



BG Consulting

Linking two worlds

121 South Alfred Street, 2nd Floor, Alexandria, VA 22314
Tel (703) 535-7577. Fax (703) 535-7998
www.bg-consulting.com

March 2004

ICSID Decision on Jurisdiction SGS Société Générale de Surveillance S.A. v. Republic of the Philippines .*

A recent decision by an arbitral tribunal of the International Center for the Settlement of Investment Disputes (ICSID) in the case *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*¹ sheds lights on certain issues pertaining to the jurisdiction of ICSID in resolving legal disputes between foreign investors and host States.

The Philippines awarded SGS, a Swiss business group a contract to provide comprehensive import supervision for goods prior to shipment to the Philippines and specialized services to assist in improving the customs clearance and control processes. Part of the service was undertaken overseas.

A dispute arose between SGS and the Philippines concerning alleged breaches of the services contract. SGS submitted certain monetary claims to the Philippines which were subject to various attempts for

amicable settlement before submitting the dispute to arbitration.

SGS invoked the provisions of a 1997 Bilateral Investment Treaty (BIT), the agreement between the Swiss Confederation and the Republic of the Philippines on the Promotion and Protection of Investments.

I- ICSID does not create precedent.

The ICSID Tribunal was posed with the question of whether to follow the rationale provided by a previous decision, *SGS v. Pakistan*², which involved similar issues. The Tribunal held that it was not bound to do so.

“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

¹ SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, case No ARB/02/6 of January 29, 2004.

² SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, International Arbitration Report, Vol 18, # 9, September 2003.



with the applicable law, which will by definition be different for each BIT and each Respondent State”³

II- Whether an investment has been made in the territory of a country.

For a dispute to be submitted to a Tribunal under the ICSID Convention it needs to arise directly out of an investment. No reference is made therein as to where that investment needs to be made. Some BITs state that a qualifying investment need be made in the territory of the Contracting State other than that of the state from which the investor is from. However, given the fact that investments are composed by different transactions some of which might be undertaken in different locations, identifying the territory of the investment is not an easy task.

In *SGS v. Philippines*, the Tribunal, reaffirmed the ruling of *SGS v. Pakistan* by concluding that an investment must be made in a territory where there had been an “injection of funds into the territory...[of a Contracting State other the State of nationality of the investor]...for carrying out...[the activities pertaining the investment]”⁴

³ *Supra note 1* at para 97.

⁴ *Id* at para 111, citing *supra note 2* at para136

The Tribunal also pointed out that to consider whether an investment has been made in a territory consideration should be given to the investment as a whole; regardless of whether individual transactions take place in different locations.

III- Umbrella clause in practice.

In *SGS v. Philippines*, the Tribunal was faced with a question similar to the one made in *SGS v. Pakistan*. Specifically the Tribunal had to determine whether a breach of contract is considered a violation of a BIT as per an “umbrella clause”.

The Tribunal in *SGS v. Philippines* had to analyze article X(2) of the Switzerland-Philippines BIT, which read: “Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party”.

The question in place this time was whether that provision gave the Tribunal jurisdiction over claims against the Respondent State that were essentially contractual.

The Tribunal held that, “...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)”⁵.

The Tribunal then concluded, “...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

⁵ *Id* at para 117.

not convert the issue of the extent or content of such obligations into an issue of international law...”⁶

IV- Contract claims can be investment claims.

The Tribunal had to answer the question of whether the BIT reference to a “dispute with respect to investments” could be used to attain jurisdiction over claims of contractual character.

It was held that a dispute arising out of an investment contract will be a “dispute with respect to investments” in the same way an alleged expropriation would be.⁷ Accordingly, Article 25(1) of the ICSID Convention required only that the dispute arise directly out of an investment regardless of the contractual or treaty nature of the dispute.

V- Exclusive jurisdiction of local courts for contractual claims.

The Tribunal had to deal with the controversial issue of exclusive jurisdiction of local courts for contractual claims as provided by the investment agreement between SGS and the Philippines.

The majority of the Tribunal drew a distinction between jurisdiction and admissibility to find that it might have jurisdiction over a dispute and yet not admit it. The Tribunal held that “...a party to a contract cannot claim on that contract without itself complying with it...”⁸

It then stayed the arbitration proceedings since the provision on exclusive jurisdiction

of local courts was not waived or overridden by the BIT or the ICSID Convention. One of the arbitrators disagreed with the stay of the proceedings based, *inter alia*, on the argument that the BIT arbitration provision and the contractual provision on exclusive jurisdiction of local courts do not override or replace the other but rather coexist.⁹

VI- Retrospective applicability of BITs.

Another issue surfaced relating to jurisdiction over contractual claims that occurred before the BIT entered into force.

The Tribunal stated that it did not need to look at disputes concerning breaches of investment contracts which occurred and were completed before the treaty’s entry into force. But the Tribunal did have jurisdiction “...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”.¹⁰

* Written by **Omar E. García-Bolívar**. Member of the panel of arbitrators of the International Center for Settlement of Investment Disputes (ICSID) and the panel of arbitrators of the World Intellectual Property Organization (WIPO).

The views expressed here should not be attributed to the organizations with which he is affiliated.

omargaria@bg-consulting.com

⁶ *Id* at para 128

⁷ *Id* at para 131.

⁸ *Id* at para 154.

⁹ Declaration of Antonio Crivellaro at para 4 .

¹⁰ *Supra note 1* at para 167.