

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