department of Finance, 22 December 1999, signed by the CEO of SGS in the Philippines, agreeing to a 3 month extension of service “in a manner that will maximize assistance to the Bureau of Customs in implementing the GATT-WTO Valuation System”.

- the provision of a customs specialist to investigate the practicability of an “open” bonded warehouse system for the BOC;
- the provision of a customs intelligence/investigative consultant for a stipulated period to conduct an in-depth review of the coordination between various Philippines intelligence units, the provision of computer hardware and software to support the coordination process, and thereafter to provide technical support; and
- setting up a BOC library, stocked with the most comprehensive trade publications from the twenty leading exporting countries to the Philippines, as well as other price data and basic customs texts on administration and procedure.

20. In exchange for the performance of SGS’s obligations, according to Article 6 and Schedule I the Philippines agreed to pay SGS, in Swiss francs, a fee amounting to 0.6% of the FOB value declared on the exporter’s final settlement invoice covering each shipment inspected. A minimum of USD225 (convertible into Swiss francs at the prevailing exchange rate) per shipment or part shipment would be applicable where the rate of 0.6% would produce a smaller amount. For inspections of shipments invoiced at less than USD2,500 the minimum fee was USD150.

21. Under Articles 7 and 10.1.4, the Philippines had to maintain a letter of credit in the amount of CHF 7,500,000 against which SGS could present for payment invoices for fees due under the CISS Agreement.

22. Article 12 of the CISS Agreement provided that:

“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.”

Thus contractual disputes were required to be submitted to specified courts in the Philippines to be decided in accordance with Philippines law.

23. Under the terms of the First Addendum, executed on 14 December 1994, in consideration of the extension of the CISS Agreement for a period of three years from 15 March 1995, SGS agreed to carry out the “Exit Program” as set out in Schedule A of the Addendum. The Exit Program consisted of a number of “projects” to be undertaken jointly by the BOC and SGS in



addition to the regular pre-shipment inspection programme. The objectives of these projects were stated to be:

- (i) to set in place on or before 16 March 1998 or at the end of the CISS Agreement between the Philippines and SGS the various systems that would enable the Philippines to value imported goods, identify high risk shipments that would be subjected to careful verification, conduct examinations on such shipments following the same procedure and level of scrutiny as SGS, and maintain a data bank of various files/control tables needed for the proper determination of dutiable values;
- (ii) to identify leakages in customs revenue generation and set in place systems to plug such leaks, manage and monitor their occurrence; and
- (iii) to extend to BOC information on the latest available hardware, systems and technology utilised by other customs and port administrations in facilitating trade and preventing smuggling and other frauds on customs.

24. The Second Addendum to the CISS Agreement, executed on 29 January 1998, extended the duration of the CISS Agreement to the end of 1999; it also made certain changes to the terms of the CISS Agreement intended to enhance the efficiency of pre-shipment inspection operations and to provide relevant electronic infrastructure.

25. The provisions of Article 12 of the CISS Agreement concerning governing law and the settlement of disputes continued to apply to the Agreement as amended by the First and Second Addenda, as well as to the further extension of the Agreement to 31 March 2000.

#### IV. THE RELEVANT TREATY PROVISIONS

26. The Tribunal's jurisdiction, if it exists, must arise by virtue of the ICSID Convention associated with the BIT. It was not disputed by the parties that at the jurisdictional stage the Tribunal may deal with all issues of law that are necessary in order to determine its jurisdiction. It is not enough that the Claimant raises an issue under one or more provisions of the BIT which the Respondent disputes. To adapt the words of the International Court in the *Oil Platforms* case, the Tribunal "must ascertain whether the violations of the [BIT] pleaded by [SGS] do or do not fall

within the provisions of the Treaty and whether, as a consequence, the dispute is one which the [Tribunal] has jurisdiction *ratione materiae* to entertain” pursuant to Article VIII(2) of the BIT.<sup>4</sup>

27. With regard to the ICSID Convention, the relevant provisions are Article 25(1) and 26.

28. Article 25(1) sets out the criteria to be met in order for ICSID to have jurisdiction over a dispute. It provides 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.”

This has to be read in conjunction with Article 42(1) of the Convention, which provides that:

“The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”

29. It is clear from the general language of Article 25(1) that ICSID jurisdiction may extend to disputes which are purely contractual in character.<sup>5</sup> For example a dispute arising out of an investment contract between a State or constituent subdivision or agency could be covered,<sup>6</sup> and this could be the case even though the dispute exclusively concerns issues arising under the proper law of the contract. There is no distinction drawn in Article 25, or in Article 42(1), between purely contractual and other disputes (e.g. claims for breach of treaty).

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<sup>4</sup> *Case concerning Oil Platforms. Islamic Republic of Iran v. United States of America*, ICJ Reports 1996 p. 803 at 810 (para. 16). In that case the Court denied jurisdiction under two articles of the Treaty of Amity and upheld it under another article. See also *Case concerning Legality of Use of Force (Yugoslavia v. Belgium)*, ICJ Reports 1999 p. 124 at 137 (para. 38).

<sup>5</sup> This is accepted as axiomatic in the literature. See, e.g., C Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) 127-34.

<sup>6</sup> In the case of a contractual dispute between an investor and a constituent subdivision or agency of a contracting State, there are two further conditions for jurisdiction: first, the constituent subdivision or agency must have been designated to the Centre by the State (Article 25(1)); secondly, the approval of that State must have been given or waived (Article 25(3)). By contrast, where a claim is made against a Contracting State for breach of a treaty, normal international law principles of attribution apply and the provisions of Article 25(1) concerning designation of constituent subdivisions or agencies are irrelevant: see *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic (ARB/97/3)*, (2002) 6 ICSID Reports 340, 360 (para. 75), agreeing in this respect with the conclusions of the Tribunal in that case: (2000) 5 ICSID Reports 296, 313-15 (paras. 49-52).

30. In accordance with Article 25, ICSID jurisdiction is based on the written consent of the parties to the dispute. This raises the question of the relation between consent given for the purposes of the ICSID Convention and any dispute resolution provisions specifically included in investment contracts. In this regard, Article 26 of the ICSID Convention provides that:

“Consent of the Parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy”.

31. In the present case, the Claimant relies upon the consent to ICSID arbitration given by the Philippines in the BIT, combined with its own written consent contained in the Request for Arbitration. It is well established that the combination of these forms of consent can constitute “consent in writing” within the meaning of Article 25(1), provided that the dispute falls within the scope of the BIT.

32. Article II of the BIT provides that:

“The present Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party, whether prior to or after the entry into force of the Agreement.

33. It is not disputed that SGS is potentially an investor of the other Contracting Party under the BIT: no issue of SGS’s nationality or effective control is raised. Furthermore it is not denied by the Respondent that the services provided by SGS, itself or through its wholly-owned Swiss affiliates, and the resulting rights to payment are capable of constituting an investment. Under Article I(2) of the BIT, the term “investments” is defined to include “every kind of asset” including “(c) claims to money or to any performance having an economic value”. But the Respondent denies that SGS made any investment in the territory of the Philippines, on the basis that all or substantially all the services for which SGS now claims payment were performed abroad, and were indeed stipulated to have been so performed in the CISS Agreement.

34. As to the basis of claim and Respondent’s consent to jurisdiction, SGS relies on the following provisions of the BIT:

#### “ARTICLE IV

#### PROTECTION, TREATMENT

1. Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension or disposal of such investments.

2. Each Contracting Party shall in its territory accord investments or returns of investors of the other Contracting Party treatment not less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State, whichever is more favourable to the investor concerned.

....

## ARTICLE VI

### DISPOSSESSION, COMPENSATION

1. Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization, or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriatory action was taken or became public knowledge, whichever is earlier. The amount of compensation, shall include interest, from the date of dispossession until payment, shall be settled in a freely convertible currency and paid without delay to the person entitled thereto without regard to its residence or domicile.

....

## ARTICLE VIII

### SETTLEMENT OF DISPUTES BETWEEN A CONTRACTING PARTY AND AN INVESTOR OF THE OTHER CONTRACTING PARTY

1. For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article IX of this Agreement (Disputes between Contracting Parties), 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. In the latter event the investor has the choice between

- (a) the International Center for the Settlement of Investment Disputes (I.C.S.I.D.) instituted by the Convention on the settlement of investment disputes between states and nationals of other States, opened for signature at Washington, on 18 March 1965;
- (b) an ad hoc arbitral tribunal which unless otherwise agreed upon by the parties to the dispute shall be established under the arbitration rules of the

United Nations Commission on International Trade Law  
(U.N.C.I.T.R.A.L.).

....

ARTICLE X

OTHER COMMITMENTS

1. If the provisions in the legislation of either Contracting Party or rules of international law entitle investments by investors of the other Contracting Party to treatment more favourable than is provided for by this Agreement, such provisions shall to the extent that they are more favourable prevail over this Agreement.
2. 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.”

**V. THE EVOLUTION OF THE DISPUTE**

35. During the period of performance of the CISS Agreement, from 16 March 1992 to 30 March 2000, SGS invoiced BOC approximately US\$680m for inspections performed in a large number of countries. During this period huge numbers of inspections were performed—for example more than 350,000 inspections in Japan. Of the amount invoiced for these inspections, some US\$540m was actually paid, leaving the amount unpaid which is the subject of the present claim.

36. In the period from March 1992 to March 1998, payment to SGS for inspections was made regularly pursuant to the revolving letter of credit arrangements set out in the CISS Agreement. Problems arose in 1998 with the change of administration in the Philippines. In the period September 1998 to March 2000, SGS claims to have provided services invoiced at CHF206,150,238.14 which remained unpaid. The Philippines initially disputed that claim. In March 2001, the Secretary of Finance of the Philippines directed the BOC to establish a joint review team with SGS to determine the total amount due. The BOC-SGS Review Team reported on 25 October 2001. Its Report was forwarded to the Secretary of Finance on 29 October 2001 under cover of a letter of the Commissioner, Bureau of Customs, stating that “This Office concurs with its findings and recommendations” (Exhibit S6, attached to the Request for Arbitration). The enclosed Report concluded that of the amount claimed by SGS, CHF192,420,782.26 was payable; CHF3,737,190.78 should be withheld in favour of the Philippines, and the balance of

CHF9,992,265.10 was unresolved. The Report expressed these findings as recommendations for the “consideration and/or approval” of the Secretary of Finance. Subsequently SGS indicated, on a without prejudice basis, that it was prepared to forgo payment of the unresolved balance of CHF9,992,265.10 if agreement could be reached on financing the amount which the Review Team had accepted as payable (Exhibit S7). Nothing was said in the Report or subsequent correspondence about arrears of interest.

37. By letter of 10 December 2001 (Exhibit S8) written to Centennial Group Holdings, a financial adviser of SGS, the Secretary of Finance said:

“We have no reason to reject the findings of the said report and, accordingly, efforts may now be directed to finding ways and means to settle the amount unanimously determined to be payable to SGS, subject to applicable laws and regulations.

We understand that SGS proposes to also deduct from its billings CHF9,992,265.10 under certain conditions. If acceptable, the amount to be deducted from the SGS billings total CHF13,729,455.88.

We earlier informed you that we initially recommended to the Department of Budget and Management (DBM) CHF104,095,461.19 last August 9, 2001 for inclusion in the 2002 Budget as part of the unprogrammed funds. We understand that the allocation for the unprogrammed funds in the 2002 Budget may cover a significant portion of our obligation to you provided the Government would be able to raise revenues in the equivalent amount.

Considering the continuing tight budgetary situation faced by the Philippine Government, we trust that you will understand and accept that the payment of these obligations recommended to be payable to SGS may have to be spread out over a certain period of time. We hope to discuss with you as soon as possible an acceptable payment schedule.

We are also exerting our best efforts for DBM to release a token good faith payment before the year ends.

We again reiterate our commitment to honor validly contracted obligations of the Republic of the Philippines.

Thank you for your kind understanding of our fiscal situation.”

SGS argues that this letter amounts to an acknowledgement of indebtedness of CHF192,420,782.26. It notes that SGS recorded such a recognition in its reply of 19 December 2001 to the Secretary of Finance (Exhibit S9).

38. On 14 December 2001 the Department of Finance issued a Press Statement, reciting the process leading to the establishment of the BOC-SGS Review Team and its recommendations. The Press Statement concluded as follows:

“To stress the N[ational] G[overnment]’s intention to settle its contractual obligations, the Department of Finance has accepted the Final Report and is now directing efforts to find ways and means to settle the liability, subject to applicable laws and regulations including the annual appropriations process in Congress. The DOF [Department of Finance] is negotiating with SGS to spread out the payments over a certain period of time considering the tight budgetary situation of the N[ational] G[overnment].”

39. In January 2002, the Philippines made “a token good faith payment” of PHP 1,000,000 (slightly less than US\$20,000) to SGS, as envisaged in the Secretary’s letter of 10 December 2001. No further payment having been made or agreement reached, the present proceedings were filed on 26 April 2002.

40. At the time of the jurisdictional hearing, the Respondent submitted that (unlike the position in the *Fedax* case<sup>7</sup>) there had never been an acknowledgement of indebtedness by the Philippines, and that there were serious issues of fraud and overcharging to be resolved. The fraud allegations were said to relate to SGS inspection operations in China. SGS denied these allegations, but appeared to accept that they could be considered, if necessary as a counterclaim, if the Respondent so wished.<sup>8</sup>

41. For reasons that will appear, it is neither necessary nor appropriate for this Tribunal to go into the allegations now made by the Philippines by way of defence. What is relevant, however, is that the present claim is not brought for the amount of CHF192,420,782.26 arguably acknowledged to be due in December 2001 (less the PHP1,000,000 actually paid). It is brought for the outstanding principal amount of CHF202,413,047.36 plus interest calculated in accordance with the CISS Agreement, Article 7.5.<sup>9</sup> SGS’s claim thus includes the unreconciled amount of CHF9,992,265.10, as to which there is no evidence at all of an acknowledgement of indebtedness by the Philippines. Moreover the calculation of interest payable under Article 7.5 of the CISS Agreement is not a straightforward matter of arithmetic, but will involve inquiry into relevant due dates and possibly other matters. On any view, a court or tribunal having jurisdiction to determine obligations under the CISS Agreement will have a substantial task to perform.

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<sup>7</sup> *Fedax NV v. Republic of Venezuela*, Award of 9 March 1998, 5 ICSID Reports 183.

<sup>8</sup> Transcript, 27 May 2003, pp. 100-102.

<sup>9</sup> See Request for Arbitration, paras. 34, 47.

42. In these circumstances the Tribunal does not need to decide whether there was a legally binding acknowledgement of indebtedness by the Secretary of Finance vis-à-vis its creditor, SGS, as to the amount of CHF192,420,782.26, in December 2001 or subsequently. Even if there was such an acknowledgement, it would not avoid the need for inquiry by a tribunal with jurisdiction over the CISS Agreement into the total amount payable, including interest.

43. The Tribunal approaches the question of its jurisdiction on the footing that in the Request for 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, but that the exact amount payable has neither been definitively agreed between the parties nor determined by a competent court or tribunal.

## **VI. THE ARGUMENTS OF THE PARTIES CONCERNING JURISDICTION**

44. For SGS, the Philippines' failure to make the payments claimed under the CISS Agreement, a large portion of which SGS claims has been acknowledged as payable to SGS constitutes:

- (a) failure to protect SGS's investment by subjecting it to unreasonable measures in violation of Article IV(1) of the BIT. In particular, by failing to make the payments due to SGS, the Philippines has deprived SGS of the returns on its investments;
- (b) failure to ensure fair and equitable treatment of SGS's investment, in violation of Article IV(2) of the BIT;
- (c) violation of Article X(2) of the BIT, which requires the Philippines to observe the payment obligations under the CISS Agreement with regard to investments by SGS; and
- (d) an isolated measure taken against SGS alone, which can be assimilated to an expropriation or a measure having the same nature or the same effect, taken by the Philippines against SGS's investments in violation of Article VI(1) of the BIT.

45. In its Request for Arbitration, SGS indicated that the four jurisdictional requirements set forth in Article 25(1) of ICSID Convention are satisfied, for the following reasons:



- (a) The dispute is a legal dispute as it concerns the failure by the Philippines to perform their obligations to SGS under the BIT and the CISS Agreement. It also concerns the relief to be granted to SGS as a result of those violations.
- (b) The dispute arises directly out of an investment. SGS's activities under the CISS Agreement clearly satisfied the investment requirements identified in ICSID case law with regard to duration, regularity of profit and return and the substantial commitment of human and financial resources in setting up the pre-shipment inspection system and assisting with the modernisation of the Philippines' customs infrastructure, thus making a significant contribution to the development of the Philippines.
- (c) There is no doubt that the dispute is between a Contracting State and a national of another Contracting State, since SGS is a Swiss company, duly incorporated in Switzerland under Swiss law.
- (d) The parties have consented in writing to ICSID arbitration. It is generally accepted that consent to ICSID jurisdiction may be given in any one of the following ways:
  - by a direct agreement between the host State and the investor;
  - by a provision in the host State's investment legislation which is accepted by the investor; or
  - by an offer made by the State in a treaty which is thereafter accepted by an investor of the other contracting State.

According to SGS, in the present case the Parties' consent to refer the dispute to ICSID arbitration was given pursuant to the third method. It arises out of two separate instruments: the BIT between Switzerland and the Philippines, and SGS's letter of 22 April 2002, received by the Philippines on 24 April 2002.

46. According to SGS, the date of the Philippines' written and binding consent to ICSID jurisdiction over the present disputes is, for the purposes of ICSID Institution Rule 2(1)(c), 23 April 1999, the date on which the BIT entered into force.

47. SGS considers it has validly consented to ICSID arbitration over this dispute, by fulfilling the conditions of Article VIII of the BIT, it has accepted the Philippines' offer to submit disputes to ICSID arbitration and thereby perfected the Parties' arbitration agreement.

48. With regard to the definition of “investment” under Article I(2) of the BIT, particularly sub-paras. (c), (d) and (e), SGS emphasizes the following: (a) the CISS Agreement clearly gives SGS “claims to money or to performance having an economic value”, in that it gives SGS claims against the Philippines for unpaid fees; (b) the dispute concerns “rights given by contract”, in that it concerns SGS’s right to demand that the Philippines perform their obligations under the CISS Agreement by making timely payment of fees due; and (c) pursuant to the requirements of the CISS Agreement, SGS has invested substantial resources, including money and know-how.

49. In addition, SGS indicates that it had assets in the Philippines that fall within the non-exhaustive definition of investments under Article I(2) of the BIT. For instance, SGS claims to have acquired, and imported into the Philippines, movable assets to set up its liaison office including computer hardware and software and office furniture valued in excess of USD3 million. The running costs of the Manila Liaison Office, including rental and salaries is claimed having amounted to USD10 million annually. Furthermore, pursuant to the terms of the CISS Agreement and its addenda, SGS invested a substantial amount of time, human and data resources, expertise, information, equipment, software and money in assisting the Philippines to modernise its customs infrastructure. The value of these investments totals over USD14 million.

50. Three additional arguments were raised by SGS in its Request for Arbitration which are worth noting:

First, the Parties unsuccessfully consulted for over two years with a view to resolving this dispute amicably. This included the establishment of the joint BOC-SGS Review Team, in March 2001, which reported its findings in November 2001. The requirement for over six months of party consultations, contained in Article VIII (2) of the BIT, was therefore satisfied.

Second, the BIT does not contain any statement indicating that the parties’ consent to ICSID jurisdiction is non-exclusive or subject to prior dispute resolution agreements. Article VIII(2) of the BIT clearly gives SGS, as foreign investor, the option of choosing whether to pursue remedies in the local courts or to submit the dispute to international arbitration. The Philippines have consented to ICSID arbitration as one of the available means of dispute resolution and the final decision as to whether prior provisions for the settlement of disputes contained in Article 12 of the CISS Agreement have precedence, or whether ICSID arbitration supersedes Article 12, rests solely in the hands of the investor.

Third, the CISS Agreement was entered in 1991, approximately eight years prior to the entry into force of the BIT. This fact plus the option granted by Article VIII of the BIT, which puts the choice of seeking relief before either national courts or international arbitration in the hands of the investor alone, is said to confirm SGS's entitlement to accept the Philippines' unilateral offer to arbitrate the present investment dispute before an ICSID arbitral tribunal. A contrary interpretation would, in SGS's opinion, strip the BIT of its purpose, which is to promote foreign investment by, *inter alia*, granting foreign investors the protection of having investment disputes arising from unlawful acts or omissions of host States decided by an international tribunal.

51. On 5 November 2002, the Philippines filed its objections to jurisdiction. The Philippines stressed that both parties' consent is the cornerstone of ICSID jurisdiction and that such consent was not given by the Philippines, on the following grounds:

- (a) The dispute between the parties is purely a contractual dispute, SGS's claim being for non-payment under a contract. The dispute is governed by a previous and subsisting dispute resolution agreement included in the CISS Agreement, according to which "all disputes" have to be submitted to the Regional Trial Courts of Makati or Manila.
- (b) The Swiss-Philippines BIT established certain duties of an international law nature, and the dispute resolution procedures (including ICSID) provided therein apply only to international law claims and have no application to purely contractual disputes.
- (c) Nothing in the BIT indicates an intention to override the provisions of the contract, which provided for the election of a particular dispute resolution by domestic courts.
- (d) The dispute does not relate to "investments in the territory of one Contracting Party" as required by the BIT. The contract and certain rulings issued by Philippines authorities confirm that the services were performed outside the Philippines.
- (e) The BIT was not intended to override previous obligations with respect to "specific investments".
- (f) The subject matter of the dispute is a cross-border service contract which is not an "investment" for the purposes of the ICSID Convention.
- (g) If the Tribunal, contrary to the submissions of the Philippines, were to find that jurisdiction pursuant to Article 25 of the Convention does exist, such jurisdiction

only extends to alleged breaches occurring after the date on which the BIT came into force, i.e. after 23 April 1999.

52. The Philippines emphasized the implications of inserting Article 12 of the CISS as a comprehensive choice of forum clause. This was in the original CISS Agreement concluded in 1991, and remained unchanged in the subsequent First and Second Addenda. For the Philippines, “it is revealing that the parties made no attempt to amend the dispute resolution provisions of the CISS Agreement, either before or after the BIT had been signed or had come into force”. According to the Philippines, “Article 12 represents a real and genuine agreement, being the product of an arms-length bargain of the parties which... resulted from a competitive tender and bidding process”.

53. The Philippines added that “SGS has not begun to demonstrate that the Tribunal has jurisdiction because it has not [referred] and cannot refer to any genuine breaches of the BIT. As noted, its claim is one of alleged non-payment under a contract and should therefore be submitted to the RTC of Makati or Manila in accordance with the clear contractual provisions”.

54. With regard to the alleged breach of Articles IV(1) and (2) of the BIT, the Philippines maintain that

“in accordance with the principles of treaty interpretation set out in Article 31(1) of the Vienna Convention, the text of this article should be given its ordinary meaning in light of the object and purpose of the parties in concluding the BIT. Whether a purported measure is discriminatory or unreasonable has to be judged by reference to the [Philippines’] actions taken with regard to other alleged investors. The [Philippines’] actions in this context must mean its administrative actions taken as the governmental authority: SGS has not pointed to any unreasonable or discriminatory action of the [Philippines]”.

55. Turning to the alleged breach of Article VI of the BIT, the Philippines relies on various authorities to demonstrate that there has been no taking of rights that could be attributable to the Philippines. According to the Philippines, the alleged failure to observe payment obligations under the CISS Agreement does not automatically constitute a violation of the BIT, since the claims are entirely for alleged non-payment under the CISS Agreement and do not transcend the terms of the contract.

56. Furthermore, the Philippines objects to the assertion that the mere existence of a BIT would automatically elevate all ordinary contractual disputes into potential international law disputes. For the Philippines “the BIT sets an independent standard and alleged breaches of its obligations cannot be aligned with alleged breaches of a private contract”.

57. An additional, important, ground upon which the Philippines bases its objection to the Tribunal’s jurisdiction is linked to the territorial limitation in Article II of the BIT, which requires the “investments” to be in the “territory of one Contracting Party”, thus excluding the services performed by SGS under the CISS Agreement, which the Agreement expressly states as being carried on “outside the territory of the Republic of the Philippines”. The Respondent emphasizes that “the connection between ‘investments’ and ‘territory’ is reinforced by the repeated and specific linking of the two concepts in respect of obligations appearing in the BIT” (Articles I(4) and IV). In response to SGS’s reference to services undertaken within the territory of the Philippines, the Respondent objects that all other services referred to in the Request for Arbitration, such as training courses, modernisation and computerisation of BOC facilities and maintaining a liaison office in Manila, were peripheral or negligible in comparison to the main obligation, which consisted in pre-shipment inspections made outside the Philippines.

58. After reviewing in detail each of the said additional services, the Respondent reaches the following conclusion:

“In considering whether the requirement of “investments in the territory” under the BIT is satisfied, the Tribunal should have regard to the place of substantial performance of the overall obligation. Even though this point arises under the BIT, previous decisions of ICSID tribunals on investments may nonetheless be of some assistance. They endorse the approach of considering not the effect of one individual activity but the overall nature of the obligation.”

The Respondent further argues that:

“[T]he Tribunal should not be distracted by incidental and minor activities, such as training courses or donation of a certain item of equipment, but instead should have regard to the ‘integral part of the overall operation’. In this case, the delivery of the PSI service, being clearly the ‘overall operation’ of this contract, took place entirely outside the Philippines.”

59. The Philippines makes three further points which should be noted:

First, the BIT does not override previous obligations. Article X(2) intends that the parties respect the terms of existing agreements by requiring each Contracting Party observe “any obligation it has assumed with regard to specific investments”. Article 31(1) of the Vienna Convention, requiring a good faith interpretation of this provision, and one consistent with the “object and purpose” of the BIT, suggests that Article X(2) shows an intention to respect “specific obligations”. Hence, SGS “may not seek to enforce the ‘specific’ payment obligations of the CISS Agreement whilst at the same time disregarding the agreement to resolve these payment (and all other contractual) obligations in the RTC of Makati or Manila.”

Second, in order to establish ICSID jurisdiction, SGS must establish the existence of an “investment” under both the BIT and Article 25 of the ICSID Convention. Under the ICSID Convention, technical assistance or consultancy contracts, suppliers’ credits and peripheral training programmes cannot be relied on by SGS as satisfying the “investment” requirement. According to the Philippines, “even on application of the ‘typical’ characteristics relied on by SGS, the relevant activities of SGS do not fall within the term “investment.” This assertion is supported by the following considerations:

- (a) “The Payment of a commission fee to SGS ... does not amount to a ‘profit’ or return which commentators ... have accepted are a necessary part of an ‘investment’. The payment is more properly characterised as remunerative in nature as opposed to revenue or profit”;
- (b) SGS did not assume any risk as a result of the CISS Agreement. In the absence of evidence of the intention of the drafters of the ICSID Convention as to what “risk” is entailed in the context of an investment, it is necessary to ascertain the “ordinary meaning” attached to the phrase. The term “risk”, which is identified as a “typical” characteristic, in the context of an investment entails the chance that the contribution of the party will drop in value and/or there will be negative/varying returns. SGS would always receive a fee dependant on the relevant invoice value or by virtue of the minimum fee provisions, even on shipments of no value. Accordingly, there is no “risk” to SGS in the “ordinary meaning” of the word;
- (c) The term “investment” should be given its ordinary meaning in light of its object and purpose. The “ordinary meaning” of the term “investment” excludes the delivery of an offshore service in exchange for a fee, especially where there is virtually no capital expenditure or assumption of risk”.

Third, with regard to the non-retrospective effect of breaches, the Philippines argues that jurisdiction can only extend to alleged breaches committed after the BIT came into force, i.e. after 23 April 1999.

Although recognizing that the BIT applies to investments made “whether prior to or after entry into force of the Agreement”, the Philippines contends that this provision does not apply to breaches and causes of action which occurred before the BIT came into force. In support of this position, the Philippines states that:

- (a) “[I]f the BIT had intended to apply to breaches or causes of action which occurred before the BIT came into force, this would have to be apparent from the face of the treaty or otherwise. However, it is not apparent; the BIT is not expressed as applying to breaches or causes of action which occurred before it came into force. The absence of any express language is indicative of the parties’ intention that the BIT apply only to disputes/causes of action which arose after its entry into force”;
- (b) “That the BIT only contemplates future breaches is also emphasized by the wording of its obligations. The BIT seeks to regulate only future behaviour by repeated reference to what the Contracting Party ‘shall’ do or refrain from doing. The BIT provides, for example, that investments ‘shall’ be accorded fair and equitable treatment and that investment ‘shall’ not be expropriated or nationalised”;
- (c) In reliance on a previous ICSID case the Philippines indicates that “the Tribunal emphasized the importance of looking at the dispute resolution provisions of the BIT within the context of the entire treaty. The Tribunal found support for its conclusion on the ambit of the dispute resolution provisions in the text of the BIT, which said that investments ‘shall’ not be expropriated”; and
- (d) “SGS cannot claim that consent to the jurisdiction of the Centre has been validly and irrevocably given by the ROP in this case in respect of breaches occurring on or before 23<sup>rd</sup> April, 1999 (when the BIT came into force). Jurisdiction cannot at the very least, extend to the monthly invoices which SGS claims are unpaid from September 1998 to 23<sup>rd</sup> April, 1999 because these alleged breaches arose before the BIT came into force. Such analysis also highlights the fact that SGS’s claim is based on non-payment under a contract and not on treaty violations. Not only has SGS failed to point to any additional administrative action by the ROP which gives rise to a breach under the BIT, it has not given details of the timing of such action”.

60. On 31 January 2003, SGS submitted its response. Its central argument was that the present Tribunal...

“has exclusive jurisdiction over all the claims now brought before it by SGS, as a result of Article 26 of the ICSID Convention, which deems the parties consent to ICSID arbitration – perfected on April 22, 2002 – to be exclusive of any other remedy. But even if, as SGS denies, there is any overlap between the arbitration agreement contained in the BIT and that found in the CISS Agreement, the former would simply supersede the latter.”

61. SGS emphasized that:

“throughout the nine year duration of the CISS Agreement SGS invested enormously in the Philippines. These investments ranged from the establishment of its Liaison Office in Manila – approved by no less than the Philippine Board of Investments... – to the annual average employment of 242 staff in the Philippines. It included pumping average annual sums of US\$8 million into Manila from Geneva for the CISS programme, as well as massive technology transfer and frequent donations to the ROP. In addition, SGS made possible increased customs revenues flowing directly to the ROP of over US\$2.5 billion, in the period between 1992 and 2000.”

62. Furthermore, SGS emphasizes that it “made substantial investments in the Territory of the Philippines” through various channels:

First, considering that “claims to money or to any performance having an economic value” fall within the meaning of investments in Article I(2) of the BIT, intangible investments such as “‘claims to money’ and ‘rights under contract’ are necessarily difficult to physically locate. In this instance, to the extent that these intangible investments can be situated anywhere... they were located in the Philippines – the centre of gravity and the primary beneficiary of the CISS Agreement”;

Second, SGS invested by undertaking “tangible investments in the Philippines in relation with the CISS programme”, particularly in the form of “the setting up a Liaison Office in Manila, through its wholly owned subsidiary SGS Far East, and its injection of substantial funds for the operation of the office”; and

Third, SGS invested in the form of “transfer of know-how” in connection with the CISS programme”, by carrying out a number of activities that included:

- conducting “training courses and seminars for the purpose of transferring customs related knowledge to BOC and other ROP agencies”;



- playing “a key role in the computerisation of the BOC’s functions, and development of IT systems such as the Data Warehousing technology”;
- setting “up the VCL which contained a database of CRF data, price information and a repository of other customs-related information”;
- contributing to the “setting up of an appeals system which relies in part on the price database provided by SGS”; and
- undertaking a “variety of consultancy projects, for the purpose of transferring customs-related knowledge to BOC”.

The said activities are considered by SGS as “an investment within the definitions of Article I(2)(d) of the BIT: “copyrights, industrial property rights, know-how and goodwill”, as well as within the BIT’s general catch-all definition of investments as “every kind of asset”.

63. A substantial portion of SGS’s response to the Philippines’ objections focuses on establishing that “the Tribunal has jurisdiction over all SGS’s claims, whether alleging treaty or contractual violations”. The first pillar of SGS’s case is that “the Tribunal must consider the claims as formulated by the claimant”, and not as “the ROP seeks to re-qualify them”.

64. The second argument invoked by SGS, is that “the Tribunal may consider contractual issues in determining claims based on a BIT” despite the fact that contract claims and treaty claims have different legal bases. In this respect, SGS maintains that:

“[I]t is perfectly proper, and often necessary for a tribunal to interpret a contract and consider issues of contractual performance in order to determine whether there has been a violation of international law.”

65. SGS’s third argument is that:

“The effect of an ‘umbrella clause’ such as article X(2) is to elevate a breach of contract claim to a treaty claim under international law.”

66. The fourth assertion invoked by SGS is that “the Tribunal’s jurisdiction extends beyond BIT claims to contract claims, due to the reference in Article VIII of the BIT to ‘disputes with respect to investments’”. SGS expresses the result of its analysis of this Article in the following proposition:

“Given the broad ambit of Article VIII of the BIT, it is evident that this Tribunal has jurisdiction over all the claims raised by SGS, including allegations of breach of contract by the ROP, as distinct from allegation of violation of the BIT.”

67. SGS denies that the Tribunal’s jurisdiction is “extinguished or diminished by the Forum selection clause in the CISS Agreement”. After an analysis of the rulings given in previous ICSID cases, SGS arrives at the conclusion that:

“In accordance with the text of the ICSID precedents, this Tribunal must hold that the forum selection clause in the CISS Agreement does not and cannot exclude the jurisdiction of this Tribunal with respect to claims presented by SGS in this proceeding.”

68. The sixth and last point emphasized by SGS is that “the Tribunal’s jurisdiction extends to ‘retrospective breaches’, in the sense that jurisdiction in the present case extends to all the claims raised by SGS regardless of the fact that the events giving rise to the claims of violations of the BIT may have occurred before the entry into force of the BIT because Article VIII, which is the key provision conferring jurisdiction on the Tribunal, contains no temporal limitations.”

69. On 14 March 2003 the Philippines submitted its response to the arguments raised by SGS in the Counter-Memorial. As a preliminary remark, the Philippines noted that the implication of SGS’s submissions:

“is that almost any contractual dispute between a State and a foreign party can be referred to ICSID provided that there is a BIT in force between that State and the State of the nationality of the foreign party. Jurisdiction provisions in such contracts, even when providing for exclusive jurisdiction in national courts, will always be capable of being by-passed and ICSID tribunals will be left to decide all the relevant contractual issues by reference to whichever national law constitutes the proper law of the contract in question.”

70. After undertaking the analysis of certain previous ICSID decisions within the context of the BIT’s application restricted to “investments in the territory”, the Philippines emphasized the following:

“To say, as SGS does, that ‘territory’ means only that a benefit needs to be shown in the territory does violence to the ordinary meaning of the words used, and is thus contrary to Art. 31(1) of the Vienna Convention on the Law of Treaties.

Such a construction also deprives ‘territory’ as used in the BIT of any meaning... [I]ts ‘purpose’, a valid consideration under Art. 31(1), was not to extend treaty obligations beyond the physical definition of territory contained in the Constitution. For these reasons, the BIT should not be applied to a service contract, the key element of which was indisputably delivered offshore.”

71. The Respondent goes on to affirm that SGS did “nothing to dispel the very clear impression left by the Request that the SGS claim is purely and simply a claim for non-payment under a commercial contract, the CISS Agreement. Although SGS refers to a number of provisions of the BIT, it makes no attempt to develop a claim for anything other than a breach of contract. Indeed, SGS itself acknowledges that ‘the CISS agreement underlies the claims presently before the Tribunal.’”

“Nor does [SGS] make any attempt to refute the argument [of the Philippines] that Article 12 of the CISS Agreement was intended to be an exclusive jurisdiction clause. Indeed, SGS had itself described the clause in those terms in proceedings before the Supreme Court of the Philippines.”

72. The Philippines questioned SGS’s assertion that “the Tribunal cannot go behind the claim formulated”: in its view...

“[T]he Tribunal can and should determine whether they are indeed satisfied that the claims (as characterised) are *prima facie* within the jurisdictional mandate of ICSID arbitration and have not been mischaracterized. If there is a clear mischaracterization of claims apparent from the claim documents, then the Tribunal should enquire further. If the claims are not sufficiently made out, the Tribunal should decline jurisdiction.”

73. Concerning the “application of the contractual disputes clause to contractual claims”, the Philippines maintained that:

“SGS’s claims are purely contractual in nature and arise solely on the basis of allegations of non-payment under a commercial contract. In deciding whether it has jurisdiction, the Tribunal needs to determine the ‘*fundamental*’ or ‘*essential*’ basis of the claims. It should give effect to the contractual jurisdiction clause if the essential basis is a contractual one.”

The Philippines added:

“In the present case, the presence of an exclusive jurisdiction clause in the CISS Agreement is relevant in several different ways. First, it is an essential part of the

background which must be taken into account in construing the scope of the offer to accept ICSID arbitration which the BIT represents... [A]n ICSID clause in a bilateral investments treaty constitutes an offer which has to be accepted by the individual investor. It is inherently unlikely that a State intended to make an offer of ICSID arbitration to a contractor in respect of simple contractual disputes arising under a contract governed by its national law when that contract was subject to an express and exclusive choice of forum. That is particularly so when the right of recourse to ICSID would be entirely at the discretion of the contractor. Moreover, in the present case, the subsequent reaffirmation of the disputes clause in Article 12 of the CISS Agreement after the conclusion, and again after the entry into force of the BIT, reinforces that conclusion.”

74. Secondly:

“SGS, having undertaken to submit all disputes to the RTC, lacks the power to seize an ICSID tribunal in order to enforce provisions of the CISS Agreement when its very act of doing so is itself a violation of its own obligations under that Agreement. The CMJ argues that Article 12 of the CISS Agreement cannot override the terms of the BIT but it must be recalled that SGS is not a party to the BIT, which so far as it is concerned, is *res inter alios acta*. By contrast, the CISS Agreement binds both the ROP and SGS. In assessing the effect, as between those two parties, of the BIT it is impossible to ignore the clear language of the agreement which binds them both.”

75. Third:

“[I]t is necessary to consider the practical implications of allowing SGS to disregard the jurisdictional clause to which it freely subscribed when it became party to the CISS Agreement. Most States conclude large numbers of contracts with foreign companies each year. In many cases these are expressly and voluntarily subjected to jurisdiction of the courts of the contracting State and are governed by the law of that State. It is axiomatic that the courts of that State are best placed to interpret and apply the law of that State. Moreover, common sense dictates that an international tribunal which is less well placed to determine questions of national law should be slow to displace the jurisdiction of courts expressly selected by the parties to the agreement in question.”

76. With regard to SGS’s assertion that “Article X(2) of the BIT is an ‘*umbrella clause*’ which elevates all breaches of contract into breaches of the BIT”, the Philippines denies that it has the effect of adding another substantive provision to the BIT:

“SGS’s interpretation of Article X(2) effectively emasculates the substantive protection contained in Arts. III-VI. What SGS is effectively saying is that this substantial body of international law practice is now to be rendered effectively otiose because the Claimant need no longer prove the additional element, it need

only argue that a breach of a private, commercial contract has been violated by a State and yet still be able to pursue its grievances in an international forum.”

77. The Philippines invoked the drafting history of the BIT as well as the texts of the draft exchanged on various earlier occasions which are said to clearly show that the Parties’ intention was to emphasize their commitment to comply with the substantive treatment obligations assumed under BIT. According to the Philippines “[i]t is clear that they did not intend to include within the protection of the BIT and international law, protections from breach of contract. No such interpretation, as advocated by SGS, can therefore be applied to this BIT”. The Philippines concluded its argument in this respect by stating that: “Article 31(1) of the Vienna Convention, which requires that treaties shall be interpreted in good faith and in the light of their object and purpose, suggests that SGS’s contention cannot be upheld, unless there is clear evidence of the contracting Parties’ intention to produce such an unequal bargain, which has not been shown.”

78. In response to SGS’s argument that “Article VIII(1) is in broad terms and allows SGS to refer all its claims to ICSID even though they arise under the CISS Agreement and not under the BIT”, the Philippines analysed the cases relied on by SGS, reaching a different conclusion:

“[A] proper consideration of the cases referred to by SGS shows that they were determined in the absence of a valid effective contractual disputes clause... In other words, one has to distinguish between causes of action founded upon contract and those founded upon the BIT. The Tribunal [in the *Vivendi* case] maintained that the former have to be resolved by the parties’ agreed contractual mechanism, even if the same issues give rise to separate claims under a BIT which may be referred to ICSID jurisdiction. In other words, there is no suggestion that ICSID jurisdiction somehow takes priority over or invalidates a contractual disputes provision in respect of contractual claims. Alternatively, even if (which is denied) SGS is correct to argue that Art. VIII can be construed as allowing purely contractual claims to be referred to ICSID, that does not apply where there is a freely negotiated and valid contractual disputes provision, as closer examination of the cases relied on by SGS demonstrates.”

79. Finally, concerning SGS argument that “the retrospective provisions of the BIT bring claims arising before the entry into force of the BIT within the ambit of the Tribunal’s jurisdiction”, the Philippines responded by affirming that

“under general principles of international law (embodied in the Vienna Convention on the Law of Treaties) retrospective effect cannot be presumed in the absence of clear words. Therefore, if the Contracting Parties had intended that the BIT extend to breaches occurring before the BIT came into force, then they would

have expressly so provided in the articles of the BIT, which they did not. SGS's submission that Art. X(2) lacks any temporal restriction ignores both the effect of Art. II, which clearly sets out the scope of application, and of Art. 28 of the Vienna Convention."

According to the Philippines, it "is the 'act' or 'fact' of breach or the date of accrual of the cause of action, which in this case occurs on the date on which the obligation to pay was not met, which is relevant to determining the application of the BIT. It is an established principle of most legal systems that a breach occurs when it is alleged that payment fell due and was not made."

80. On 6 May 2003 SGS submitted its Rejoinder. In its view, SGS's investment in the Philippines was significant by any standard. But even if SGS made only a small investment in the country, they were sufficient to qualify for ICSID jurisdiction. According to SGS, the various investments and activities undertaken cannot be considered "*de minimis*", "ancillary" or "peripheral". After an enumeration of the facts supporting SGS's contentions as to what constituted its substantial economic contributions within the Philippines, SGS concluded its survey by stating that:

"The weight of the evidence set out in the CMJ and in the preceding sections of this Rejoinder leaves no doubt that SGS invested substantially in the Philippines for the purposes of the CISS Programme. In view of this overwhelming evidence, including the many contemporaneous acknowledgments by the ROP of the considerable benefits to the ROP of SGS's services, it is extremely surprising that the ROP continues to argue that SGS did not make a qualifying investment in the Philippines. After all, although the ROP accepts that SGS' activities under the programme constitute investments, it fails to identify any country other than the Philippines where that investment might be located. The whole CISS Programme, and all the activities performed under it, were investments in the Philippines within the meaning of the BIT and the ICSID Convention."

81. As to "the jurisdictional requirements of the ICSID Convention" for the purpose of establishing that "the dispute is 'with respect to investments' within the meaning of the BIT". SGS based its position on two parallel legal arguments. First, no direct or physical investments are needed to be located within the territory, since the reference to "investments" in Articles V, VI and X of the BIT "is not preceded or followed by the phrase 'in the territory'." Second, SGS did in any event make substantial investments in the Philippines.

82. The analysis of certain previous ICSID cases led SGS to conclude:

- “Whether one looks at the objectives of the BIT, the economic realities of global investment flows, the definition of ‘investments’ under the BIT, or the principles set out in precedent ICSID cases, it is clear that the BIT does not cover only investments physically located within the territory of the host State”;
- “For there to be a qualifying investment it is sufficient that the investor show that the effect of or the value added by the investments or the investment activities flow into the territory of the host State”;
- “In the present case, it is clear that while the visual pre-shipment inspections were performed outside the Philippines, the relevant information derived from those inspections was delivered in the ROP’s territory”;
- “Further, and more broadly, the economic effect of the information obtained by SGS through its inspections was felt within the ROP’s territory, and not in any other country.”

83. Defending its initial proposition that “the Tribunal must consider the claims as formulated by the claimant”, SGS reviewed previous decisions in order to ascertain that “ICSID case law does not impose a *prima facie* test”. But even if it did, SGS would pass it “without difficulty”.

84. With regard to the effect of a valid choice of forum clause on the jurisdiction of an ICSID tribunal, SGS maintained its previous position according to which “the presence of a contractual forum selection clause will not affect an international tribunal’s jurisdiction to consider violations of international law”. According to SGS the case law invoked by the Philippines does not support the latter’s proposition that “a contractual forum selection clause ousts an international tribunal’s jurisdiction over claims pleaded on the basis of a breach of contract rather than of a violation of a treaty”. In SGS’s opinion, the rule is that “a contractual forum selection clause will not affect or exclude ICSID jurisdiction”. According to SGS: “This is the case when the investor’s claim alleges violations of a BIT, but it is also the case in the present dispute with respect to SGS’s claims, raised in the alternative, alleging breaches of contract that are not violations of the BIT.”

85. Subsequently, SGS reiterated its position in the following manner:

- “There is nothing in the language of the CISS Agreement which would exclude ICSID’s jurisdiction over any of the claims presented in these proceedings”;

- “The essential basis of each of SGS’s principal claims is an alleged violation by the ROP of a substantive provision of the BIT. Therefore, should the Tribunal seek to determine the essence of those claims, that essence is a violation of the BIT and not a breach of contract”;
- “Further, SGS’s alternative claim, which is based on breach of contract, need not be referred to the Philippines courts identified in the CISS agreement”;
- “Article VIII (of the BIT) ...allows SGS to submit its alternative breach of contract claim to ICSID arbitration as that claim is ‘with respect to investments’.”

86. As to Article X(2) of the BIT, SGS reviewed a considerable number of supporting authorities, concluding that:

“From the forgoing, it [is] abundantly clear that a provision such as Art. X(2) of the BIT is designed to extent the BIT’s protection to cover breaches of contracts between the host State and the investor.”

87. It also devoted further elaboration to the assertion that “the Tribunal’s jurisdiction covers breach of contract claims by virtue of Article VIII of the BIT”, which allows the referral to ICSID arbitration of “disputes with respect to investments”, and thus grants this Tribunal jurisdiction over all claims raised by SGS, including its alternative claim alleging breach of contract by the Philippines, as distinct from allegations of violation of the BIT.

88. On 26 and 27 May 2003 the jurisdictional issues were again debated at a hearing, held in Paris. During the hearing, each party submitted its own views and arguments, and discussed those of the other. In general, each party’s position remained as presented in the written submissions, but additional contributions were given which clarified some essential points.

89. On the Claimant’s side, emphasis was given to the “territoriality” of their investment in the Philippines. Answering questions raised by the Tribunal, the Claimant explained in detail the modalities through which services were rendered outside and inside the Philippines. In particular, the role of the Manila liaison office has become clear, as well as the way SGS reported to the BOC and received payment of its fees.

90. The Claimant devoted significant time to re-address the interpretation of the so-called “umbrella clause” (Article X(2) of the BIT). Authorities relied on in support of a broad



interpretation of that clause included Prosper Weil,<sup>10</sup> Joachim Karl,<sup>11</sup> an UNCTAD publication of 1998 on BIT practice,<sup>12</sup> Ibrahim Shihata,<sup>13</sup> F.A. Mann,<sup>14</sup> M. Nash Leich,<sup>15</sup> Dolzer & Stevens,<sup>16</sup> Antonio Parra,<sup>17</sup> and others, together with a survey of a number of BITs.

91. On the Respondent's side, important clarifications were given as to:

- the understanding of certain basic provisions of the CISS Agreement, including the selection of forum clause;
- the tax treatment reserved to SGS's investment in the Philippines;
- the mechanics of payment under the contract;
- the Philippines' understanding of the "umbrella clause" in the light of other comparable BITs;
- the legal nature of the CISS Agreement (whether a concession of public services or not);
- certain Philippine court proceedings, where the foreign or internal nature of SGS's services had been discussed;
- whether SGS's claims were based on alleged violations of the contract or of the BIT;
- whether SGS's services constituted, in their essence, an investment under the Convention and the BIT;
- whether, and to what extent, international public law, including treaties on investment, applies to "private" or "commercial" contracts concluded directly by a State with foreign companies.

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<sup>10</sup> P Weil, "Problèmes relatifs aux contrats passés entre un état et un particulier", in (1969-III) 128 *Receuil des cours* 95, 130-3.

<sup>11</sup> J Karl, "The Promotion and Protection of German Investment Abroad", (1996) 11 *ICSID Rev-FILJ* 1, 23.

<sup>12</sup> UNCTAD, *Bilateral Investment Treaties in the mid-1990s* (Geneva, 1998) 54-6.

<sup>13</sup> I Shihata, "Applicable Law in International Arbitration: Specific Aspects in the Case of the Involvement of State Parties", in *The World Bank in a Changing World* (1995) vol. II, 595, 601.

<sup>14</sup> FA Mann, "British Treaties for the Promotion and Protection of Investments" (1981) 52 *BYIL* 241, 245-6.

<sup>15</sup> M Nash Leich, "Contemporary Practice of the United States relating to International Bilateral Investment Treaties" (1990) 84 *AJIL* 895, 898.

<sup>16</sup> R Dolzer & M Stevens, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers, 1995) 81-2.

## VII. THE ISSUES FOR THE TRIBUNAL

92. In the Tribunal's view, the arguments and submissions of the parties recited above raise five main issues:

- (a) whether a contract for the provision of services performed mostly (but not wholly) outside the territory of the host State may nonetheless constitute an investment in its territory for the purposes of Article II of the BIT, having regard to the circumstances of the present case and the provisions of the CISS Agreement;
- (b) whether the so-called "umbrella clause" (Article X(2) of the BIT) gives the Tribunal jurisdiction over essentially contractual claims against the Respondent State;
- (c) alternatively, whether the general description of a "dispute concerning an investment" (Article VIII(1) of the BIT) encompasses claims of an essentially contractual character;
- (d) whether the Tribunal can or should exercise jurisdiction in the present case, notwithstanding the exclusive jurisdiction clause, Article 12 of the CISS Agreement, requiring contractual disputes to be referred to the courts of the Philippines; and
- (e) whether the Tribunal has jurisdiction over the present claims as claims for breach of treaty independently of the CISS, under Articles IV and/or VI of the BIT.

93. In addition, the Respondent argues that the BIT did not apply retrospectively to claims which arose prior to its entry into force on 23 April 1999. This argument cannot be considered until the Tribunal has identified which claims (if any) are properly before it, and the basis of its jurisdiction over such claims.

94. The parties disagreed on all five basic issues identified in paragraph 92, treating them all as questions going to jurisdiction. In the Tribunal's view there is no doubt that most of these issues are jurisdictional. The position is, however, less clear as to issue (d), the effect of Article 12 of the CISS Agreement. This may better be regarded as concerned with the admissibility of the

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<sup>17</sup> A Parra, "Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment", (1997) 12 *ICSID Rev-FILJ* 287.

claim than jurisdiction in the strict sense. But there is no doubt that it is preliminary in character and the parties have treated it as such.

95. Each of these five issues was discussed at some length by the ICSID Tribunal in *SGS v. Pakistan*. In that case an Inspection Agreement between SGS and Pakistan, concluded in 1995, provided for analogous services to those in the present case. Less than two years after the Agreement entered into force it was purportedly terminated by Pakistan. The dispute between the parties concerned the validity and legal effect of the termination, as well as the adequacy of performance on both sides and outstanding financial claims. The Agreement contained an exclusive jurisdiction clause (Article 11) referring “[a]ny dispute, controversy or claim arising out of, or relating to” the Agreement to arbitration in Pakistan. In fact three different cases were brought: first, by SGS in the Swiss courts, then by Pakistan before the local courts to initiate a domestic arbitration under Article 11, and finally by SGS before ICSID (following the failure of the Swiss proceedings). SGS argued that the offer of ICSID arbitration in the Swiss-Pakistan BIT took priority over domestic arbitration under Article 11 of the Inspection Agreement, and that ICSID jurisdiction included claims both under the contract and under the BIT.

96. So far as the five questions enumerated in paragraph 92 above are concerned, the Tribunal in *SGS v. Pakistan* gave the following answers:<sup>18</sup>

- (a) There was an investment “in the territory of the host State” within the meaning of the BIT because there had been an “injection of funds into the territory of Pakistan for the carrying out of SGS’s engagements under the PSI Agreement.”<sup>19</sup> It did not matter that most of SGS’s expenses were incurred outside Pakistan: some expenditure in Pakistan had been “necessary to enable [SGS] to perform its obligations under the PSI Agreement”<sup>20</sup> and that was sufficient for this purpose. It was also relevant that, as described by Pakistan in the Swiss proceedings (in which it successfully claimed sovereign immunity) “the functions delegated to SGS” were considered as functions *jure imperii* performed in aid of the collection of tax revenue by Pakistan.<sup>21</sup>

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<sup>18</sup> A number of other questions were raised before the *SGS v. Pakistan* Tribunal (e.g. *lis alibi pendens*). These are not relevant to the present case.

<sup>19</sup> *SGS v. Pakistan*, para. 136.

<sup>20</sup> *SGS v. Pakistan*, para. 137.

<sup>21</sup> *SGS v. Pakistan*, paras. 138-9.

- (b) Article 11 of the Swiss-Pakistan BIT, providing that each State 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”, could not have the far-reaching effect of “automatically ‘elevat[ing]’ to the level of breaches of international treaty law” breaches of investment contracts entered into by the State.<sup>22</sup> Having regard to the distinction in principle between breaches of contract and breaches of treaty, contractual claims could only be brought under Article 11 “under exceptional circumstances”.<sup>23</sup>
- (c) The phrase “disputes with respect to investments” in Article 9(1) of the Swiss-Pakistan BIT does not encompass claims of an essentially contractual character. In the Tribunal’s view, there was nothing “in Article 9 or in any other provision of the BIT that can be read as vesting... jurisdiction over claims resting *ex hypothesi* exclusively on contract”.<sup>24</sup>
- (d) The Tribunal’s jurisdiction being limited to claims under the BIT, i.e. to claims for breaches of international obligations, that jurisdiction was not affected by the exclusive jurisdiction clause in the Inspection Agreement. Since the Tribunal lacked any purely contractual jurisdiction, there was no need to consider whether the effect of the BIT was to override exclusive jurisdiction clauses in contracts. Nor was it necessary to consider the effect of Article 26 of the ICSID Convention.<sup>25</sup> However the Tribunal expressed doubts that it could have been intended by general language in the BIT to “supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent.”<sup>26</sup>
- (e) In principle it was for the Claimant to formulate its claim: “if the facts asserted by the Claimant are capable of being regarded as alleged breaches of the BIT, consistently with the practice of ICSID tribunals, the Claimant should be able to have them considered on their merits.”<sup>27</sup> That was the case with SGS’s claim against Pakistan. Accordingly the Tribunal had, and should exercise, jurisdiction

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<sup>22</sup> *SGS v. Pakistan*, para. 166.

<sup>23</sup> *SGS v. Pakistan*, para. 172.

<sup>24</sup> *SGS v. Pakistan*, para. 161.

<sup>25</sup> *SGS v. Pakistan*, para. 174.

<sup>26</sup> *SGS v. Pakistan*, para. 161.

<sup>27</sup> *SGS v. Pakistan*, para. 145.

over the Claimant's treaty claims as distinct from its contract claims, notwithstanding the pending arbitration of the contractual claims in Pakistan.<sup>28</sup>

97. This Tribunal will revert to these questions as they arise in the somewhat different legal and factual context of the present dispute. As will become clear, the present Tribunal does not in all respects agree with the conclusions reached by the *SGS v. Pakistan* Tribunal on issues of the interpretation of arguably similar language in the Swiss-Philippines BIT. This raises a question whether, nonetheless, the present Tribunal should defer to the answers given by the *SGS v. Pakistan* Tribunal. The ICSID Convention provides only that awards rendered under it are "binding on the parties" (Article 53(1)), a provision which might be regarded as directed to the *res judicata* effect of awards rather than their impact as precedents in later cases. In the Tribunal's view, although different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law, which will by definition be different for each BIT and each Respondent State.<sup>29</sup> Moreover there is no doctrine of precedent in international law, if by precedent is meant a rule of the binding effect of a single decision.<sup>30</sup> There is no hierarchy of international tribunals, and even if there were, there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals. It must be initially for the control mechanisms provided for under the BIT and the ICSID Convention, and in the longer term for the development of a common legal opinion or *jurisprudence constante*, to resolve the difficult legal questions discussed by the *SGS v. Pakistan* Tribunal and also in the present decision.

98. The Tribunal accordingly turns to the six questions identified in paragraphs 92 and 93 above.

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<sup>28</sup> *SGS v. Pakistan*, para. 187-9.

<sup>29</sup> See Schreuer, 1082, referring to earlier cases.

<sup>30</sup> Indeed there is no guarantee that ICSID decisions will be published: see ICSID Convention, Art. 48(5).

**(a) Was there an investment in the territory of the Philippines?**

99. In accordance with Article II, the BIT applies to “investments in the territory of the one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party, whether prior to or after the entry into force of the Agreement”. The language is clear in requiring that investments be made “in the territory of” the host State,<sup>31</sup> and this requirement is underlined by other references to the territory of the host State in the BIT (see Preamble, para. 2, Articles II(1), (2), IV(1), (2), (3), VIII(2) and X(2)). In accordance with normal principles of treaty interpretation,<sup>32</sup> investments made outside the territory of the Respondent State, however beneficial to it, would not be covered by the BIT. For example the construction of an embassy in a third State, or the provision of security services to such an embassy, would not involve investments in the territory of the State whose embassy it was, and would not be protected by the BIT.

100. As noted above, the Respondent argued that all or substantially all of SGS’s investment fell into that category. Moreover it stressed that the parties themselves, in the CISS Agreement and through their conduct, had treated SGS as non-resident in the Philippines and as providing services abroad and not in the Philippines. Those aspects of SGS’s performance which occurred in the Philippines (the provision of the various services detailed in paragraphs 19 and 23 above, and the maintenance of the Manila Liaison Office) were merely incidental or peripheral. Furthermore, the Respondent argued, the gist of the present case was a claim for money due for services performed in the country of export, not in the Philippines. No question arose, for example, as to the unfair treatment or wrongful expropriation of the Manila Liaison Office. The actual dispute revolved around non-payment for services provided, and necessarily provided, abroad.

101. The Tribunal does not agree that SGS’s services under the CISS Agreement can be subdivided in this way. Under the CISS Agreement, SGS was to provide services, within and outside the Philippines, with a view to improving and integrating the import services and associated customs revenue gathering of the Philippines. The focal point of SGS’s services was the provision, in the Philippines, of a reliable inspection certificate (termed a Clean Report of

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<sup>31</sup> The term “territory” is defined in Article I(4) as “the territory of the State concerned as defined by the respective Constitution and other pertinent law”. This definition was extensively discussed by the Parties in negotiating the BIT.

<sup>32</sup> Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Arts. 31-33.

Findings (CRF)) on the basis of which import clearance could be expedited and the appropriate duty charged. SGS's inspections abroad were not carried out for their own sake but in order to enable it to provide, in the Philippines, an inspection certificate on which BOC could rely to enter goods to the customs territory of the Philippines and to assess and collect the ensuing revenue. It is true that the certificate was not a legal instrument; it was merely evidence of the nature, value and classification of a shipment. It was nonetheless valuable evidence and its provision was central to SGS's operations. Further, those operations were organized through the Manila Liaison Office, which under Article 5 of the CISS Agreement SGS was obliged to "continue and maintain... until the date upon which this Agreement ceases to be effective or its implementation is interrupted or indefinitely suspended." This was a substantial office, employing a significant number of people. Requisitions for inspections were channelled through the Office which arranged the inspection, received the results, incorporated them in a CRF which it provided both to the importer and the BOC prior to customs clearance and dealt with any resulting queries. In addition, direct periodic reports had to be made to the Government,<sup>33</sup> and from time to time BOC would make specific requests for reports or other services with respect to specific consignments.

102. The position might have been different if SGS had provided the certificates and issued its reports abroad, e.g. to a Philippines trade mission in each country of export. But it did not perform the service in that way, nor did the CISS Agreement envisage that it would do so. A substantial and non-severable aspect of the overall service was provided in the Philippines, and SGS's entitlement to be paid was contingent on that aspect. Article 6.3 of the Agreement provided that...

"SGS shall be entitled to such fees regardless of whether the seller fails to provide the necessary information for the issuance of a Clean Report and/or does not proceed with the shipment of goods for any reason... provided, SGS has rendered the required service and supplies the Government with reasonable information regarding its inspections and price comparison."

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<sup>33</sup> A number of provisions of the CISS Agreement called for reporting to the Government, an act evidently to be performed in the Philippines: see Articles 2.2.2, 2.2.3, 2.2.4, 2.3, 4.2. Of particular significance was Art. 4.2:

"Periodical reports shall be issued by SGS to the Government giving details of the volume of goods inspected; undervaluation detected and consequent increase in revenue payable to the Government; over-invoicing detected and commissions and similar fees payable to importers or third parties in the Philippines and other benefits which the Government has derived from the Comprehensive Import Supervision Service."

See also the amendment to Art. 6.3 made by the First Addendum, requiring SGS to coordinate with BOC in verifying the utilization of its certificates: this verification process would naturally take place in the Philippines.

Article 8.1 required SGS “in performing services hereunder [to] exercise reasonable care”. It is clear that this obligation extended to exercising such care in making the various reports to the Government required by the Agreement.<sup>34</sup>

103. These elements taken together are sufficient to qualify the service as one provided in the Philippines. Since it was a cost to SGS to provide it, this is enough to amount to an investment in the Philippines within the meaning of the BIT.

104. The Philippines argued that the CISS Agreement was structured in such a way as to minimize the significance of the Liaison Office, and more generally of the services provided within the Philippines. The purpose of doing so was to ensure that income payable to SGS for its services was not taxable in the Philippines. Article 2 of the CISS Agreement provided that inspection was to be carried out “at all points of supply outside the territory of the Republic of the Philippines and/or in the ports of shipment and other points of dispatch”. Article 5 provided that the Liaison Office was established “exclusively for informational, as opposed to income generating purposes.” Article 6.2 declared that the fees for services under the Agreement have been fixed taking into consideration Philippine tax laws and rulings to the effect that “income derived by a foreign company from services performed outside of Philippine territorial jurisdiction are not subject to any Philippine tax.”<sup>35</sup> It went on to provide that fees “shall be correspondingly increased” if this assumption about tax liability should prove to be unfounded.

105. The Liaison Office (which had a number of sub-branches) was funded by subventions from an SGS affiliate in Geneva which employed the staff. According to evidence presented by SGS, its monthly payroll in the Philippines ranged between US\$100,000 and US\$200,000, amounting to something of the order of a quarter of its total expenses. SGS accepted that this was a fraction of the cost of conducting the actual inspections abroad. Under Article 7 of the CISS Agreement, invoices were forwarded to the BOC from Switzerland and were paid by bank transfer to SGS’s Swiss account.

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<sup>34</sup> Article 8.1 was amended by the First Addendum so as to limit SGS’s liability to certain values. The duty of care remained. In addition SGS was required to execute a separate undertaking “[t]o ensure compliance with all its commitments and obligations”: this would clearly have applied to obligations required to be performed in the Philippines.

<sup>35</sup> Article 6.2 was amended by the First Addendum so as to incorporate the relevant BIR Rulings into the Agreement “in accordance with the principle that the provisions of existing laws are read and become part of contractual stipulations.”



106. The Tribunal does not consider that these circumstances affect the conclusion that SGS made an investment in the Philippines. A Swiss company within the SGS Group funded the Liaison Office as a part of the provision of an overall service—essentially an informational service—which for the reasons given had its focus in the Philippines. The fact that the bulk of the cost of providing the service was incurred outside the Philippines is not decisive. Nor is it decisive that SGS was paid in Switzerland. In any event, the agreed forum for suit if SGS was not paid was the Regional Trial Court in Manila or Makati.

107. The Respondent argued that SGS's conduct demonstrated its acceptance that the investment was made abroad; even that it amounted to an estoppel. The Tribunal does not agree. The fact that for tax purposes SGS's services were treated as performed abroad is not decisive. The tax treatment of investments is a matter for local law with its own regime of rules as to where income is considered to have been earned, a regime distinct from that of the BIT. SGS pointed out that it was a matter for the revenue authorities to determine the situation, not for BOC to do so, and that it had reserved the right to reassess its charges in the event that income under the CISS Agreement was held to be locally taxable.

108. Similar considerations apply to SGS's pleas before the local courts that it was not locally present for the purposes of legal proceedings brought against it. In fact the Tribunal finds it difficult to understand why the Liaison Office, employing a significant number of people, was not locally present.<sup>36</sup> There was certainly a sufficient presence to establish jurisdiction based on residence under many legal systems.

109. For similar reasons the Tribunal does not accept that SGS is estopped from arguing that there was an investment in the Philippines for the purposes of the BIT. Accepting, for the sake of argument, that the principle of estoppel is relevant for this purpose, the statements made by SGS to various Philippine government offices<sup>37</sup> or before the local courts<sup>38</sup> were not directed to the issue

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<sup>36</sup> Apparently the Philippines courts in the two *Lorenzo Tan* cases gave conflicting decisions on this point. Transcript, 26 May 2003, p. 39.

<sup>37</sup> Thus lawyers for an SGS affiliate seeking an amendment of a Certificate of Authority to allow for the work of the Manila Liaison Office in 1987 stated that the Office would not undertake inspections but “will merely be a documents centre set up to facilitate the smooth running of the scheme”. This may have understated the significance the Liaison Office came to have but was not fundamentally incorrect: the CISS scheme revolved around the provision of reliable documents. See also the Application to do Business or

whether there was an investment in the Philippines for the purposes of the BIT.<sup>39</sup> Even if they had been, there is no evidence that the Philippines relied on such statements in order to exclude the possibility of proceedings under the BIT. If the Philippines had considered the matter, it would no doubt have relied on Article 12 of the CISS Agreement as determining local contractual jurisdiction vis-à-vis SGS, not on arguments made by SGS in miscellaneous local proceedings brought, mostly unsuccessfully, by third persons.

110. Earlier decisions of ICSID Tribunals on the question whether an investment was made “in the territory” of the host State do not provide much assistance. The question was discussed in the *Gruslin* case, but the claim was rejected on another jurisdictional ground.<sup>40</sup> The Tribunal in the *Fedax* case gave a very broad definition of territoriality,<sup>41</sup> but the focus of the decision was whether the endorsee of a promissory note issued with respect to an investment had itself made an investment, and whether the dispute over non-payment of the note arise “directly” out of an investment within the meaning of Article 25(1) of the ICSID Convention. Counsel for the Respondent declined to argue that *Fedax* was in this respect wrongly decided,<sup>42</sup> but at any rate the circumstances of the *Fedax* case were very different from the present. This was also true in the *CSOB* case, where the emphasis was more on the existence of an investment than its location. But the Tribunal held that the agreement in that case qualified as an investment under the BIT because its “the basic and ultimate goal... was to ensure a continuing and expanding activity of CSOB” in

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Engage in any Economic Activity in the Philippines, made by SGS Far East Ltd. on 31 March 1987, according to which the Manila Liaison Office would “serve as a documents/communication centre pursuant to agreement with Phil. Government”.

<sup>38</sup> In *Macasiano v. Société Générale de Surveillance S.A.*, SGS responded to a Supreme Court challenge concerning the constitutionality of the CISS Agreement by asserting that the Agreement was “an ordinary contract” and did not involve an “invalid delegation of sovereign attributes”: Comment of 1 February 1994. By resolution of 5 April 1995 the case was held moot.

<sup>39</sup> Other decisions included *Bureau Veritas v. Office of the President*, (1992) 205 SCR Annotated 705. Counsel for the Philippines accepted that the various cases were “not on all fours”: Transcript, 26 May 2003, p. 38.

<sup>40</sup> *Gruslin v. Malaysia*, Award of 27 November 2000, 5 ICSID Reports 483, 507-8.

<sup>41</sup> *Fedax NV v. Republic of Venezuela*, Decision on Objections to Jurisdiction, 11 July 1997, 5 ICSID Reports 183, 198 (para. 41): “The important question is whether the funds made available are utilized by the beneficiary of the credit, as in the case of the Republic of Venezuela, so as to finance its various governmental needs.” The territorial requirement in the BIT in that case was, however, less categorical. It referred to “the protection in its territory of investments of nationals of the other Contracting Party”: see *Venezuela-Netherlands, Agreement on encouragement and reciprocal protection of investments*, Caracas, 22 October 1991, 1788 UNTS 70, Art. 2, and this only in the clause dealing with entry, not in a general clause defining the scope of the Treaty as a whole.

<sup>42</sup> Transcript, 26 May 2003, p. 65; 27 May 2003, pp. 105-7.

the Slovak Republic. The Tribunal emphasised “the entire process” of economic activity, even though particular aspects of it were not locally performed.<sup>43</sup>

111. The most relevant decision is that in *SGS v. Pakistan*, where, as noted, the Tribunal held that equivalent pre-inspection services were provided “in the territory of the host State” because there had been an “injection of funds into the territory of Pakistan for the carrying out of SGS’s engagements under the PSI Agreement.”<sup>44</sup> The Tribunal agrees with this reasoning. Indeed the present case seems even stronger, given the scale and duration of SGS’s activity and the significance of the activities of the Manila Liaison Office.

112. For these reasons the present Tribunal concludes that SGS made an investment “in the territory of” the Philippines under the CISS Agreement, considered as a whole. Moreover the present dispute concerns the service so provided and arises directly out of it, within the meaning of Article 25(1) of the ICSID Convention. There was no distinct or separate investment made elsewhere than in the territory of the Philippines but a single integrated process of inspection arranged through the Manila Liaison Office, itself unquestionably an investment “in the territory of” the Philippines. Thus the present dispute falls within the scope of the BIT in accordance with Article II.

**(b) Jurisdiction under the “Umbrella Clause”: Article X(2)**

113. On the footing that it had made an investment in the territory of the Philippines, the principal jurisdictional submission of SGS is that, having failed to pay for services due under the CISS Agreement, the Philippines is in breach of Article X(2) of the BIT, and that the Tribunal’s jurisdiction is attracted by Article VIII(2) in respect of such breaches. The Philippines for its part denies that Article X(2) has such an effect, relying *inter alia* on the decision of the *SGS v. Pakistan* Tribunal on the equivalent BIT provision in that case.

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<sup>43</sup> *Ceskoslovenska Obchodni Banka, AS v. The Slovak Republic*, Decision on Objections to Jurisdiction, (1999) 5 ICSID Reports 330, 356 (para. 88).

<sup>44</sup> *SGS v. Pakistan*, para. 136.

114. One must begin with the actual text of Article X.<sup>45</sup> It is headed “Other Commitments”. Article X(1) is a kind of “without prejudice” clause, providing that legislative provisions or international law rules more favourable to an investor shall to that extent “prevail over this Agreement”. It deals with the relation between commitments under the BIT and distinct commitments under host State law or under other rules of international law. It does not appear to impose any additional obligation on the host State in the framework of the BIT.<sup>46</sup>

115. Article X(2) is different. It reads:

“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.”

This is not expressed as a without prejudice clause, unlike Article X(1). It uses the mandatory term “shall”, in the same way as substantive Articles III-VI. The term “any obligation” is capable of applying to obligations arising under national law, e.g. those arising from a contract; indeed, it would normally be under its own law that a host State would assume obligations “with regard to specific investments in its territory by investors of the other Contracting Party”. Interpreting the actual text of Article X(2), it 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>47</sup> Article X(2) was adopted within the framework of the BIT, and has to be construed as intended to be effective within that framework.

116. The object and purpose of the BIT supports an effective interpretation of Article X(2). 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 covered investments.

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<sup>45</sup> See paragraph 34. The BIT was concluded in English and French, with the English text prevailing in case of any “divergence of interpretation”. Examination of the French text does not reveal any relevant divergence.

<sup>46</sup> The phrase “shall prevail over”, used in relation to other commitments, may not have the effect of incorporating those commitments into a BIT. See *Yaung Chi Oo Trading Pte. Ltd. v. Government of the Union of Myanmar* (ASEAN I.D. Case No. ARB 01/1), (2003) 42 ILM 540, 556-7 (paras. 79-82).

<sup>47</sup> It was not suggested by the Respondent that Article X(2) only applies to obligations already assumed at the time of entry into force of the BIT. Like other provisions of the BIT, Article X is ambulatory in effect.

117. Moreover it will often be the case that a host State assumes obligations with regard to specific investments at the time of entry, including investments entered into on the basis of contracts with separate entities. Whether collateral guarantees, warranties or letters of comfort given by a host State to induce the entry of foreign investments are binding or not, i.e. whether they constitute genuine obligations or mere advertisements, will be a matter for determination under the applicable law, normally the law of the host State. But 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).

118. The Respondent argued that, if Article X(2) does have substantive effect, it should be interpreted as being limited to obligations under other international law instruments.<sup>48</sup> But such a limitation could readily have been expressed. The argument accepted that Article X(2) may have operative effect, but read into that provision words of limitation which are simply not there.

119. This provisional conclusion—that Article X(2) means what it says—is however contradicted by the decision of the Tribunal in *SGS v. Pakistan*, the only ICSID case which has so far directly ruled on the question.<sup>49</sup> 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. Article 11 of the Swiss-Pakistan BIT provides 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.”

Apart from the phrase “shall constantly guarantee” (what could an inconstant guarantee amount to?), the phrase “the commitments it has entered into with respect to the investments” is likewise less clear and categorical than the phrase “any obligation it has assumed with regard to specific investments in its territory” in Article X(2) of the Swiss-Philippines BIT.

120. Nonetheless it is relevant to consider the reasons given by the Tribunal in *SGS v. Pakistan* for giving a highly restrictive interpretation to the “umbrella clause”, in the context of the more

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<sup>48</sup> Transcript, 26 May 2003, pp. 100-2.

<sup>49</sup> See above, paragraph 96.

specific language of Article X(2), the provision the present Tribunal has to apply. Essentially there were four such reasons.

121. The first reason was textual. As the Tribunal noted, Article 11 could cover a wide range of commitments including legislative commitments; it went on to say that the interpretation favoured by SGS was “susceptible of almost indefinite expansion”.<sup>50</sup> It is true that Article X(2) of the Swiss-Philippines BIT likewise is not limited to contractual obligations. But it is limited to “obligations... assumed with regard to specific investments”. For Article X(2) to be applicable, the host State must have assumed a legal obligation, and it must have been assumed vis-à-vis the specific investment—not as a matter of the application of some legal obligation of a general character. This is very far from elevating to the international level all “the municipal legislative or administrative or other unilateral measures of a Contracting Party.”<sup>51</sup>

122. Secondly, the Tribunal applied general principles of international law to generate a presumption against the broad interpretation of Article 11. The principle relied on was 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”.<sup>52</sup> This principle is well established. It was affirmed by the *ad hoc* Committee in the *Vivendi* case, cited by the Tribunal.<sup>53</sup> But the Franco-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. Certainly it might do so, as the International Law Commission observed in its commentary to Article 3 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts.<sup>54</sup> The question is essentially one of interpretation, and does not seem to be determined by any presumption.

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<sup>50</sup> *SGS v. Pakistan*, para. 166.

<sup>51</sup> *Ibid.*

<sup>52</sup> *SGS v. Pakistan*, para. 167.

<sup>53</sup> *SGS v. Pakistan*, paras. 147-148, citing the *Vivendi Annulment* decision, (2002) 6 ICSID Reports 340, 365-7 (paras. 95-98, 101).

<sup>54</sup> Commentary to Article 3, para. (7), referring to the possibility that “the provisions of internal law... are actually incorporated in some form, conditionally or unconditionally, into that [sc. the international] standard”. See J Crawford, *The International Law Commission’s Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge, CUP, 2002) 89.

123. Thirdly, the Tribunal was concerned that the effect of a broad interpretation would be, *inter alia*, to override dispute settlement clauses negotiated in particular contracts.<sup>55</sup> The present Tribunal agrees with this concern, but—as will be seen—it does not accept that this follows from the broad interpretation of Article X(2).

124. Fourthly and subsidiarily, the Tribunal in *SGS v. Pakistan* found support for its conclusion in the fact that Article 11 is located at the end of the BIT, after the basic jurisdictional clauses, whereas if it had been intended to impose substantive international obligations it would more naturally have appeared earlier.<sup>56</sup> This factor is entitled to some weight, and it is the case that where it appears (as it does in only a minority of BITs) the “umbrella” clause is usually located earlier in the text.<sup>57</sup> But the Tribunal does not regard the location of the provision as decisive, having regard to the other considerations recited above. In particular, it is difficult to accept that the same language in other Philippines BITs is legally operative,<sup>58</sup> but that it is legally inoperative in the Swiss-Philippines BIT merely because of its location.

125. Not only are the reasons given by the Tribunal in *SGS v. Pakistan* unconvincing: the Tribunal failed to give any clear meaning to the “umbrella clause”. It treated Article 11 as signalling...

“an *implied affirmative commitment* to enact implementing rules and regulations necessary or appropriate to give effect to a contractual or statutory undertaking in favor of investors of another Contracting Party that would otherwise be a dead letter. Secondly, we do not preclude the possibility that *under exceptional circumstances*, a violation of certain provisions of a State contract with an investor of another State might constitute violation of a treaty provision... enjoining a Contracting Party constantly to guarantee the observance of contracts with investors of another Contracting Party.”<sup>59</sup>

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<sup>55</sup> *SGS v. Pakistan*, para. 168.

<sup>56</sup> *SGS v. Pakistan*, paras. 169-70.

<sup>57</sup> E.g., United States-Poland, Treaty concerning Business and Economic Relations, Washington, 21 March 1990, Art. 2(6), final sentence; United States-Estonia, Treaty for the Encouragement and Reciprocal Protection of Investments, 19 April 1994, Art. 2(3)(c).

<sup>58</sup> E.g., United Kingdom-Philippines, Agreement for the Promotion and Protection of Investments, 3 December 1980, Art. III(3); Netherlands-Philippines, Agreement for the Promotion and Protection of Investments, 27 February 1985, Art. III(3).

<sup>59</sup> *SGS v. Pakistan*, para. 172 (emphasis added).

But Article 11, if it has any effect at all, confers jurisdiction on an international tribunal, and needs to do so with adequate certainty. Jurisdiction is not conferred by way of “an implied affirmative commitment” or through the characterisation of circumstances as “exceptional”.

126. Moreover the *SGS v. Pakistan* Tribunal appears to have thought that the broad interpretation which it rejected would involve a full-scale internationalisation of domestic contracts—in effect, that it would convert investment contracts into treaties by way of what the Tribunal termed “instant transubstantiation”.<sup>60</sup> But this is not what Article X(2) of the Swiss-Philippines Treaty says. It 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 of the Philippines to international law. Article X(2) addresses not the *scope* of the commitments entered into with regard to specific investments but the *performance* of these obligations, once they are ascertained.<sup>61</sup> It is a conceivable function of a provision such as Article X(2) of the Swiss-Philippines BIT to provide assurances to foreign investors with regard to the performance of obligations assumed by the host State under its own law with regard to specific investments—in effect, to help secure the rule of law in relation to investment protection. In the Tribunal’s view, this is the proper interpretation of Article X(2).

127. To summarize, for present purposes Article X(2) includes commitments or obligations arising under contracts entered into by the host State. The basic obligation on the State in this case is the obligation to pay what is due under the contract, which is an obligation assumed with regard to the specific investment (the performance of services under the CISS Agreement). But this obligation does not mean that the determination of how much money the Philippines is obliged to pay becomes a treaty matter. The extent of the obligation is still governed by the contract, and it can only be determined by reference to the terms of the contract.

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<sup>60</sup> *SGS v. Pakistan*, para. 172.

<sup>61</sup> This is not a novel distinction. It is made for example in the UNCTAD Study, *Bilateral Investment Treaties* (Graham & Trotman, NY, 1988) 55-6: “Its effect [sc. of the umbrella clause] is not to transform the provisions of a State contract into international obligations... However, it makes the respect of such contracts... an obligation under the treaty” (emphasis in original). The subsequent UNCTAD study, *Bilateral Investment Treaties in the Mid-1990s* (NY, 1998) 56, is less precise but likewise concludes that “as a result of this provision, violations of commitments regarding investment by the host country would be redressible through the dispute-settlement procedures of a BIT.”



128. To summarize the Tribunal's conclusions on this point, Article X(2) 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. That issue (in the present case, the issue of how much is payable for services provided under the CISS Agreement) is still governed by the investment agreement. In the absence of other factors it could be decided by a tribunal constituted pursuant to Article VIII(2). The proper law of the CISS Agreement is the law of the Philippines, which in any event this Tribunal is directed to apply by Article 42(1) of the ICSID Convention. On the other hand, if some other court or tribunal has exclusive jurisdiction over the Agreement, the position may be different.

129. Before turning to that question, however, it is appropriate to ask whether the present Tribunal could exercise jurisdiction over contractual disputes concerning an investment by virtue of Article VIII(2) of the BIT, irrespective of any breach of the substantive provisions of the BIT. This issue was debated before the Tribunal and is potentially relevant, for example, in the context of the application of the BIT to claims arising before its entry into force.

**(c) Jurisdiction over contractual claims: Article VIII(2)**

130. Article VIII of the BIT provides for settlement of "disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party". If a dispute is not resolved by consultations between the parties pursuant to Article VIII(1), 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", and in the latter case, at the investor's option, to ICSID or UNCITRAL arbitration.

131. *Prima facie*, Article VIII is an entirely general provision, allowing for submission of all investment disputes by the investor against the host State.<sup>62</sup> The term "disputes with respect to investments" ("différents relatifs à des investissements" in the French text) is not limited by reference to the legal classification of the claim that is made. A dispute about an alleged

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<sup>62</sup> Earlier drafts of what became Article VIII were similarly broad: e.g. Art. 10(1) of an earlier draft referred to "any dispute that may arise in connection with the investment".

expropriation contrary to Article VI of the BIT would be a “dispute with respect to investments”; so too would a dispute arising from an investment contract such as the CISS Agreement.

132. This *prima facie* conclusion is supported by a number of further considerations, both within the BIT itself and extrinsic to it:

- (a) Each of the forums contemplated by Article VIII(2) (the national courts of the host State, ICSID panels and *ad hoc* tribunals established under the UNCITRAL Rules) has the competence to apply the law of the host State, including its law of contract. Indeed, if the BIT has not been implemented internally, the national courts may *only* be competent to apply their own law.
- (b) The general term “disputes with respect to investments” may be contrasted with the more specific term “[d]isputes... regarding the interpretation or application of the provisions of this Agreement” in Article IX. If the States Parties to the BIT had wanted to limit investor-State arbitration to claims concerning breaches of the substantive standards contained in the BIT, they would have said so expressly, using this or similar language.
- (c) As noted already, the purpose of the BIT is to promote and protect foreign investments. Allowing investors a choice of forum for resolution of investment disputes of whatever character is consistent with this aim.<sup>63</sup> By contrast drawing technical distinctions between causes of action arising under the BIT and those arising under the investment agreement is capable of giving rise to overlapping proceedings and jurisdictional uncertainty. It may be necessary to draw such distinctions 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.
- (d) By definition, investments are characteristically entered into by means of contracts or other agreements with the host State and the local investment partner (or if these are different entities, with both of them). The specific link between investments and contracts is acknowledged by the line of cases dealing with pre-contractual claims. ICSID tribunals have been very reluctant to acknowledge that an investment has actually been made until the contract has been signed or at least approved and acted on.<sup>64</sup> Thus the phrase “disputes with respect to investments” naturally includes contractual disputes; the same is true of the

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<sup>63</sup> See above, paragraph 116.

<sup>64</sup> See, e.g., *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, Award of 15 March 2002, 6 ICSID Reports 308, 319-20 (paras. 48, 51) (entry into an investment coextensive with conclusion of a binding contract).

phrase “legal dispute arising directly out of an investment” in Article 25(1) of the ICSID Convention.

- (e) In other investment protection agreements, when investor-State arbitration is intended to be limited to claims brought for breach of international standards (as distinct from contractual or other claims under national law), this is stated expressly. A well-known example is Chapter 11 of the North American Free Trade Agreement (NAFTA), under which investors may only bring claims for breaches of specified provisions of Chapter 11 itself.<sup>65</sup>

133. However, a different view of the matter was apparently taken by the ICSID Tribunal in *SGS v. Pakistan*, and it is necessary to consider the reasons given for their conclusion. The equivalent provision of the BIT in that case, Article 9, used the phrase “disputes with respect to investments”: this is the same as Article VIII of the Swiss-Philippines BIT. The relevant passage of the decision reads as follows:

“161. We recognize that disputes arising from claims grounded on alleged violation of the BIT, and disputes arising from claims based wholly on supposed violations of the PSI Agreement, can both be described as ‘disputes with respect to investments,’ the phrase used in Article 9 of the BIT. That phrase, however, 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. In other words, from that description alone, without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9. Neither, accordingly, does an implication arise that the Article 9 dispute settlement mechanism would supersede and set at naught all otherwise valid non-ICSID forum selection clauses in all earlier agreements between Swiss investors and the Respondent. Thus, we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this Tribunal with jurisdiction over claims resting *ex hypothesi* exclusively on contract. Both Claimant and Respondent have already submitted their respective claims sounding solely on the PSI Agreement to the PSI Agreement arbitrator. We recognize that the Claimant did so in a qualified manner and questioned the jurisdiction of the PSI Agreement arbitrator, albeit on grounds which do not appear to relate to the issue we here address. We believe that Article 11.1 of the PSI Agreement is a valid forum selection clause *so far as concerns the Claimant’s contract claims which do not also amount to BIT claims*, and it is a clause that this Tribunal should respect. We are not suggesting that the parties cannot, by special agreement, lodge in this Tribunal jurisdiction to pass upon and decide claims sounding solely in the contract. Obviously the parties

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<sup>65</sup> To similar effect see e.g., the *Vivendi Annulment* decision, (2002) 6 ICSID Reports 340, 356 (para. 55). The issue there was a slightly different one, viz., whether in pursuing ICSID arbitration rather than local proceedings for breach of contract the investor had taken the “fork in the road” under the BIT. But it involved the interpretation of similar general language in the BIT.

can. But we do not believe that they have done so in this case. And should the parties opt to do that, our jurisdiction over such contract claims will rest on the special agreement, not on the BIT.

162. We conclude that the Tribunal has no jurisdiction with respect to claims submitted by SGS and based on alleged breaches of the PSI Agreement which do not also constitute or amount to breaches of the substantive standards of the BIT.”<sup>66</sup>

134. The present Tribunal agrees with the concern that the general provisions of BITs should not, unless clearly expressed to do so, override specific and exclusive dispute settlement arrangements made in the investment contract itself. On the view put forward by SGS it will have become impossible for investors validly to agree to an exclusive jurisdiction clause in their contracts; they will always have the hidden capacity to bring contractual claims to BIT arbitration, even in breach of the contract, and it is hard to believe that this result was contemplated by States in concluding generic investment protection agreements. But there are two different questions here: 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 (or, more precisely, the admissibility of those claims) when there is an exclusive jurisdiction clause in the contract. It is not plausible to suggest that general language in BITs dealing with all investment disputes should be limited because in some investment contracts the parties stipulate exclusively for different dispute settlement arrangements. As will be seen, it is possible for BIT tribunals to give effect to the parties’ contracts while respecting the general language of BIT dispute settlement provisions.

135. 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 ICSID arbitration under Article VIII(2) of the BIT.<sup>67</sup>

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<sup>66</sup> Emphasis in original.

<sup>67</sup> The same conclusion was reached by an ICSID Tribunal in *Salini Costruttori SpA v. Kingdom of Morocco*, (2001) 6 ICSID Reports 398, 415 (para. 61).

**(d) The exclusive choice of forum clause**

136. The Tribunal turns to the question of the jurisdiction clause mutually agreed in the CISS Agreement and its impact on the present claim.

137. As noted already, Article 12 of the CISS Agreement provides that:

“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.”

*Prima facie* Article 12 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”. It is clear that the substance of SGS’s claim, viz., a claim to payment for services supplied under the Agreement, falls within the scope of Article 12.

138. It has been suggested that in some legal systems, a clause referring to national courts or tribunals may be legally ineffective to confer or affect that jurisdiction, and should be construed as a mere acknowledgement of a jurisdiction already existing by virtue of the non-derogable law of the host State. This was suggested of the law of Argentina in the *Lanco* case.<sup>68</sup> But the Tribunal does not interpret Article 12 of the CISS Agreement as a mere acknowledgement which does not impose a contractual obligation upon SGS as to the use of the Philippines courts to resolve contractual disputes. SGS did not dispute that under Philippine law (the proper law of the CISS Agreement), a contractual stipulation to accept the exclusive jurisdiction of the Regional Trial Courts is effective in law and binding on the parties. In accordance with general principle, courts or tribunals should respect such a stipulation in proceedings between those parties, unless they are bound *ab exterior*e, i.e., by some other law, not to do so. Moreover it should not matter whether the contractually-agreed forum is a municipal court (as here) or domestic arbitration (as in *SGS v. Pakistan*) or some other form of arbitration, e.g. pursuant to the UNCITRAL or ICC Rules. The basic principle in each case is that a binding exclusive jurisdiction clause in a contract should be respected, unless overridden by another valid provision.<sup>69</sup>

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<sup>68</sup> *Lanco International, Inc. v. Argentine Republic*, (1998) 5 ICSID Reports 367, 378 (para. 26). The Tribunal would observe, however, that the mere fact that “administrative jurisdiction cannot be selected by mutual agreement” does not prevent the investor agreeing by contract not to resort to any other forum.

<sup>69</sup> For an express provision see Article II(1) of the Claims Settlement Declaration, 19 January 1981, which expressly overrides exclusive jurisdiction clauses except for those relating to Iranian courts: 1 Iran-US CTR 9.

(i) Is the exclusive jurisdiction clause overridden by the BIT or the ICSID Convention?

139. Accordingly, faced with an exclusive jurisdiction clause in these terms, the first question must be whether the BIT or the ICSID Convention purport to confer upon investors the right to pursue contractual claims under the BIT disregarding the contractually chosen forum.

140. One possibility is that this right is conferred by Article VIII(2) of the BIT itself, which gives the investor a choice to submit the dispute “either to the national jurisdiction of the Contracting Party in whose territory the investment has been made or to international arbitration”, and in the latter case, a further choice between ICSID and UNCITRAL arbitration. The question is whether Article VIII(2) was intended to override an exclusive jurisdiction clause in an investment contract, so far as contractual claims are concerned.

141. Two considerations lead the majority of the Tribunal to give a negative answer to this question.<sup>70</sup> The first consideration involves the maxim *generalia specialibus non derogant*. Article VIII is a general provision, applicable to investment arrangements whether concluded “prior to or after the entry into force of the Agreement” (Article II). The BIT itself was not concluded with any specific investment or contract in view. 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. As Schreuer says, “[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>71</sup> The second consideration derives from the character of an investment protection agreement as a framework treaty, intended by the States Parties to support and supplement, not to override or replace, the actually negotiated investment arrangements made between the investor and the host State.

142. It is suggested that, while BIT provisions for investor-State arbitration do not override exclusive jurisdiction clauses in later investment contracts, at least they have that effect for earlier

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<sup>70</sup> Professor Crivellaro would give an affirmative answer, at least with respect to BITs which post-date the relevant contract. See his attached Declaration.

<sup>71</sup> Schreuer, 362.

contracts, by application of the maxim *lex posterior derogat legi priori*.<sup>72</sup> But there is no textual basis in the BIT for drawing such a distinction. The distinction would tend to operate in an arbitrary way: in the present case, for example, the BIT is renewable after 10 years and thereafter every five years (Article XI(1)); the CISS itself was renewed on the same terms as to dispute settlement on several occasions. In such circumstances, which is the prior agreement and which is the subsequent one? But 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. It must be presumed that whatever effect the BIT has on contracts it has on a continuing basis, as new contracts are concluded and new investments admitted. 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.

143. For these reasons, in the Tribunal's view, the BIT did not purport to override the exclusive jurisdiction clause in the CISS Agreement, or to give SGS an alternative route for the resolution of contractual claims which it was bound to submit to the Philippine courts under that Agreement.

144. Alternatively, SGS argues that Article 26 of the ICSID Convention has this effect. Article 26 provides:

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

It may be 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.

145. Unlike the argument considered above concerning the legal effect of the BIT, this argument at least has the merit that it identifies two agreements of the same character between the same parties, viz., Article 12 of the CISS Agreement and the later agreement to ICSID arbitration

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<sup>72</sup> See, e.g., the discussion in *Lanco International, Inc. v. Argentine Republic*, (1998) 5 ICSID Reports

constituted by the terms of Article VIII of the BIT in association with the Request for Arbitration. In principle a later agreement between the same parties could override an earlier one. But SGS's argument depends upon a view of the intended meaning and effect of Article 26 which the Tribunal does not share, for three reasons.

146. First, it is not supported by the *travaux préparatoires* of Article 26, which make it clear that Article 26 was intended as a rule of interpretation, not a mandatory rule.<sup>73</sup>

147. Secondly, it ignores the phrase “unless otherwise stated” in Article 26. The question may be asked why the exclusive jurisdiction clause in the contract is not a contrary statement for this purpose. Article 26 is concerned with the consent of the parties to ICSID arbitration (not the consent of the States Parties to a BIT). In that context the immediately succeeding phrase “unless otherwise stated” must include a contrary statement or agreement by those parties. This is the conclusion reached by Schreuer:

“This exclusive remedy rule of Art. 26 is subject to modification by the parties. The words ‘unless otherwise stated’ in the first sentence give the parties the option to deviate from it by agreement.”<sup>74</sup>

Moreover he applies this principle not only to other forms of arbitration but also to domestic forum clauses:

“Explicit reference to domestic courts means that the exclusive remedy rule of Art. 26 does not apply since the parties have stated otherwise.”<sup>75</sup>

148. Thirdly, the view that Article 26 provides a mandatory override of previously agreed dispute settlement clauses would mean that in the common case under a BIT (such as the Swiss-Philippines BIT) where the parties have a choice between ICSID arbitration and UNCITRAL arbitration in respect of the same dispute, that choice would materially affect their legal rights. 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

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367, 377 (para. 24).

<sup>73</sup> See the summary in Schreuer, 388-90.

<sup>74</sup> Schreuer, 347.

<sup>75</sup> Schreuer, 363.



the UNCITRAL Rules contain no equivalent provision). The Tribunal does not believe that this could have been intended.

(ii) Effect given to exclusive jurisdiction clauses in arbitral practice

149. Accordingly the Tribunal is faced with a valid and applicable exclusive jurisdiction clause, affecting the substance of SGS's claim. The question is whether this affects the Tribunal's jurisdiction or the admissibility of the claim.

150. The jurisprudence of mixed arbitral tribunals has not been entirely consistent, but the balance of opinion supports the conclusion that it does. For example, in the *Woodruff* case the United States-Venezuela Mixed Commission had jurisdiction over "[a]ll claims owned by citizens of the United States of America against the Republic of Venezuela", such claims to be decided "upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation".<sup>76</sup> The holders of Venezuelan railway bonds issued in 1859 made claims but were denied on the ground that by the terms of the bonds all controversies were to be "decided by the common laws and ordinary tribunals of Venezuela". The Umpire, Barge, rejected the argument that the Protocol of 1903 overrode the exclusive claims clause in the contract:

"the judge, having to deal with a claim fundamentally based on a contract, has to consider the rights and duties arising from that contract, and may not consider a contract that the parties themselves did not make, and he would be doing so if he gave a decision in this case and thus absolved from the pledged duty of first recurring for rights to the Venezuelan courts, thus giving a right, which by this same contract was renounced, and absolve claimant from a duty that he took upon himself by his own voluntary action..."<sup>77</sup>

The Commission decided that "as the claimant by his own voluntary waiver has disabled himself from invoking the jurisdiction of this Commission, the claim has to be dismissed without prejudice on its merits, when presented to the proper judges."<sup>78</sup>

151. The United States-Mexico General Claims Commission took a similar approach in the *North American Dredging Company of Texas* case. The Commission said:

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<sup>76</sup> See the United States-Venezuela Claims Protocol, 17 February 1903: 101 BFSP 646, 2 Malloy 1870.  
<sup>77</sup> (1903) 9 RIAA 213, 222.

“each case involving the application of a valid clause partaking of the nature of the Calvo Clause will be considered and decided on its merits. Where a claim is based on an alleged violation of any rule or principle of international law, the Commission will take jurisdiction notwithstanding the existence of such a clause in a contract subscribed by such claimant. But where a claimant has expressly agreed in writing, attested by his signature, that in all matters pertaining to the execution, fulfillment, and interpretation of the contract he will have resort to local tribunals, remedies, and authorities, and then wilfully ignores them by applying in such matters to his government, he will be held bound by his contract and the Commission will not take jurisdiction of such claim.”<sup>79</sup>

152. It is true that there are decisions apparently to the opposite effect, but mostly these depend on the existence of a provision overriding contractual forum clauses. For example, the Italian-Venezuelan Protocol of 13 February 1903 contained two salient provisions: in Article I, Venezuela expressly recognized “in principle the justice of the [Italian] claims”—this amounted in effect to an acknowledgement of indebtedness. Secondly, the Protocol was concerned with a defined class of existing claims; after dealing with certain of these specifically, it referred “all the remaining Italian claims, without exception” to the Mixed Commission.<sup>80</sup> In the *Martini* case, Arbitrator Ralston was able to rely on “the plain language of the protocol” in dismissing arguments based on a local forum clause.<sup>81</sup>

153. But it is one thing for a defined class of existing claims to be referred to an international tribunal “without exception”, and another for a government to agree to the adjudication for the future of an indefinite range of cases in a number of different forums with different rules. The Tribunal cannot accept that standard BIT jurisdiction clauses automatically override the binding selection of a forum by the parties to determine their contractual claims. As the *ad hoc* Committee said in the *Vivendi* case:

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<sup>78</sup> Ibid., 223. An earlier decision to similar effect is *Flanagan, Bradley, Clark & Co. v. Venezuela*, under the Convention between the United States and Venezuela of 5 December 1885, in Moore, *Digest of International Arbitrations* (1898) vol. IV, 3564, 3665.

<sup>79</sup> (1926) 20 AJIL 800, 808 (para. 23); 3 ILR 292, 293. See also *Mexican Union Railway Limited (Great Britain) v. United Mexican States* (1930) 5 RIAA 115, 5 ILR 207; *El Oro Mining & Railway Co. Limited (Great Britain) v. United Mexican States* (1931) 5 RIAA 191, 6 ILR 201.

<sup>80</sup> Art. IV. Art. VII dealt with bondholders' claims. For the text see 10 RIAA 479.

<sup>81</sup> (1903) 10 RIAA 644, 663-4. Decisions of mixed arbitral tribunals under the Treaty of Versailles, 1919, were variable and depended on the interpretation of Article 304(b) of the Treaty, which could be regarded as overriding exclusive jurisdiction clauses in contracts: see, e.g., *Greek Government v. Vulkan Werke* (1925) 3 ILR 402.

“where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract.”<sup>82</sup>

(iii) Distinction between jurisdiction and admissibility

154. In the Tribunal’s view, this principle is one concerning the admissibility of the claim, not jurisdiction in the strict sense. The jurisdiction of the Tribunal is determined by the combination of the BIT and the ICSID Convention. It is, to say the least, 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. Although under modern international law, treaties may confer rights, substantive and procedural, on individuals,<sup>83</sup> they will normally do so in order to achieve some public interest. Thus the question is not whether the Tribunal has jurisdiction: unless otherwise expressly provided, treaty jurisdiction is not abrogated by contract. The question is 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. In the Tribunal’s view the answer is that it should not be allowed to do so, unless there are good reasons, such as *force majeure*, preventing the claimant from complying with its contract. This impediment, based as it is on the principle that a party to a contract cannot claim on that contract without itself complying with it, is more naturally considered as a matter of admissibility than jurisdiction.<sup>84</sup>

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<sup>82</sup> (2001) 6 ICSID Reports 340, 366 (para. 98).

<sup>83</sup> Cf. *LaGrand Case (Germany v. United States of America)*, ICJ Reports 2001 p. 466 at 494 (paras. 77-78); ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to GA Res 56/83, 12 December 2001, Art. 33(2).

<sup>84</sup> It may be noted that the analogous rule of exhaustion of local remedies is normally a matter concerning admissibility rather than jurisdiction in the strict sense: I Brownlie, *Principles of Public International Law* (6<sup>th</sup> edn, Oxford, 2003) 681; CF Amerasinghe, *Local Remedies in International Law* (2<sup>nd</sup> edn, Cambridge, CUP, 2004) 293-4..

(iv) Conclusion on Article 12 of the CISS Agreement

155. To summarise, in the Tribunal's view its jurisdiction is defined by reference to the BIT and the ICSID Convention. But the Tribunal 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 have done so exclusively. SGS should not be able to approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim. The Philippine courts are available to hear SGS's contract claim. Until the question of the scope or extent of the Respondent's obligation to pay is clarified—whether by agreement between the parties or by proceedings in the Philippine courts as provided for in Article 12 of the CISS Agreement—a decision by this Tribunal on SGS's claim to payment would be premature.

(e) **Is there a BIT claim independent of the CISS Agreement?**

156. Before considering the implications of these findings for the present proceedings it is necessary to consider whether SGS has stated a case under the BIT which can be determined independently from the contractual issues referred to the Philippine courts by Article 12 of the CISS Agreement, a jurisdictional agreement which, for the reasons given, this Tribunal must respect.

(i) The general principle

157. In accordance with the basic principle formulated in the *Oil Platforms* case (above, paragraph 26), it is not enough for the Claimant to assert the existence of a dispute as to fair treatment or expropriation. The test for jurisdiction is an objective one and its resolution may require the definitive interpretation of the treaty provision which is relied on. On the other hand, as the Tribunal in *SGS v. Pakistan* stressed,<sup>85</sup> it is for the Claimant to formulate its case. Provided the facts as alleged by the Claimant and as appearing from the initial pleadings fairly raise questions of breach of one or more provisions of the BIT, the Tribunal has jurisdiction to determine the claim. By extension, in international arbitration a Claimant must state its claim in its

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<sup>85</sup> See above, paragraph 96. See also *United Parcel Service of America, Inc. v. Government of Canada*, Decision on Jurisdiction, 22 November 2002, para. 33.

initial application, and wholly new claims cannot thereafter be added during the pleadings.<sup>86</sup> On the other hand, a Claimant is not limited to the facts set out in its Request for Arbitration: it may assert and prove additional facts, including those occurring at a subsequent time up to the closure of the proceedings, provided these fall within the scope of its original claim.<sup>87</sup>

158. The Tribunal would note that the dispute in *SGS v. Pakistan* appears to be a more complex one than the present, and that the *SGS v. Pakistan* Tribunal held it was not to be characterised as a merely contractual dispute.<sup>88</sup> That was certainly true in the *Vivendi* case, where the claim presented by the Claimant went beyond the scope of the concession agreement and involved allegations which, if proved, were capable of amounting to breaches of Article 3 or possibly Article 5 of the Franco-Argentine BIT. As the *ad hoc* Committee held:

“the conduct alleged by Claimants, if established, *could* have breached the 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 Claimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of Articles 3 and/or 5 of the BIT.”<sup>89</sup>

159. By contrast the present dispute is on its face a dispute about the amount of money owed under a contract. SGS accepts that the provision of services under the CISS Agreement came to an end by effluxion of time. No question of a breach of the BIT independent of a breach of contract claim is raised (as, arguably, in *SGS v. Pakistan*); there is no allegation of a conspiracy by local officials to frustrate the investment (as in *Vivendi*). As presented to the Tribunal by the Claimant, the unresolved issues between the parties concern the determination of the amount still payable.

(ii) The BIT claims presented by SGS

160. In its Request for Arbitration SGS invoked Articles IV, VI and X(2).<sup>90</sup> Article X(2) having already been dealt with, the Tribunal turns to the remaining claims under Articles IV (fair

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<sup>86</sup> See *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia)*, ICJ Reports 1992 p. 240 at 265-70 (paras. 64-70).

<sup>87</sup> See *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections*, ICJ Reports 1998 p. 275 at 317-19 (paras. 96-101); *Request for Interpretation of the Judgment of 11 June 1998 in the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Nigeria v. Cameroon), Preliminary Objections*, ICJ Reports 1999 p. 31 at 38 (para. 15).

<sup>88</sup> *SGS v. Pakistan*, paras. 186-8.

<sup>89</sup> (2001) 6 ICSID Reports 340, 370 (para. 112, emphasis in original). See also *ibid.*, para. 114.

<sup>90</sup> Request for Arbitration, paras. 38-41.

and equitable treatment) and VI (expropriation). It is convenient to deal first with the expropriation claim.

161. In the Tribunal's view, on the material presented by the Claimant no case of expropriation has been raised. Whatever debt the Philippines may owe to SGS still exists; whatever right to interest for late payment SGS had it still has. There has been no law or decree enacted by the Philippines attempting to expropriate or annul the debt, nor any action tantamount to an expropriation. The Tribunal is assured that the limitation period for proceedings to recover the debt before the Philippine courts under Article 12 has not expired.<sup>91</sup> A mere refusal to pay a debt is not an expropriation of property, at least where remedies exist in respect of such a refusal. *A fortiori* a refusal to pay is not an expropriation where there is an unresolved dispute as to the amount payable.

162. Turning to Article IV (fair and equitable treatment), the position is less clear-cut. Whatever the scope of the Article IV standard may turn out to be—and that is a matter for the merits—an unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues under Article IV. As noted already (see paragraphs 36-41), the Philippines did appear to acknowledge that a large proportion of the amount claimed was payable. In the circumstances the Tribunal reaches the same conclusion on Article IV as it does on Article X(2). At the level of jurisdiction, a claim has in its view been stated by SGS under both provisions. But, there being an unresolved dispute as to the amount payable, for the Tribunal to decide on the claim in isolation from a decision by the chosen forum under the CISS Agreement is inappropriate and premature.

163. The Tribunal holds that it has jurisdiction over SGS's claim under Articles X(2) and IV of the BIT, but that in respect of both provisions, SGS's claim is premature and must await the determination of the amount payable in accordance with the contractually-agreed process.

164. In these circumstances it is not necessary for the Tribunal to consider whether Article 12 of the CISS Agreement is wide enough to encompass a claim under substantive provisions of the BIT, and what the legal consequences of an affirmative answer would be.

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<sup>91</sup> Transcript, 27 May 2003, pp. 57-8.

**(f) The retrospectivity issue**

165. Finally, as noted above, the Respondent argued that the BIT did not apply retrospectively to claims which arose prior to its entry into force on 23 April 1999.

166. According to Article II of the BIT, it applies to investments “made whether prior to or after the entry into force of the Agreement”. Article II does not, however, give the substantive provisions of the BIT any retrospective effect. The normal principle stated in Article 28 of the Vienna Convention on the Law of Treaties applies: the provisions of the BIT “do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty”. The application of this principle to BIT claims was explored in some detail by a NAFTA Tribunal in *Mondev International Ltd. v. United States of America*.<sup>92</sup> As the Tribunal said (discussing the substantive standards under Chapter 11 of NAFTA): “events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.”<sup>93</sup>

167. It may be noted that in international practice a rather different approach is taken to the application of treaties to procedural or jurisdictional clauses than to substantive obligations. It is not, however, necessary for the Tribunal to consider whether Article VIII of the BIT applies to disputes concerning breaches of investment contracts which occurred and were completed before its entry into force. At least it is clear that it applies to breaches which are continuing at that date, and the failure to pay sums due under a contract is an example of a continuing breach.

168. In the present case the Tribunal has held that its jurisdiction in the present case depends primarily on Article X(2) of the BIT, which is a substantive and not merely a procedural provision. As to Article X(2), it is clear that the failure to observe obligations arising under the CISS Agreement could not have occurred before the recommendation made by BOC to the Secretary of Finance in December 2001 as to the total amount payable under the CISS Agreement.<sup>94</sup> This was well after the entry into force of the BIT, and there is accordingly no problem of the retrospective

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<sup>92</sup> (2002) 6 ICSID Reports 192, 208-9 (paras. 68-70).

<sup>93</sup> *Ibid.*, 209 (para. 70).

<sup>94</sup> See above, paragraphs 37-41.

application of the BIT in the present case. Similar considerations apply to SGS's case under Article IV of the BIT.

**IX. THE TRIBUNAL'S CONCLUSIONS AND THEIR IMPLICATIONS FOR FURTHER PROCEEDINGS CONCERNING THE PRESENT DISPUTE**

169. For the reasons given above, the Tribunal concludes as follows:

- (1) SGS made an investment in the territory of the Philippines within Article II of the BIT. The present dispute is one with respect to that investment and arises directly from it (see above, paragraphs 99-112).
- (2) Under Article X(2) of the BIT, the Respondent is required to observe the obligation to pay sums properly due and owing under the CISS Agreement; but this obligation is dependent on the amounts owing being definitively acknowledged or determined in accordance with the CISS Agreement (see above, paragraphs 113-129).
- (3) Under Article VIII(2) of the BIT, the Tribunal has jurisdiction with respect to a claim arising under the CISS Agreement, even though it may not involve any breach of the substantive standards of the BIT (see above, paragraphs 130-135).
- (4) But such a contractual claim, brought in breach of the exclusive jurisdiction clause embodied in Article 12 of the CISS Agreement, is inadmissible, since Article 12 is not waived or over-ridden by Article VIII(2) of the BIT or by Article 26 of the ICSID Convention (see above, paragraphs 136-155).
- (5) No claim for breach of Article VI of the BIT can be sustained on the facts as presented by the Claimant (see above, paragraphs 156-164).
- (6) SGS's claims under Articles X(2) and IV, in association with Article VIII(2), fall within the temporal scope of the BIT and are not excluded on grounds of retrospectivity (see above, paragraphs 165-168).

170. The effect of these findings is that SGS is bound by the terms of the exclusive jurisdiction clause, Article 12 of the CISS Agreement, in order to establish the quantum or content of the obligation which, under Article X(2) of the BIT, the Philippines is required to observe. This is a matter of admissibility rather than jurisdiction, and there is a degree of flexibility in the way it is



applied.<sup>95</sup> For example, evidently a party could not be required to litigate locally if the local courts are closed to it due to armed conflict.

171. Normally a claim which is within jurisdiction but inadmissible (e.g., on grounds of failure to exhaust local remedies) will be dismissed, although this will usually be without prejudice to the right of the claimant to start new proceedings if the obstacle to admissibility has been removed (e.g., through exhaustion of local remedies). However, international tribunals have a certain flexibility in dealing with questions of competing forums. In the *MOX Plant case (Ireland v. United Kingdom)* before an Annex VII Tribunal under the Law of the Sea Convention 1982, it emerged that a circumstance highly relevant to the question of the Tribunal's jurisdiction was the impending commencement of proceedings by the European Commission against Ireland in the European Court of Justice. The European Commission claimed that the matter in dispute fell exclusively within the jurisdiction of the European Court. Depending on the outcome of those proceedings, the Annex VII Tribunal might find itself without jurisdiction by virtue of Article 281 of the 1982 Convention. The Tribunal stayed its own proceedings pending determination of the issue by the European Court, proceedings which it called on the parties to expedite as far as lay within their power.<sup>96</sup>

172. More directly in point, perhaps, Pakistan argued that the Tribunal should adopt a similar procedure in *SGS v. Pakistan*. The Tribunal declined to do so because it held that there was no sufficient overlap between the BIT claims before it and the contractual claims before the Pakistan arbitrator.<sup>97</sup> In particular it noted that there was no need for "the factual predicate of a determination by the PSI Agreement arbitrator that either party breached that Agreement" in order to enable it to decide the BIT claims.<sup>98</sup>

173. Implicit in the discussion in *SGS v. Pakistan* is the view that an ICSID Tribunal has the power to stay proceedings pending the determination, by some other competent forum, of an issue relevant to its own decision. This Tribunal agrees. Article 19 of the ICSID Arbitration Rules

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<sup>95</sup> An analogy may be drawn with the practice of national courts faced with claims such as *lis alibi pendens* and *forum non conveniens*, which are likewise not jurisdictional. See, e.g., the cases discussed by TL Stein in "Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal", (1984) 78 *AJIL* 1, 20-23.

<sup>96</sup> *The MOX Plant Case (Ireland v. United Kingdom)*, Order No. 3, (2003) 42 ILM 1187, 1199.

<sup>97</sup> *SGS v. Pakistan*, paras. 185-89.

<sup>98</sup> *Ibid.*, para. 188.

gives the Tribunal general power to make orders required for the conduct of the proceeding, and this general power is confirmed by the second sentence of Article 44 of the Convention, in accordance with which:

If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

174. The Tribunal notes that at the time the present arbitration was commenced, SGS had made substantial efforts to settle the claim through negotiations. Indeed a recommendation had been made by BOC to the Secretary of Finance of the Philippines as to the amount payable—a recommendation which the Secretary of Finance had appeared to accept.<sup>99</sup> SGS’s Request for Arbitration clearly pleaded the failure to pay as a breach of the BIT, specifically Article X(2) and IV. But because of Article 12 of the CISS Agreement, it is for the Philippines courts to determine how much is payable, unless the parties themselves can reach a definitive agreement on SGS’s claim. Thus this Tribunal is precisely faced with the situation where the Philippines’ responsibility under Article X(2) and IV of the BIT—a matter which does fall within its jurisdiction—is subject to “the factual predicate of a determination” by the Regional Trial Court of the total amount owing by the Respondent.<sup>100</sup>

175. In the circumstances the Tribunal concludes that the circumstance of the fixing of the amount payable under the CISS Agreement—whether by definitive agreement between the parties or by proceedings before the courts of the Philippines—should not require the bringing of a new ICSID claim by SGS, but falls within the framework of SGS’s existing claim in this arbitration.<sup>101</sup> That being so, justice would be best served if the Tribunal were to stay the present proceedings pending determination of the amount payable, either by agreement between the parties or by the Philippine courts in accordance with Article 12 of the CISS Agreement.

176. The stay of proceedings may be lifted for sufficient cause on application by either party. The Tribunal calls on both parties to expedite proceedings before the Philippine courts and, in general, to take all necessary measures to ensure a prompt and effective resolution of the dispute.

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<sup>99</sup> See above, paragraphs 37-41.

<sup>100</sup> Other questions could perhaps arise, even if the amount payable were to be determined by the Regional Trial Court: cf. *Russian Indemnity* case, (1912) 11 RIAA 431.

<sup>101</sup> See above, paragraph 157.

The parties are directed to report briefly to the Tribunal, either jointly or separately, at six-monthly intervals commencing 1 July 2004, on the steps being taken for the resolution of the present claim.

**DECISION**

177. For these reasons the Tribunal:

- (a) holds that it has jurisdiction over the present dispute under Article VIII(2) of the BIT in combination with Articles X(2) and IV;
- (b) dismisses the claim so far as it is based on Article VI of the BIT;
- (c) by majority, stays the present arbitration proceedings pending a decision on the amount due but unpaid under the CISS Agreement, a matter which (if not agreed by the parties) is to be determined by the agreed contractual forum under Article 12 of the CISS Agreement;
- (d) decides that the proceedings will resume on the request of either party as soon as the condition for admissibility set out above has been satisfied;
- (e) reserves all questions concerning the costs and expenses of the Tribunal and the costs of the parties for subsequent determination.

Professor Crivellaro appends a declaration to the present decision.

*signed*

Dr. Ahmed S. El-Kosheri,

President

*signed*

Professor James R. Crawford

*signed*

Professor Antonio Crivellaro

January 29, 2004

## DECLARATION

The Decision on jurisdiction has been decided unanimously in respect of all issues except one, that is whether the Tribunal's jurisdiction under Articles VIII(2) or X(2) of the BIT is qualified or conditioned, with regard to contractual claims, by the existence of Article 12 of the CISS Agreement, by which SGS accepted to refer contractual disputes to the Philippines courts.

Phrased in the words of the Decision, the issue is "*whether Article VIII(2) was intended to override an exclusive jurisdiction clause in an investment contract, so far as contractual claims are concerned*" (para. 140). After due consideration, the answer of the majority was negative. My opinion was different and is expressed herein below.

My dissent is limited to Section VII(d) of the Decision and, by direct consequence, it extends to the Tribunal's conclusion under para. 177(c), where the Tribunal "*stays the present arbitration proceedings pending a decision on the amount due but unpaid under the CISS Agreement*".

The reasons are the following.

1. Swiss investors working in the Philippines were firstly offered the option to refer investment disputes to ICSID arbitration on 23 April 1999, when the BIT came to force. The CISS Agreement was concluded eight years before, on 23 August 1991. The duration of the CISS Agreement was extended from 1995 to 1998 (First Addendum of 14 December 1994), then until end of 1999 (Second Addendum of 29 January 1998) and, finally, from 31 December 1999 to 31 March 2000 by letter sent on 22 December 1999 by the Respondent to SGS (Exhibit S5). The only contractual document signed by SGS after the entry into force of the BIT is, therefore, the letter of 22 December 1999. The letter was drawn up by the Respondent and countersigned by SGS for acceptance. It was exclusively meant to seek SGS's adhesion to continuation of its services during three additional, and last, months.

2. In the given circumstances, when it undertook to refer contractual disputes to the Philippines courts, SGS cannot have irrevocably waived the right to refer them to one of the alternative forums subsequently offered in the BIT. On 23 August 1991, the alternative options were, simply, not in force. They came to force in April 1999, and the December 1999 letter cannot reasonably represent an instrument by which SGS disposed of those options. The BIT has created a completely new law and has conferred on SGS new or additional rights of forum selection. They include, in particular, the right to select the forum after that the dispute has arisen.

3. Article VIII(2) of the BIT offers to the investor the unconditioned right to submit the dispute “*either to the national jurisdiction [...] or to international arbitration*” (ICSID, or UNCITRAL). I emphasize the words “*either ... or ...*” because they are, in my understanding, indicative of the host State’s intention to offer an additional forum option, left to the investor’s choice. Moreover, and this in my view is also important, Article VIII(2) entitles the investor to select the forum after that a six month attempt of amicable settlement has failed, i.e. after that the object, importance, value and any other implication of the dispute have become known. Differently from the contract dispute clause, which identifies one specified forum *ante causam*, Article VIII(2) permits an *ex post facto* selection amongst different forums.

4. As worded in the Decision (paras. 140 and 141), the question is whether the BIT dispute clause “*overrides*” or “*replaces*” the contract dispute clause. I wonder whether this way of defining the question is the correct way. In the reality, neither one of the two provisions “*overrides*” or “*replaces*” the other. They both survive and coexist. Article 12 of the CISS Agreement remains effective also after entry into force of the BIT, except for the fact that the domestic forum ceases to be the “*exclusive*” forum from the investor’s perspective. SGS could have brought the dispute to either the domestic courts or to the ICSID Tribunal. And if the Respondent commenced a case before the Philippines courts under Article 12 of the CISS Agreement, SGS could not invoke Article VIII(2) of the BIT for denying their jurisdiction.

5. It is my understanding that the most significant advantage which, in practice, is granted by a BIT to foreign investors is, precisely, the right to select, amongst the alternative forums made available by the BIT, the forum that the investor deems the most suitable to him after that the elements of fact or law of the dispute have become clear. A BIT can certainly limit the investor’s freedom of choice, for instance providing that a forum which has already been agreed in a past investment agreement remains the “*exclusive*” forum for disputes arising from that investment agreement. Such a limitation is not uncommon in BITs practice. However, it is not provided in the BIT here in question.

6. Whilst the substantive provisions of the BITs (duty of fair treatment; prohibition of discriminatory measures; duty to provide for prompt and adequate compensation in case of expropriations or equivalent measures) impose on the host States obligations which are already in force under general international law, the really innovating contribution of a BIT is given by the

investor's privilege to chose a preferential forum amongst those offered by the host State after that the dispute has arisen (together with, when stipulated, the s.c. "umbrella clause"). The practical significance of the BITs would, in my opinion, seriously diminish if such particular privilege, which is the most attractive to foreign investors, is put into doubt or denied.

7. I consider that a significant difference exists between the case in which the investor, absent any BIT, accepts in the investment agreement the jurisdiction of the domestic courts, and the case in which, absent any BIT, the investor proposes, negotiates and obtains an international arbitration agreement as forum clause in the contract. It seems to me that in the second case the investor "opts in advance" for the additional or alternative forum then offered in a subsequent BIT dispute clause. In the reality, a BIT dispute clause similar to Article VIII(2) would offer no new options to the investor in a case of the second type. In the first case, the investor simply adheres to the only forum which is competent even in the silence of the parties and makes no real "choice". It is in such a case that, in my view, a subsequent BIT may confer on the investor the privilege to opt for other forums, without *per se* cancelling the contract dispute clause.

8. In this respect, I think that the Tribunal in *SGS v. Pakistan* has been *inter alia* influenced by the fact that, as it appears from that Decision, SGS had initially requested an international arbitration clause, but the Pakistani Government had counter-requested subjection to domestic jurisdiction, and the ending compromise was found in the Islamabad-based arbitration. In that case, the Tribunal was confronted with an initial choice made by the parties amongst different options. In the present case, the CISS Agreement was drafted by the Respondent and its text was then made the basis of a tendering process opened to several bidders. The two situations are different.

9. I doubt whether the Roman adagios *generalia specialibus non derogant* and *lex posterior derogat legi priori* (paras. 141 and 142 of the Decision) may be extended to the comparison between a treaty and a contract. As the Decision admits in respect of the second maxim (but the same should also apply to the first maxim), for such maxims to apply it is required that the two instruments have the same legal character and, I would add, be made by or be directly binding on the same parties. In any case, the second maxim seems to me more apt to the present case than the former: SGS is a beneficiary third party in respect of the BIT; the BIT's offer of ICSID arbitration is given by the same State with which SGS had concluded the contract years before; therefore, the *lex* which is *posterior* in the relationship between SGS and the State is the BIT.

10. Not only the BIT is *posterior*, but contains a provision, Article VIII(2), granting to the investor a more favourable treatment in respect of the CISS Agreement in matter of dispute settlement. In my understanding, what is here important is establishing whether an investor's commitment – acceptance of local jurisdiction – remains irrevocable also after that, thanks to a subsequent treaty, the investor has become the beneficiary of a more favourable treatment, including the privilege to chose other forums. For answering to such question, 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.

11. Article 12 of the CISS Agreement refers to disputes connected with “this Agreement”. The language excludes any claim based on alleged breaches of BIT obligations. Here, SGS claims that the Respondent has violated Article X(2) of the BIT. The claim does not fall within the scope of Article 12 of the Contract, and the Tribunal has accepted to have jurisdiction over alleged contract breaches under Article X(2) of the BIT. Consequently, SGS's claim seemed to me fully admissible before our Tribunal, without first being processed before the domestic courts as to *quantum* matters. If our jurisdiction derives from (also) Article X(2), as unanimously admitted, I see no reason why our Tribunal could not deal with and decide on the merits of the payment claim, including *quantum*, after proper examination of either party's future arguments and defences.

12. It is not clear to me when SGS' contractual claims, over which our Tribunal declares to have jurisdiction, will become admissible before this Tribunal. I understand that they could be brought again before our Tribunal in case, for instance, of a denial of justice in the Philippines. If SGS' claims may return to the ICSID Tribunal for a miscarriage of justice (they cannot certainly return in case of a wrong judgment in the merits; we are not a Court of Appeal in respect of domestic courts), this means that our Tribunal is restricting, in practice, its jurisdiction to BIT claims only, after affirming, in theory, that Article VIII and X(2) of the BIT confer on the Tribunal



jurisdiction over also purely contractual claims. I fail to see the consistency between the two positions.

13. The practical outcome of the present case recalls, to some extent, the result in the *Vivendi* case, in which the Claimant was directed to first refer its contractual claims to the Tucuman courts and bring the case to ICSID arbitration in case of BIT violations. However, the *Vivendi* Tribunal had retained jurisdiction over BIT claims only, and the France/Argentina BIT did not contain an “umbrella clause”. Here, our Tribunal has stated to have jurisdiction over both types of claims, whether founded on alleged breaches of the BIT or on alleged breaches of the contract, and I think it was mandated to proceed to examining the future Claimant’s statements of claim and the Respondent’s statements of defence concerning the substance of the dispute.

14. It is for the above reasons that I disagree with the stay of the proceedings.

Antonio Crivellaro

*signed*

January 29, 2004