

INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES
Washington, D.C.

CASE No. ARB/01/13

SGS Société Générale de Surveillance S.A.
(Claimant)

versus

Islamic Republic of Pakistan
(Respondent)

DECISION OF THE TRIBUNAL
ON OBJECTIONS TO JURISDICTION

Members of the Tribunal

Judge Florentino P. Feliciano, President

Mr. André Faurès, Arbitrator

Mr. J. Christopher Thomas Q.C., Arbitrator

Secretary of the Tribunal

Ms. Martina Suchankova

Representing the Claimant

Messrs. François Stettler and
Andrea Rusca, SGS Société

Générale de Surveillance S.A.

Messrs. Emmanuel Gaillard and
John Savage, Shearman & Sterling

Representing the Respondent

Mr. Makhdoom Ali Khan
Attorney General for Pakistan

Messrs. Jan Paulsson and
Nigel Blackaby, Freshfields
Bruckhaus Deringer

Mr. Salman Talibuddin,
M/s Kabraji & Talibuddin

PART I: BACKGROUND TO THE RESPONDENT'S OBJECTIONS

A. Introduction

1. The Islamic Republic of Pakistan (“Pakistan” or the “Respondent”) objects to the jurisdiction of this Tribunal on a number of grounds. Its principal ground is that the parties to this arbitration had previously agreed in a contract between them (the “Pre-Shipment Inspection Agreement” or the “PSI Agreement”) to refer “[a]ny dispute, controversy or claim arising out of, or relating to” the Agreement, “or breach, termination or invalidity thereof,” to arbitration in accordance with the Arbitration Act of the Territory (of Pakistan) as presently in force.

2. Pakistan observes that at its request such an arbitral process was initiated and that it predates the Claimant’s Request for ICSID Arbitration by some eleven months. It requests this Tribunal to recognize the primacy of the jurisdiction of the parties’ freely negotiated dispute settlement mechanism over the jurisdiction of this Tribunal. This Tribunal was subsequently created by virtue of the 12 October 2001 Request of the Claimant, Société Générale de Surveillance S.A. (“SGS” or the “Claimant”), for ICSID arbitration pursuant to Article 9(2) of the *Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments* (the “Treaty” or the “BIT”). Pakistan asks the Tribunal to dismiss the present claims on the ground that a more specialized tribunal has already been established by agreement of the parties and that tribunal’s jurisdiction can encompass all of the claims presently before this Tribunal. In sum, according to Pakistan, that tribunal, not this one, should hear the parties’ claims.

3. Pakistan therefore requests that the Tribunal order the dismissal of SGS’s claims as set forth in its Request for Arbitration dated 12 October 2001, and the Claimant to pay the full costs arising from its Request, including the fees and expenses of Pakistan’s legal counsel.¹

4. SGS opposes the objection. It asserts that once the Treaty entered into force and an investment dispute arose between the parties, it was free at any time to invoke the jurisdiction of this Tribunal. SGS argues that the PSI Agreement arbitration must give way to this arbitration which has been initi-

¹ Respondent’s Memorial on Objections to Jurisdiction (“Objections”) at paragraph 151.

ated pursuant to a treaty in which Pakistan made a general offer to arbitrate investment disputes. SGS accepted Pakistan's offer to arbitrate by issuing its own consent and ICSID jurisdiction has thus been constituted by the parties' agreement to arbitrate.

5. SGS submits further that this Tribunal's jurisdiction is broader than that of the PSI Agreement arbitrator and includes jurisdiction not only over alleged breaches of the Treaty, an inter-State agreement, but also both parties' claims of alleged breaches of the PSI Agreement, a State-private investor agreement.

6. SGS therefore requests that the Tribunal reject Pakistan's Objections, and retain jurisdiction over the claims raised by SGS in this arbitration; order Pakistan to pay the full costs incurred by SGS in resisting Pakistan's Objections, including the fees and expenses of SGS's legal counsel and expert and proceed to hear the merits of SGS's claims.²

7. The foregoing summaries of the parties' submissions and requests for relief identify, by way of introduction, the basic issues that divide them. The Tribunal will review the parties' specific arguments in greater detail below.

8. The Tribunal set a schedule for the filing of written pleadings as follows:

- Pakistan's Objections to Jurisdiction, to be filed on 22 October 2002;
- SGS's Reply to the Respondent's Objections to Jurisdiction, to be filed on 10 December 2002;
- Pakistan's Reply, to be filed on 10 January 2003; and
- SGS's Rejoinder, to be filed on 10 February 2003.

9. The parties' pleadings were duly filed and an oral hearing was held on 13-14 February 2003 at the World Bank's offices in Paris.

² SGS's Reply at paragraph 228.

B. The contractual relationship between the parties

10. It is necessary to recount the origins of the relationship between the parties. While the parties diverge as to the PSI Agreement's legal significance for the purposes of the Objections, there is no doubt that the disputes which have arisen between them emerged from a relationship defined initially by contract. In setting out the factual background of this case, the Tribunal is not making findings of fact and is either relying upon the facts as alleged by the Claimant (which are taken to be true solely for the purposes of the Objections to Jurisdiction) or on what appear to the Tribunal to be undisputed facts.

11. Following a series of discussions, written communications, and negotiations, on 29 September 1994, the Government of Pakistan entered into a contract with SGS whereby SGS agreed to provide "pre-shipment inspection" services with respect to goods to be exported from certain countries to Pakistan.³ SGS undertook to inspect such goods (i) abroad through its offices and affiliates; and (ii) at Pakistani ports of entry jointly with Pakistani Customs.⁴ The objective of such inspection was to ensure that goods were classified properly for duty purposes and to enable Pakistan to increase the efficiency of its customs revenues collection and thereby contribute to the national treasury. SGS was to (i) physically identify goods; (ii) verify their dutiable value prior to shipment; and (iii) recommend appropriate customs classifications to the Pakistani authorities for goods to be imported into Pakistan.⁵ Once goods were pre-inspected, SGS was required to prepare a Clean Report of Findings (CRF) containing the information gathered by the local SGS office or affiliate in the different countries of supply, together with a recommendation for a tariff rate for each particular item, and verification of the relevant goods within Pakistani territory.⁶ Pakistan was to rely upon the CRFs issued by SGS for the purpose of collecting the correct duties and taxes leviable on inspected imports.

12. Article 4 of the PSI Agreement required SGS to prepare and submit to Pakistan monthly reports. These reports were to set forth:

- (a) The value of orders received and goods inspected by country of supply;

³ SGS's Request for Arbitration (the "Request"), dated 12 October 2001, at paragraphs 5-10.

⁴ *Id.* at paragraph 11.

⁵ *Id.*

⁶ *Id.*

- (b) The estimated amount of customs revenue generated by country of supply;
- (c) The incremental amount of duties and taxes realized by Pakistan as a result of the PSI Agreement; and
- (d) A description of SGS's findings in the pre-inspection process.⁷

13. Pursuant to Article 5.7 and 5.8 of the PSI Agreement, SGS was given permission to open one or more liaison offices in Pakistan and the Government undertook to ensure that SGS obtained the necessary immigration and working permits and authorizations.⁸ These offices were to convey information to Pakistan's customs authorities. The offices were to be "restricted to carrying out liaison activities and [could] not indulge in any commercial or trading activities whatsoever."⁹ SGS established two such offices in Karachi and Lahore as duly authorized by Pakistan's Board of Investment.¹⁰

14. The PSI Agreement had a term of five years that was renewable automatically provided neither party objected to such renewal in writing. In addition, pursuant to Article 10.6, Pakistan had the right to terminate the PSI Agreement after the first appraisal of SGS's work, by giving three months notice. "After the expiry of the first full financial year and the appraisal as aforesaid, any of the two parties [had] the right to terminate the agreement at any subsequent time after giving a three months notice of such termination to the other party."¹¹

15. The PSI Agreement contained a dispute settlement provision in its Article 11, entitled "Arbitration and Governing Law," the relevant part of which stated:

Arbitration. Any dispute, controversy or claim arising out of, or relating to this Agreement, or breach, termination or invalidity thereof, shall as far as it is possible, be settled amicably. Failing such amicable settlement, any such dispute shall be settled by arbitration in accordance with the Arbitration Act of

⁷ PSI Agreement, Article 4. Exhibit S3 to the Request for Arbitration.

⁸ *Id.*, Article 5.7.

⁹ Letter from Pakistan's Investment Promotion Board to SGS, dated 22 December 1994, at paragraph i. Exhibit S4 to the Request for Arbitration.

¹⁰ SGS's Request at paragraph 13.

¹¹ PSI Agreement, Article 10.6.

the Territory as presently in force. The place of arbitration shall be Islamabad, Pakistan and the language to be used in the arbitration proceedings shall be the English language.¹²

16. The PSI Agreement entered into force on 1 January 1995. It was subsequently performed by both parties in the sense that services were rendered by SGS and invoices issued by it were paid by Pakistan. Both parties dispute the adequacy of the other's performance, but for the purposes of resolving these Objections it is unnecessary to inquire into these matters of contractual performance. On 12 December 1996, the Government of Pakistan notified SGS that the PSI Agreement was terminated with effect from 11 March 1997.

17. In various *fora*, SGS has described Pakistan's act as follows: the Agreement was not "validly terminated" by the Respondent;¹³ there was a "wrongful repudiation of contract";¹⁴ there was an "unlawful and ineffective" termination of the PSI Agreement;¹⁵ and there were "breaches of the PSI Agreement as well as violations of the BIT" that "therefore give rise to Pakistan's liability to SGS for breach of contract, as well as its liability to SGS for infringement of the BIT."¹⁶

18. Pakistan has defended its actions as lawful and justified and on 11 September 2000 filed a claim against SGS in the PSI Agreement arbitration alleging various breaches of that agreement on SGS's part.¹⁷

C. Chronology of post-PSI Agreement termination events

19. After notice of termination was given by Pakistan, communications were exchanged between the two parties as well as between the Government of the Swiss Confederation and the Government of Pakistan. These communications did not lead to a resolution of the dispute and on 12 January 1998, SGS

¹² *Id.*, Article 11.

¹³ Petition filed by SGS with the Court of First Instance of Geneva, at page 12. Exhibit 3 to the Respondent's Objections to the Claimant's Request for Urgent Provisional Measures.

¹⁴ Paragraph C.5 of SGS's "Reply on Behalf of the Respondent" in the matter of *Islamic Republic of Pakistan v. Société Générale de Surveillance S.A.*, Application under Section 20 of the Arbitration Act 1940, dated 7 April 2001. Exhibit S26 to Claimant's Reply to the Respondent's Objections to Jurisdiction.

¹⁵ SGS's Request at paragraph 16.

¹⁶ *Id.*, at paragraph 36.

¹⁷ Pakistan has annexed its Statement of Claim dated 18 October 2002 and filed with the PSI Agreement arbitrator shortly before that arbitration was stayed pending resolution of the present Objections. Exhibit P15 to the Respondent's Objections to Jurisdiction.

initiated a commercial claim in the courts of Switzerland seeking relief against what it alleged was Pakistan's unlawful termination of the PSI Agreement.

1. The Swiss legal proceedings

20. SGS's Petition in the Court of First Instance of Geneva, Switzerland, alleged wrongful termination of the PSI Agreement. That Agreement, according to SGS, was perfectly performed by SGS from 1 January 1995 to 11 March 1997. Pakistan had never, before 29 December 1997, pretended that the contract was null *ab initio*; to the contrary, Pakistan on 12 December 1996 purported to terminate the contract *ex nunc*. Moreover, during the period from 1 January 1995 to 11 March 1997, the Government of Pakistan had, without reservations, partially paid the invoices issued by SGS Geneva. The Government of Pakistan hence, still owed the following amount for services rendered by SGS before 12 March 1997, which amounts were due in accordance with Article 6.5 of the PSI Agreement:

In capital: U.S.\$8,368,430.49
 In interests: U.S.\$1,065,371.75¹⁸

21. SGS'S prayer for relief asked the Geneva Court of First Instance:

- (a) to declare its jurisdiction to decide the Petition;
- (b) to determine that the PSI Agreement had not been validly terminated *ab initio* by Pakistan;
- (c) to require Pakistan to pay to SGS the amounts of

In capital: U.S.\$8,386,430.49
 In interests until December 31, 1997: U.S.\$1,065,371.75

- (d) To order Pakistan to pay SGS interest at the rate of 7.5% in accordance with Article 6.6 of the PSI Agreement (LIBOR for three (3) months plus 2%) on the mentioned capital amount from January 1, 1998 without prejudice to any other claims of SGS in particular for damages "for abusive termination of contract;" and;

¹⁸ English translation of the Petition to the Court of First Instance, dated 12 January 1998. Exhibit 3 to Respondent's Objections to the Claimant's Request for Urgent Provisional Measures.

- (e) Finally, to dismiss the contrary submissions of Pakistan and to require Pakistan to pay all legal costs.¹⁹

22. Pakistan opposed this claim on various grounds but principally on the ground that the parties had agreed to the arbitration of any disputes arising out of the PSI Agreement rather than to submit to the courts of any country and on the ground that as a sovereign State it was immune to the legal process of the Swiss courts.

23. On 24 June 1999, the Court of First Instance rejected SGS's claim, principally on the first ground asserted by the Respondent.²⁰ SGS then appealed to the Court of Appeal of Geneva. On 23 June 2000, the Court of Appeal dismissed the appeal but on grounds (basically, that of sovereign immunity) different from those specified by the Court of First Instance.²¹ SGS then appealed to the Swiss Federal Tribunal.

24. The Swiss legal proceedings concluded with the denial of the Claimant's final appeal on 23 November 2000. Both appellate courts, the Court of Appeal of Geneva and the Swiss Federal Tribunal upheld the judgment of the Geneva Court of First Instance, but on the ground of sovereign immunity. These legal proceedings (the "Swiss legal proceedings") unfolded over a period of some twenty-two months.

25. No further appeal was available in the Swiss court hierarchy once the Federal Tribunal dismissed SGS's appeal.

2. Pakistan's initiation of the PSI Agreement arbitration

26. On 11 September 2000, after the judgments of the first two Swiss courts were rendered, but before the judgment of the Swiss Federal Tribunal was issued, Pakistan formally invoked Article 11.1 of the PSI Agreement to commence arbitration proceedings in Pakistan. (The Tribunal will refer to this proceeding as the "PSI Agreement arbitration.") Pakistan applied to the Court of the Senior Civil Judge, Islamabad, pursuant to s. 20 of the Pakistan Arbitration Act, 1940, for an order that the dispute between the parties be

¹⁹ *Id.*

²⁰ Judgment on Exception of the Court of First Instance. Exhibit 4 to the Respondent's Objections to the Claimant's Request for Urgent Provisional Measures.

²¹ Court of Appeal of Geneva's decision in the Civil Case, June 23, 2000. Exhibit 2C to the Respondent's Index of Swiss Court Proceedings.

referred for decision by an arbitrator to be appointed by the Court.²² (Pakistan did not file a Statement of Claim at this time.)

27. SGS then appeared before the Senior Civil Judge by filing, on 7 April 2001, a set of preliminary objections to the PSI Agreement arbitration and, without prejudice to such objections, a counter-claim against Pakistan for alleged breaches of the PSI Agreement.²³

28. With respect to the merits, SGS alleged that there had been a wrongful repudiation of the PSI Agreement and that:

...the wrongful repudiation of contract by the Government of Pakistan and its subsequent, false, malicious and politically motivated accusations have caused colossal loss and damages to the Respondent...²⁴

29. SGS thus claimed the following relief:

- (a) Payment of outstanding invoices for services rendered, U.S.\$8,368,430.48;
- (b) Interest on unpaid invoices in the amount of U.S.\$2,299,953.38;
- (c) Damages for premature termination of the PSI Agreement, U.S.\$31,500,000;
- (d) Demobilisation costs, U.S.\$2,400,000;
- (e) Reputation damage due to Pakistan's allegedly defamatory statements, U.S.\$213,000,000;
- (f) Damages for loss of opportunity, U.S.\$70,000,000;
- (g) Legal fees and expenses, U.S.\$1,500,000; and
- (h) Interest at the rate specified in the PSI Agreement from the date of termination to the date of payment on all amounts claimed.²⁵

²² Exhibit S25 to the Claimant's Reply to the Respondent's Objections to Jurisdiction.

²³ *Id.*

²⁴ Reply on behalf of the Respondent in the matter of *Islamic Republic of Pakistan v. Société Générale de Surveillance S.A.*, at counter-claim, paragraph 2. Exhibit 6 to the Respondent's Objections to the Claimant's Request for Urgent Provisional Measures.

²⁵ *Id.*

3. SGS's consent to ICSID arbitration under the Treaty

30. Approximately eleven months after Pakistan initiated the PSI Agreement arbitration and some six months after the filing of its objections to jurisdiction and its counter-claim in the PSI Agreement arbitration, by letter dated 10 October 2001, SGS wrote to the Minister of Foreign Affairs of Pakistan (copied to the President and the Minister of Finance of Pakistan and the Ambassador of Pakistan to the Swiss Confederation), referring to the Treaty and observing that disputes had arisen between the two parties "in connection with investments by SGS, and notably with the Pre-Shipments Program established by SGS."²⁶

31. The letter went on to state:

These disputes concern, in particular, non-payment by Pakistan of invoices submitted to SGS (sic), and Pakistan's attempts to terminate the SGS-Pakistan Agreement. Pakistan's acts and omissions in this connection constitute violations of a number of obligations owed to SGS pursuant to the Swiss-Pakistan Agreement, as well as breaches of the SGS-Pakistan Agreement.²⁷

32. SGS therefore informed Pakistan that it was now seeking resolution of these disputes under the Treaty and that pursuant to its Article 9(2), SGS consented to the submission of the said disputes to arbitration by the International Centre for Settlement of Investment Disputes (ICSID).²⁸

33. By letter dated 12 October 2001, SGS dispatched a Request for Arbitration to the Secretary-General of the ICSID.²⁹

34. At paragraphs 33-38 of the Request, SGS set out its claims and request for relief as follows:

33. As introduced above, SGS performed its obligations under the PSI Agreement in full and carried out the pre-ship-

²⁶ Letter from SGS to Pakistan dated 10 October 2001. Exhibit S18 to the Request for Arbitration.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Request for Arbitration, dated 12 October 2001.

ment inspections of goods to be imported into Pakistan from January 1, 1995 until March 11, 1997.

34. In contrast, Pakistan unlawfully purported to terminate the PSI Agreement, depriving SGS of the profits and opportunities that it would have enjoyed had the contract continued to be performed in accordance with its terms. Pakistan has also failed to pay invoices in a total principal amount of US\$8,368,430.49. SGS has also suffered serious and unjustified damage to its reputation as a result of Pakistan's conduct.

35. These acts and omissions by Pakistan constitute blatant violations of its obligations to SGS under the BIT. In particular, Pakistan has:

- failed to promote SGS's investment in violation of Article 3(1) of the BIT;
- failed to protect SGS's investment, in violation of Article 4(1) of the BIT. Pakistan has, notably, impaired by its unreasonable conduct the enjoyment by SGS of its investment;
- failed to ensure the fair and equitable treatment of SGS's investment, in violation of Article 4(2) of the BIT; and
- taken measures of expropriation, or measures having the same nature or the same effect, against SGS's investment, in violation of Article 6(1) of the BIT. This violation exists, in particular, because Pakistan has not provided SGS with effective and adequate compensation; and failed to constantly guarantee the observance of the commitments it has entered into with respect to SGS's investments, in violation of Article 11 of the BIT. In particular, Pakistan has failed to guarantee the observance of its contractual commitments under the PSI Agreement.

36. In addition, most or all of Pakistan's acts and omissions described above qualify as breaches of the PSI Agreement as well as violations of the BIT. They therefore give rise to

Pakistan's liability to SGS in breach of contract, as well as its liability to SGS for infringement of the BIT.

37. In this proceeding, SGS will seek relief including the following items:

- (i) payment of outstanding invoices (US\$8,368,430.49);
- (ii) compensation for profits lost as a result of Pakistan's unlawful acts and omissions, provisionally quantified at US\$31,500,000;
- (iii) compensation for demobilization costs of the SGS Pre-Shipment infrastructure, including its liaison offices in Pakistan, amounting to US\$ 2,400,000;
- (iv) compensation for opportunities lost as a result of Pakistan's unlawful acts and omissions, provisionally quantified at US\$70,000,000;
- (v) compensation for damage to SGS's reputation resulting from Pakistan's unlawful acts and omissions, to be quantified later in this proceeding;
- (vi) the reimbursement of all costs incurred by SGS in pursuing the resolution of the claims brought in this arbitration, including but not limited to the fees and/or expenses of the arbitrators, ICSID, legal counsel, experts and SGS's own staff;
- (vii) compounded interest on all amounts awarded at an appropriate rate or rates, and over an appropriate period or periods; and
- (viii) any other relief, that the Arbitral Tribunal shall deem appropriate.

38. This request for relief, together with all statements of fact and law contained in this Request for Arbitration, will be amplified during the course of this arbitration.³⁰

4. The ensuing court proceedings in Pakistan

35. Having initiated the present ICSID arbitration, SGS then took steps to oppose the PSI Agreement arbitration. On 4 January 2002, SGS filed an application with the Senior Civil Judge, Islamabad, for an injunction against the PSI Agreement arbitration on the ground principally that SGS was entitled to have the dispute settled through ICSID arbitration and that the PSI Agreement arbitration should be stayed until the ICSID Tribunal determined Pakistan's objection to its jurisdiction.³¹

36. On 7 January 2002, the application was rejected by the Senior Civil Judge who also directed both parties to submit the names of arbitrators, one of whom could be appointed to arbitrate the PSI Agreement dispute. SGS then appealed to the Lahore High Court. The Lahore High Court dismissed that appeal on 14 February 2002.³²

37. SGS appealed further to the Supreme Court of Pakistan on 5 March 2002. Pakistan, for its part, filed its own appeal against one paragraph of the Lahore High Court's judgment and filed as well an application for an injunction to restrain SGS from pursuing the ICSID arbitration.³³

38. Following the parties' respective petitions filed in the Supreme Court of Pakistan, the Court, on 15 March 2002, allowed both petitions and granted leave to appeal. At the same time, the Supreme Court restrained both parties from pursuing their respective arbitration proceedings pending a decision on their appeals. While the two appeals were before the Supreme Court, on 17 April 2002, an application was made by the Government of Pakistan to the Court to hold SGS in contempt of court because it had taken steps in furtherance of this ICSID arbitration. The contempt application has been addressed in the Tribunal's Procedural Order No. 2, and it is unnecessary to discuss that further in the context of these Objections.

³⁰ *Id.*

³¹ Exhibit P1 to Respondent's Objections to the Claimant's Request for Urgent Provisional Measures.

³² *Id.*

³³ *Id.*

39. On 3 July 2002, the Supreme Court of Pakistan rendered its final decision on both appeals, dismissing the Claimant's appeal and granting the Respondent's request to proceed with the PSI Agreement arbitration and restraining the Claimant from pursuing or participating in the ICSID arbitration.³⁴

40. The Supreme Court's Reasons for Judgment were followed on 7 July 2002 with the appointment of Mr. Justice (Retd.) Nasir Aslam Zahid as sole arbitrator to hear the PSI Agreement arbitration.³⁵

41. The newly appointed PSI Agreement arbitrator accepted his appointment and scheduled a meeting with the parties for 18 October 2002. After SGS's application for interim measures of protection was heard by this Tribunal at The Hague, The Netherlands, and this Tribunal recommended a stay of that arbitration until this Tribunal determined whether it had jurisdiction to consider the claims brought before it, the PSI Agreement arbitrator agreed to stay that arbitration for the time being.³⁶

42. On 18 October 2002, Pakistan filed its Statement of Claim with the PSI Agreement arbitrator. Pakistan alleged that SGS failed to perform its obligations in accordance with the PSI Agreement and that Pakistan did not receive the benefit therefrom that it had bargained for.³⁷ Accordingly, Pakistan's request for relief sought the following:

- a) Restitution of the sum of US\$43,211,553.00 paid to the Defendant in respect of the aforementioned 85,945 CRFs;
- b) Interest/compensation for moneys wrongfully received and held at the rate of 18% per annum from the date of receipt till the date of the decree on the award; and

³⁴ *Id.*

³⁵ Judgment of the Supreme Court of Pakistan (Appellate Jurisdiction) on Civil Appeal Nos. 459 (*Société Générale de Surveillance S.A. v. Pakistan, through Secretary Ministry of Finance, Revenue Division, Islamabad*) & 460 (*Pakistan through Secretary Ministry of Finance, Revenue Division, Islamabad v. Société Générale de Surveillance S.A.*), June 2002, at paragraph 78. Exhibit P21 to Respondent's Objections to Jurisdiction.

³⁶ Letter from counsel for Pakistan to the Tribunal dated 22 November, 2002, attaching the Stay Order issued by the sole Arbitrator, Justice Nasir Aslam Zahid, on 12 November 2002.

³⁷ Statement of Claim, Exhibit P17 to the Respondent's Objections to Jurisdiction.

- c) Any other relief that the Arbitral tribunal may deem fit and appropriate in the circumstances.³⁸

PART II: PAKISTAN'S OBJECTIONS TO JURISDICTION

43. Pakistan asserts that this Tribunal does not have jurisdiction over any of the claims set forth in SGS's Request for ICSID Arbitration. It observes that SGS has acknowledged that the present dispute "*arises out of* Pakistan's actions and omissions with respect to the Pre-Shipment Inspection Program and the PSI Agreement" [emphasis in original].³⁹ The claims, "irrespective of how SGS labels them, are entirely contractual in nature."⁴⁰

44. Pakistan relies upon a recent ICSID *ad hoc* Annulment Committee decision, in the *Vivendi* case,⁴¹ where the Committee stated:

In a case 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.⁴²

45. Pakistan says that the essential basis of the present claims is breach of contract and that even if the labels in the Request for Arbitration were accepted at face value and SGS's claims were analyzed in terms of the three categories of "Contract, Defamation and BIT" claims, the broad PSI Agreement arbitration clause requires the parties to bring any dispute to the PSI Agreement arbitrator, regardless of whether such claims sound in contract, tort, or treaty.⁴³

46. Pakistan makes a number of other objections to this proceeding based on the doctrines of *lis pendens*, waiver, and estoppel.⁴⁴ It also goes on to raise a separate and independent basis for dismissal of SGS's claims, namely, that the investment in question was not made "in the territory" of Pakistan as required by the BIT. Even if it was, the claims fail because SGS ignored a con-

³⁸ *Id.*, at paragraph 63.

³⁹ Objections, at paragraph 60, quoting the Claimant's Request for Arbitration at paragraph 61.

⁴⁰ *Id.*

⁴¹ *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic* ("*Vivendi*" or "*Vivendi Annulment*"), Case No. ARB/97/3, Decision on Annulment of 3 July 2002.

⁴² *Id.*, at paragraph 98.

⁴³ Objections at paragraph 61.

⁴⁴ *Id.*, at paragraphs 97-100, and 129-33.

dition precedent to the bringing of a BIT claim. Rather than observe the 12-month consultation period imposed by the Treaty, SGS filed the Request for Arbitration with the ICSID Secretariat only two days after it notified Pakistan that it had a BIT claim.⁴⁵

47. During the hearing, counsel for Pakistan set out four propositions, each of which was said to be sufficient to command the dismissal of the claim:

- (a) No ICSID arbitration because of the existence of another prior agreement;
- (b) Alternatively, no ICSID arbitration because of waiver;
- (c) Alternatively, no ICSID arbitration because of contractual claims; and
- (d) In the final alternative, ICSID arbitration would at any rate be premature.⁴⁶

48. In its principal argument, Pakistan submits that under the ICSID Convention and under the principle of *pacta sunt servanda*, this Tribunal does not have jurisdiction where the parties have agreed to submit disputes elsewhere. The jurisdiction of ICSID tribunals is limited to the adjudication of disputes that the parties have actually agreed to submit to the Centre and not to an alternative forum.⁴⁷ Conversely, if the parties agree to submit their disputes to a forum other than ICSID, Article 26 of the ICSID Convention requires the ICSID tribunal to respect their agreement.⁴⁸

⁴⁵ *Id.*, at paragraph 62.

⁴⁶ Transcript of the Hearing (“Transcript”), Volume 1, p. 7, lines 15-23.

⁴⁷ Objections at paragraphs 63-64. Pakistan refers in this regard to Article 25(1) of the ICSID Convention which states that the Centre’s jurisdiction shall only extend to legal disputes “which the parties to the dispute consent in writing to submit to the Centre.”

⁴⁸ Article 26 states: “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.” Pakistan refers in this respect to works such as Professor Christoph Schreuer’s *The ICSID Convention: A Commentary*, awards of other ICSID tribunals, and decisions of national courts. Objections, at paragraphs 65-69.

49. In Pakistan's submission,

... no ICSID tribunal has ever held that it has jurisdiction over claims for breach of a particular contract containing a non-ICSID arbitration clause, regardless of whether or not the tribunal concluded it had jurisdiction over any related claims arising under a bilateral investment treaty or some other source of rights for foreign investors against the state.⁴⁹

50. A series of ICSID cases, beginning with the *Klöckner* case, are said to support this proposition.⁵⁰ Pakistan places particular reliance on the *Vivendi* Annulment Committee decision as affirming the principle of party autonomy; that Committee held that the parties' agreement to refer disputes arising under a concession contract to the courts of the province of Tucumán, Argentina, did not prevent the ICSID tribunal from dealing with BIT claims relating to the same facts. However, the Annulment Committee expressly stated that it was not holding that the ICSID tribunal had jurisdiction over claims for breach of the concession agreement. Rather, it made the statement earlier quoted, namely, that in a case 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 in that contract."⁵¹

51. Pakistan contrasts the present case to *Vivendi*, noting that Section 11.1 of the PSI Agreement contains the parties' agreement exclusively to submit "[a]ny dispute, controversy or claim arising out of, or relating to this Agreement or breach, termination or invalidity thereof" to the PSI Agreement arbitrator. Based on this, the Tribunal does not have jurisdiction over SGS's "Contract Claims."

52. Even if both tribunals could exercise jurisdiction over the "Contract Claims," Pakistan argues that the contractual choice of forum should control,

⁴⁹ Objections, at paragraph 70.

⁵⁰ *Klöckner Industrie-Anlagen GmbH, et al. v. United Republic of Cameroon* ("Klöckner"), Case No. ARB/81/2, Decision on Annulment, 3 May 1985, *Tradex Hellas S.A. v. Republic of Albania* ("*Tradex Hellas*"), Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996, 14 ICSID Review—F.I.L.J. 161 (1999), *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco* ("*Salini*"), Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, 1 J.D.I. 196 (2002), *Lanco International Inc. v. Argentine Republic* ("*Lanco*"), Case No. ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1998, 40 ILM 457 (2001), *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* ("*Vivendi*") Case No. ARB/97/13, Decision on Annulment of 3 July 2002, 41 ILM 1135 (2002).

⁵¹ Objections at paragraphs 78-80. The passage from *Vivendi Annulment* is cited at paragraph 80 of the Memorial.

where it broadly provides for mandatory arbitration of all disputes, the parties are identical, the claims for breach of the BIT include a pure claim for breach of contract, and the Claimant when it filed its ICSID request was already participating in contract arbitration proceedings with overlapping claims concerning the same facts and circumstances and seeking the same relief. As a result, the application of the *lis pendens* doctrine requires dismissal of the second proceeding.⁵² Pakistan urges the Tribunal to follow the “clearly expressed intention of the parties as set forth in the PSI Agreement” and dismiss all claims in the Request for “breach of contract.”⁵³

53. Pakistan refers to SGS’s having previously argued that this Tribunal has concurrent jurisdiction over the “Contract Claims” by virtue of Article 11 of the BIT. That article states:

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.

54. SGS has argued that Article 11.1 of the BIT “elevates” all contract claims to the level of claims of a breach of the BIT. Pakistan submits that claims under this Article are “second order” claims (*i.e.*, claims that will not ripen until after a prior determination has been made of a “first order” claim that a contract commitment has been breached).⁵⁴ In its submission, the tribunal with the authority to make that primary determination is the PSI Agreement arbitrator.⁵⁵

55. Even if SGS were correct, Pakistan argues, the BIT’s general provisions would be superseded by the PSI Agreement’s specific agreement to arbitrate. If the Tribunal accepted SGS’s view of Article 11, it would eviscerate the parties’ specific arbitration agreement in this case. Previous cases have recognized that ICSID tribunals should avoid interpretations of contract provisions, in particular, arbitration clauses, that would render the clauses totally ineffective or violative of “common sense.”⁵⁶

⁵² *Id.*, at paragraph 97.

⁵³ *Id.*, at paragraph 84.

⁵⁴ Transcript, Volume 1, at pp. 15-16, p. 112, lines 2-7.

⁵⁵ Objections at paragraphs 87.

⁵⁶ *Id.*, at paragraph 88. *Holiday Inns S.A. and others v. Morocco* (“*Holiday Inns*”), Case No. ARB/72/1 (an unpublished ICSID award discussed in Pierre Lalive, “The First ‘World Bank’ Arbitration (*Holiday Inns v. Morocco*)—Some Legal Problems”, 1 ICSID Reports 645) also affirmed the principle of *ut res magis valeat quam pereat*.

56. If the Tribunal accepted SGS's logic, it would negate routine forum selection clauses in thousands of State-investor contracts where States subject to BITs make routine commitments to investors.⁵⁷

57. Pakistan notes that the Claimant also seeks compensation for damages to its "reputation resulting from Pakistan's unlawful acts and omissions," allegedly resulting from the manner in which the PSI Agreement was terminated. Pakistan describes this as a "Defamation Claim." Whether it sounds in tort or contract, Pakistan says, the only forum competent to hear SGS's "Defamation Claim" is the PSI Agreement arbitration.⁵⁸

58. Pakistan notes that there is no provision in the BIT that would give the Tribunal jurisdiction over the "Defamation Claim." Consequently, Pakistan argues that the Tribunal should dismiss the "Defamation Claim" in SGS's Request and refer SGS to the PSI Agreement arbitration.⁵⁹

59. Pakistan also controverts SGS's suggestion that this Tribunal could claim jurisdiction over Pakistan's own breach of contract claims against SGS.⁶⁰ It asserts that it has only one possible forum in which to bring its own contract claims against SGS. It is bound firstly under Section 11.1 of the PSI Agreement to pursue its claims in the PSI forum. Second, nothing in the BIT provides Pakistan with any rights on which it could bring its PSI Agreement non-performance claims before an ICSID Tribunal. SGS's reliance on Article 9 of the BIT is in error as it refers merely to "disputes with respect to investments" and this cannot be construed as creating rights for Pakistan to submit any contract claims it has with SGS to ICSID arbitration.⁶¹

60. In Pakistan's view, the doctrine of *lis pendens* bars SGS from submitting the "Contract Claims" and "Defamation Claim." Where, as here, there is an identity as to parties and claims brought before two tribunals, the one receiving the claims later in time should dismiss its proceedings in favour of the first proceedings.⁶²

⁵⁷ *Id.*, at paragraph 89.

⁵⁸ *Id.*, at paragraph 91.

⁵⁹ *Id.*, at paragraphs 92 and 93.

⁶⁰ *Id.*, at paragraph 94.

⁶¹ *Id.*, at paragraph 96.

⁶² *Id.*, at paragraph 97.

61. In this case, in contrast to ICSID cases where the doctrine's application was rejected, Pakistan argues, the PSI Agreement arbitration commenced (including SGS's counter-claim): (i) before SGS consented to ICSID jurisdiction; (ii) with the identical parties; (iii) with identical relief being sought by SGS; and (iv) involving identical causes of action for SGS. The doctrine of *lis pendens* thus requires dismissal of the "Contract" and "Defamation" claims.⁶³

62. In Pakistan's view, the "essential basis" of the "BIT Claims" is contractual; those claims are also therefore subject to the PSI Agreement arbitrator's exclusive jurisdiction. For four years SGS has argued that Pakistan's acts or omissions were alleged breaches of contract and no reference was made to a claim of expropriation, failure to provide fair and equitable treatment, or failure to promote or protect an investment under the BIT.⁶⁴ SGS filed contractual claims in the Swiss courts and contractual counter-claims in the PSI Arbitration. Pakistan argues that SGS then "re-labeled" its claims as "BIT Claims."⁶⁵ However, nothing in the Washington Convention or in ICSID jurisprudence requires the Tribunal to accept that a particular claim arises under a treaty simply because a claimant says so.⁶⁶

63. According to the *Vivendi Annulment* decision, the test of whether the claim sounded in contract or treaty turned on the claim's "essential" or "fundamental basis."⁶⁷ To Pakistan, the essential nature of SGS's claims "is and always will be contractual."⁶⁸ From December 1996 to October 2001, no mention was made of a possible treaty claim; yet the BIT was in force from May 1996. The "Contract," "Defamation" and five "BIT Claims"⁶⁹ are based on "the same limited factual allegations."⁷⁰ In addition, the prayers for relief in the Request for ICSID Arbitration and the PSI counter-claim are virtually identical. No special relief is sought for alleged BIT breaches. The Request itself states: "this dispute arises out of Pakistan's actions and omissions with

⁶³ *Id.*, at paragraph 100.

⁶⁴ Transcript, Volume 1, pp. 95-96.

⁶⁵ *Id.*, Volume 1, p. 104, lines 7-8.

⁶⁶ Objections at paragraph 102. During the hearing, counsel for Pakistan reviewed the Request for Arbitration and asserted that it "does not allege facts which if proven would rise to a level of a breach of the BIT; accordingly, they fall to be determined by the PSI Agreement to arbitration as contract claims where they currently stand, and not before this Tribunal." Transcript, Volume 1, p. 84, lines 10-14 *et seq.*

⁶⁷ *Vivendi Annulment*, pp. 38-39, at paragraphs 98-101.

⁶⁸ Objections, at paragraph 104.

⁶⁹ The BIT claims are: failure to promote SGS's investment, failure to protect its investment, failure to provide fair and equitable treatment, expropriation, and failure constantly to guarantee the observance of Pakistan's commitments to SGS.

⁷⁰ Objections at paragraph 105.

respect to the Pre-Shipment Program and the PSI Agreement.”⁷¹ Further, SGS specifically admits that “most or all of Pakistan’s acts and omissions...qualify as breaches of the PSI Agreement as well as violations of the BIT.”⁷² Accordingly, Pakistan submits that the Tribunal should treat the “BIT Claims” as contract claims and dismiss them.⁷³

64. Pakistan submits further that even if SGS has separate “BIT Claims,” Article 11.1 of the PSI Agreement is sufficiently broad to encompass claims for breach of a treaty.

65. The principle of *generalia specialibus non derogant* (general words do not derogate from special words) should apply: the specific agreement takes precedence over the general agreement in the BIT.⁷⁴

66. Pakistan asserts that the “arising out of or relating to” formula used in Section 11.1 is a universally regarded broad arbitration clause. Courts and tribunals have consistently held that the “arising out of or relating to” formulation encompasses any and all disputes touching on the contract in question regardless of whether they sound in contract, tort, statute or treaty.⁷⁵ Thus, Pakistan argues, SGS’s “BIT Claims” are subject to arbitration before the PSI Agreement arbitrator.

⁷¹ Request, at paragraph 61.

⁷² *Id.*, at paragraph 36.

⁷³ Objections, at paragraphs 105-109. At the hearing, counsel for the Respondent stated: “...what the Tribunal has to look at is the claim as stated by the Claimant, and to ask itself the question, the facts as alleged, which we say are purely contractual breaches, it’s all they have alleged, is that sufficient if they prove everything that they claim they wish to prove, is that sufficient to bring them into ... the breach of the BIT?” Transcript, Volume 1, p. 106, lines 11-17.

⁷⁴ Objections at paragraph 112. The Respondent cites the *Holiday Inns, Amco Asia, Lanco*, and *Salini* cases in support of this proposition to determine whether a claim is subject to a particular dispute resolution clause. At the hearing, extensive argument was devoted to the point that the PSI Agreement arbitrator could consider claims that Pakistan breached the Treaty. Transcript, Volume 1, pp. 23-27.

⁷⁵ Pakistan refers to various texts and to such cases as *Pennzoil Exploration and Production Co. v. Ramco Energy Ltd.*, *Partial Award in ICC Case No. 7319 of 1992*, and *Judgment No. 8375 of 16 November 1987* in this regard. It also cites *J.J. Ryan & Son Inc. v. Rhone Poulenc Textile S.A.* 863 F.2d 315, 321 (4th Cir.1988). [Pakistan’s emphasis.] Pakistan also cites both Redfern and Hunter and Fouchard Gaillard Goldman who, it says, agree that the phrase “arising out of” will embrace all disputes capable of being submitted to arbitration and arbitrators have jurisdiction as long as the terms of arbitration are wide enough to demonstrate the parties intended it to be so.

67. In Pakistan's submission, since the PSI Agreement encompasses the "BIT Claims," the only remaining question is whether this Tribunal has concurrent jurisdiction over them or whether it must dismiss them in favour of the PSI Agreement arbitration. In its submission, the Tribunal does not have concurrent jurisdiction and must dismiss the "BIT Claims" in favour of the PSI Agreement arbitration.⁷⁶

68. Pakistan argues further that this Tribunal should defer to the PSI Agreement arbitrator because even if, *status quo ex ante*, this Tribunal could have had concurrent jurisdiction, "that ship has sailed."⁷⁷ The PSI arbitrator: (i) was seized with jurisdiction over the claims of both parties first; and (ii) has a broader ability to resolve the entire dispute among the parties.⁷⁸

69. Pakistan then addresses the effect of Article 26 of the ICSID Convention on this case. Article 26 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. A Contracting State may require the exhaustion of local administrative or

⁷⁶ Objections at paragraphs 120-128.

Pakistan cites *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* ("SPP"), Case No. ARB/84/3, for the proposition that "a specific agreement between the parties to a dispute would naturally take precedence with respect to a bilateral treaty between the investor's State and [a particular sovereign]... [This hierarchy] reflects the maxim *generalia specialibus non derogant*." It also cites Professor Schreuer's *Commentary* which states that a document with 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 such as the BIT. Pakistan asserts that, contrary to SGS's assertion that the specific agreement of the parties should be rendered valueless, the PSI Agreement is a specific agreement regarding dispute resolution and should be given precedence over the more general provisions of the BIT.

Pakistan also distinguishes the *Vivendi Annulment* decision from the present case by noting that although both cases present superficially similar facts, in that the *Vivendi* Annulment Committee held that a contractual choice of forum clause did not supersede the parties' choice of ICSID to resolve the BIT claims, that case differs from the present one in that the clause in the operative contract provided only that "for purposes of interpretation and application of this Contract the parties submit themselves to the [local courts]." This was a narrow clause clearly limited to contract claims and not to BIT claims, whereas the clause in the PSI Agreement is a broad form of arbitration clause.

Similarly, in *Lanco* and *Salini*, Pakistan says that those cases turned either on a more narrowly drafted clause or on one that was not a true choice of forum clause since it vested jurisdiction over disputes in local courts who, as a matter of law, already had compulsory jurisdiction over the disputes. These are in contrast with the broad clause in question because it is not limited to "interpretation and application" of the contract but extends to any and all claims "arising out of or relating" thereto.

⁷⁷ Objections at paragraph 128.

⁷⁸ *Id.*

judicial remedies as a condition of its consent to arbitration under this Convention.

70. Pakistan argues that Article 26, which the negotiating history shows is merely a rule of interpretation, precludes parties from pursuing their claims in multiple *fora* simultaneously.⁷⁹ Once the choice of the forum for dispute resolution has been made, the parties are bound by it. Pakistan argues that SGS has clearly made its choice to resolve the dispute by PSI Agreement arbitration and its submission to ICSID is seeking “another remedy in the same matter” in that the counter-claims in the PSI Arbitration are identical to the relief sought before this Tribunal. SGS thus seeks “another remedy in the same matter.” SGS is clearly precluded from bringing a claim before ICSID and cannot benefit from the ICSID exclusivity rule.⁸⁰

71. Pakistan asserts that SGS could have raised its “BIT Claims” in the PSI Agreement arbitration. Under the general principles of *ne bis in idem* and *res judicata*, the fact that it did not do so is irrelevant.⁸¹ It was for this reason that the Supreme Court of Pakistan held SGS was estopped from pursuing its claims before ICSID.⁸²

72. SGS has made its choice by filing first in the PSI Agreement arbitration and cannot avoid the consequences of this choice.⁸³

73. Pakistan notes that SGS has already argued that even if there is concurrent jurisdiction, the tribunal with narrower jurisdiction should defer to the tribunal with broader jurisdiction. Pakistan submits that the forum with the most comprehensive jurisdiction is the PSI Agreement arbitration because:

- (a) only the PSI Agreement arbitrator has jurisdiction over SGS’s “Contract” and “Defamation Claims”;

⁷⁹ At the hearing, counsel for Pakistan directed the Tribunal to the negotiating history of what became Article 26 of the Convention. The Tribunal was given excerpts from the ICSID’s *History of the ICSID Convention*, a two volume work that reproduces the *travaux préparatoires* of the Convention. Counsel observed that the records show that the delegates to the negotiations were assured that the proposed convention would not operate so as to disrupt settled expectations or pre-existing arrangements. Transcript, Volume 1, pp. 38-47, p. 69, lines 13-16.

⁸⁰ Objections at paragraphs 130-131.

⁸¹ *Id.*, at paragraph 132.

⁸² Judgment of the Supreme Court of Pakistan, in *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Exhibit P21 to Respondent’s Objections to Jurisdiction, at p. 33, paragraph 54.

⁸³ Objections at paragraph 133.

- (b) only the PSI Agreement arbitrator has jurisdiction over Pakistan's claims against SGS for breach of the PSI Agreement; and
- (c) at most, the PSI Agreement arbitrator and ICISD have concurrent jurisdiction over the "BIT Claims."⁸⁴

74. Accordingly, SGS's claims should be dismissed in their entirety.

75. Pakistan then advances a separate argument against jurisdiction: SGS's activities under the PSI Agreement did not constitute an investment within the territory of Pakistan within the meaning of Article 2(1) of the BIT because SGS's obligations were performed outside Pakistan.

76. Pakistan argues that the pre-inspection of goods being imported into Pakistan was conducted by pre-existing SGS controlled or affiliated entities outside Pakistan and while SGS may have invested in offices and personnel in various ports around the world in order to be able to perform its obligations under the PSI Agreement, this does not involve an investment in the territory of Pakistan.⁸⁵

77. The liaison offices established in Pakistan which SGS presents as evidence of its investment were simply to process and convey information and to bill; there was no revenue-generating activity in Pakistan, as agreed by both parties.⁸⁶ Finally, Pakistan points to what it calls an admission by SGS in the Swiss legal proceedings that its activities pursuant to the PSI Agreement did not constitute an investment in the territory of Pakistan within the meaning of Article 2(1) of the BIT.⁸⁷

78. Pakistan also observes that possibly unlawful conduct of SGS and its employees in respect of the PSI Agreement is being investigated. In the event that it is found that the PSI Agreement was procured through bribery and corruption, Pakistan reserves its right to argue that the Tribunal does not have jurisdiction over the claims in any event because SGS did not invest "in accordance with the laws and regulations of" Pakistan as required in Article 2 of the BIT.⁸⁸

⁸⁴ *Id.*, at paragraph 136.

⁸⁵ *Id.*, at paragraph 139.

⁸⁶ *Id.*, at paragraph 140.

⁸⁷ *Id.*, at paragraph 143.

⁸⁸ *Id.*, at paragraphs 144-145.

79. Pakistan also contends that the Tribunal has no jurisdiction on the ground that SGS failed to comply with a mandatory 12-month consultation period before requesting ICSID to register its claim.

80. Article 9 of the BIT states:

(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 10 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 twelve months and if the investor concerned gives written consent, the dispute shall be submitted to the arbitration of the International Centre for Settlement of Investment Disputes, instituted by the Convention of Washington of March 18, 1965, for the settlement of disputes regarding investments between States and nationals of other States...

81. In Pakistan's submission, under the BIT, SGS was barred from bringing an ICSID arbitration against Pakistan until the conclusion of a 12-month consultation period regarding the alleged BIT violations. SGS notified Pakistan of its belief that a dispute within the ambit of the BIT existed only two days before it submitted a Request for ICSID Arbitration. The Tribunal must give effect to the terms of the Treaty which give Pakistan one year to discuss, analyze and potentially settle SGS's "BIT Claims" before proceeding to ICSID arbitration.⁸⁹

82. Finally, in its Reply and at the hearing, Pakistan asserted that an ICSID arbitration would be premature at this time. The only forum capable of resolving the contract claims is the PSI Agreement arbitration and this Tribunal should stay this proceeding until that arbitration is concluded; otherwise, there would be greater costs to the parties, risks of inconsistent awards, and so on.⁹⁰

⁸⁹ *Id.*, at paragraph 151.

⁹⁰ Reply at paragraphs 116-120. Transcript, Volume 1, pp. 115-124.

PART III: SGS'S RESPONSE TO THE OBJECTIONS

83. SGS responds to Pakistan's objections by firstly pointing out that it does not accept the characterization of SGS's claims as "Contract," "Defamation" and "BIT Claims."⁹¹ All of SGS's claims are "BIT Claims" in the sense that they are brought before this Tribunal on the basis of the BIT. It is for the Claimant, not the Respondent, to formulate its claims; they must be taken as they are, not as Pakistan would like them to be.

84. SGS alleges five breaches of the BIT (including a claim based upon what it calls the Article 11 "umbrella clause") and asserts that "most or all of Pakistan's acts and omissions described above qualify as breaches of the PSI Agreement as well as violations of the BIT";⁹²

In other words, SGS brings before this Tribunal (i) claims alleging violations by Pakistan of a number of specific provisions of the BIT, including the "umbrella clause" at Article 11 of that instrument and, in the alternative to its claims alleging the violation of Article 11 of the BIT, (ii) claims alleging breaches of contract by Pakistan which do not constitute violations of the BIT.⁹³

85. In SGS's view, for the Tribunal to have jurisdiction over the dispute, the conditions set forth in Article 25(1) of the ICSID Convention must be met.⁹⁴ Article 25 sets out the conditions for jurisdiction as follows:

- (a) the dispute must be a "legal" one;
- (b) it must "aris[e] directly out of an investment";
- (c) it must be between a Contracting State...and a national of another Contracting State; and

⁹¹ Claimant's Reply to the Respondent's Objections to Jurisdiction ("Reply") at paragraphs 31-35. SGS also filed an expert report and a supplementary report by Professor Christoph Schreuer.

⁹² Reply at paragraph 34.

⁹³ *Id.*

⁹⁴ Article 25 states:

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.

- (d) the parties to the dispute must “consent in writing to submit [it] to the Centre.”⁹⁵

86. In SGS’s view, Pakistan disputes only the fourth condition. The burden is on Pakistan to prove that this is not met. There is a written consent; Pakistan contests whether that consent, and therefore the Tribunal’s jurisdiction, covers the claims before this Tribunal.⁹⁶

87. The parties’ written consent consists of (i) the written offer of ICSID arbitration made by Pakistan, in Article 9 of the BIT, and (ii) the written acceptance by SGS in its letter to Pakistan of 10 October 2001.⁹⁷

88. Pakistan’s Objection cannot be sustained because the parties’ consent covers all of the claims made in the Request for Arbitration. In this regard, SGS submits that it can be established:

- (a) that the Tribunal’s jurisdiction extends to SGS’s claims as formulated by SGS;
- (b) that the forum selection clause in the PSI Agreement does not diminish this Tribunal’s jurisdiction;
- (c) that in the event of *prima facie* overlapping arbitration provisions, this Tribunal’s jurisdiction must prevail;
- (d) that the *lis pendens* principle does not bar this Tribunal from hearing SGS’s claims;
- (e) that SGS did not waive its right to pursue ICSID arbitration, nor is it estopped from presenting its claims to this Tribunal;
- (f) that this dispute is with respect to investments within the meaning of the BIT; and
- (g) that non-observance of the waiting period set out in the BIT does not affect this Tribunal’s jurisdiction.⁹⁸

⁹⁵ Reply, at paragraph 37.

⁹⁶ *Id.*, at paragraph 39.

⁹⁷ *Id.*, at paragraphs 39-40.

⁹⁸ *Id.*, at paragraph 41.

89. Pakistan ignores the basic principle that it is a claimant's prerogative to formulate the claims that it is asking the judges to resolve, a principle consistently applied by ICSID tribunals.⁹⁹

90. In SGS's view, it is only at the merits phase that the Tribunal will have to consider whether SGS's characterization of its claims is correct, and whether its claims succeed as a result.¹⁰⁰ The Tribunal must decide whether claims alleging violations of the BIT, including violations of Article 11, are within its jurisdiction. It will also have to decide whether it has jurisdiction over SGS's claims alleging only breaches of the PSI Agreement, pleaded in the alternative to the alleged breaches of Article 11. What the Tribunal cannot do at this stage is decide whether SGS's claims alleging violations of the BIT are in fact, as Pakistan alleges, "contractual claims" or claims of any sort other than as stated by SGS.¹⁰¹

91. SGS observes that the BIT sets forth international law obligations of the Contracting Parties.¹⁰² An alleged violation of the BIT is therefore a breach of international law, requiring a determination based on international law standards. A breach of contract, on the other hand, is usually determined by reference to national law standards.

92. Even though a claim for breach of contract and a claim for violation of the BIT may be based on similar or identical facts, they rely on fundamentally different legal bases and are assessed according to different standards. SGS refers in this regard to the *Vivendi* Annulment Committee which accepted that questions of breach of contract and violation of the BIT could be closely related:

A state may breach a treaty without breaching a contract, and *vice versa*... The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.¹⁰³

⁹⁹ *Id.*, at paragraph 44. Transcript, Volume 1, pp. 135-139.

¹⁰⁰ *Id.*, at paragraph 48.

¹⁰¹ *Id.*, at paragraph 49.

¹⁰² *Id.*, at paragraph 50.

¹⁰³ *Vivendi Annulment*, at paragraphs 95-96, quoted in the Reply at paragraph 53.

93. However, SGS submits that this does not mean that a tribunal may not consider contractual issues when determining if there has been a breach of the BIT.¹⁰⁴

94. SGS submits that Pakistan concedes that Article 9 of the BIT covers claims alleging violations of the BIT. Such claims fall within the parties' consent to ICSID arbitration and this Tribunal has jurisdiction over them. Pakistan's position is that only contractual claims rather than claims alleging violations of the BIT fall outside the Tribunal's jurisdiction and claims alleging violations of the BIT remain within it.¹⁰⁵

95. SGS submits that it is perfectly proper for a tribunal to interpret a contract and consider issues of contractual performance in order to determine whether there has been a breach of international law.

96. An ICSID tribunal can make determinations based on the contract and on national law in order to decide whether a State has committed a violation of its international law obligations through a breach of the BIT. SGS alleges that Pakistan's actions relating to the PSI Agreement are a breach of Articles 3(1), 4(1), 4(2) and 6(1) of the Treaty. These obligations, related to the promotion of investments, the protection of investments, the fair and equitable treatment of investments, and expropriation, are international law obligations. The fact that they are in relation to the performance of a contract does not detract from the qualification of SGS's claims as international law claims. In deciding those BIT claims, the Tribunal must consider the terms and performance of the PSI Agreement.¹⁰⁶

97. This is also the case regarding SGS's claim that Pakistan breached the "umbrella clause" at Article 11 of the BIT. That provision states:

Either Contracting Party shall constantly guarantee the observance of commitments it has entered into with respect to the investments of the investors of the other Contracting Party.¹⁰⁷

¹⁰⁴ Reply, at paragraph 55.

¹⁰⁵ *Id.*, at paragraph 58. SGS cites *Salini* and *Vivendi* for the "uncontroversial principle" that a tribunal constituted under a BIT has jurisdiction over claims alleging violations of that BIT. *Vivendi* adds that even if the contract in question refers contractual disputes to the courts of a domestic jurisdiction, it does not affect the jurisdiction of the Tribunal to consider a claim based on the provisions of a BIT.

¹⁰⁶ *Id.*, at paragraphs 61 and 62.

¹⁰⁷ *Id.*, at paragraph 63.

98. In SGS's view, the inclusion of an "umbrella clause" such as Article 11 of the BIT has the effect of elevating a simple breach of contract claim to a treaty claim under international law.¹⁰⁸ SGS's claim of a breach of Article 11 of the BIT is formulated as an international law claim alleging a breach of the Treaty. In deciding this, however, the Tribunal must consider whether Pakistan breached the PSI Agreement.¹⁰⁹ Nothing prevents this Tribunal from "taking into account and interpreting the PSI agreement and its performance" when it considers whether the Respondent has breached the BIT.¹¹⁰

99. Article 11 of the Treaty is characterized by the Claimant as an "umbrella clause which says that each time you violate a provision of the contract, . . . , you also violate norms of international law, you violate the treaty by the same token."¹¹¹ Counsel later elaborated on this characterization of Article 11 as follows:

...I myself prefer to call it a mirror effect clause, because in fact it is a mirror effect which it creates.

You have a violation of the contract, and the Treaty says, as if you had a mirror, that this violation will also be susceptible to being characterized as a violation of the Treaty. So the same facts, the same breach will be a violation of the contract in itself, and a violation of the Treaty.¹¹²

And,

If I am the government and if I breach a contract, by the same token I will breach a treaty, so the useful effect of this is to create this mirror effect, to say that I will elevate in essence, and

¹⁰⁸ *Id.*, at paragraph 64 and Transcript, Volume 1 at pp. 140-183 and Volume 2 at pp. 74-106. SGS refers to, among others, R. Dolzer and M. Stevens, who commented in their book, *Bilateral Investment Treaties*, on the importance of umbrella clauses in protecting the investor's contractual rights against any interference which might be caused by either a simple breach of contract or by administrative or legislative acts. Umbrella clauses are included because it "is not entirely clear under general international law whether such measures constitute breaches of international obligations." (Dolzer and Stevens at p. 82.) SGS also refers in this regard to a comment of the late Ibrahim Shihata (former Secretary-General of ICSID) and to Professor Schreuer's opinion.

¹⁰⁹ Reply, at paragraph 68.

¹¹⁰ *Id.*, at paragraph 72.

¹¹¹ Transcript, Volume 1, p. 130, lines 23-25, p. 131, lines 1-3, pp. 140-168.

¹¹² *Id.*, Volume 1 at p. 141, lines 15-23.

that's what it does, it may be far-reaching but that's what it does, to elevate breaches of contract as breaches of a treaty.¹¹³

100. SGS also maintains that the Tribunal has jurisdiction over claims by SGS which allege breach of contract as opposed to a violation of the BIT. These claims are raised in the alternative, to be decided only if the Tribunal rejects the claims that Pakistan violated the "umbrella clause."¹¹⁴ This jurisdiction to decide contract claims results from the broad terms of Article 9 of the BIT which refers to "disputes with respect to investments."¹¹⁵

101. In light of the terms of Article 9 of the BIT, Pakistan is bound to submit all disputes to ICSID arbitration including SGS's claims for breach of contract as distinct from a breach of the BIT.¹¹⁶

102. SGS argues that Pakistan's contention that Article 11.1 of the PSI Agreement excludes or diminishes this Tribunal's jurisdiction under Article 26 of the ICSID Convention is without merit. The question to be confronted is whether there was any stipulation contrary to ICSID's exclusive jurisdiction in the consent to arbitration.

103. Pakistan consented to ICSID's exclusive jurisdiction in Article 9 of the BIT which contains no reservations or "statement otherwise." SGS's consent comes from its Request for Arbitration. SGS argues that "the consent of each of the parties to submit to the exclusive jurisdiction of this Tribunal was unequivocal, and at no time did either of the parties 'otherwise state'."¹¹⁷

104. SGS goes on to submit that a long line of ICSID decisions shows that a forum selection clause in a contract will not apply to the exclusion of ICSID jurisdiction.¹¹⁸ SGS points out that in every case on which Pakistan relies (*Klöckner, Tradex Hellas, Lanco, Salini and Vivendi Annulment*), the ICSID tribunal retained jurisdiction.

105. SGS concludes that in conformity with the text of the ICSID Convention and the weight of ICSID precedent, the Tribunal must hold that

¹¹³ *Id.*, Volume 1 at p.146, lines 16-21.

¹¹⁴ Transcript, Volume 1, p. 130, lines 12-16.

¹¹⁵ Reply at paragraphs 74-79.

¹¹⁶ *Id.*, at paragraph 81.

¹¹⁷ *Id.*, at paragraph 93.

¹¹⁸ *Id.*, at paragraph 97.

the forum selection clause in the PSI Agreement does not and cannot exclude the jurisdiction of this Tribunal with respect to SGS's claims. At the very most, the Islamabad arbitrator may have, *prima facie*, concurrent jurisdiction over some aspects of the current dispute relating to the interpretation and performance of the PSI Agreement. However, even then, this Tribunal's jurisdiction must prevail.¹¹⁹

106. This Tribunal must prevail because the BIT's dispute resolution provision supersedes the PSI Agreement's forum selection clause, to the extent they both cover the same ground.¹²⁰ International methods of dispute settlement take precedence over domestic arbitration. BITs are intended to promote and protect investments and ensure their equitable treatment which gives investors substantive rights under international law, such as the right to have their disputes heard by an international tribunal.¹²¹

107. In SGS's submission, Pakistan's argument that the Islamabad arbitrator has jurisdiction over the "BIT Claims" is flawed:

- (a) Although some BITs include a matrix of *fora* available to claimants, this BIT does not. Article 9(2) speaks only of ICSID jurisdiction and Article 26 of the Convention gives this Tribunal exclusive jurisdiction;
- (b) A contract forum selection clause cannot extend the jurisdiction of a domestic court or tribunal to claims of breach of a treaty (see *Vivendi* both in its discussion of *Lanco* and the case before it);
- (c) At the time that the PSI Agreement was concluded, the BIT did not exist and therefore the parties could not have intended to cover claims that could not have been made at the time; and
- (d) Finally, the Supreme Court of Pakistan concluded that the BIT had not been incorporated into the law of Pakistan and no court could enforce any treaty rights arising from the BIT. Moreover, the Supreme Court stated that the PSI Arbitration shall be confined to the claims based on the terms and conditions of that agreement.¹²²

¹¹⁹ *Id.*, at paragraph 113.

¹²⁰ *Id.*, at paragraph 115.

¹²¹ *Id.*, at paragraphs 117-118.

¹²² *Id.*, at paragraphs 131-135.

108. In respect of the Respondent's arguments that this Tribunal has no jurisdiction over SGS's "Defamation Claims" or Pakistan's potential counter-claims, SGS argues that this Tribunal has jurisdiction over all ancillary claims and counter-claims that arise directly out of the subject-matter of the dispute as long as they are within the scope of the consent of the parties.¹²³ Such consent extends to all "disputes with respect to investments" under Article 9 of the BIT, including SGS's request for compensation for damage to its reputation as a result of Pakistan's violations of the BIT.¹²⁴ The consent also covers any eventual counter-claims that might be presented by Pakistan.

109. In SGS's view, there is nothing remarkable about an ICSID tribunal considering a State party's counter-claim when its jurisdiction arises out of a BIT. "It must have been expressly contemplated by Pakistan and Switzerland in this case [that the ICSID tribunal could consider a State party's counter-claim] because Article 9(3) of the BIT provides that "each party may start the procedure."¹²⁵

110. Pakistan has argued that the maxim *generalia specialibus non derogant* should apply such that the PSI Agreement's arbitration clause would take precedence over the BIT's ICSID arbitration clause. SGS argues that the relevance of the ICSID case on which Pakistan relies, *SPP v. Egypt*, is limited to its particular facts.¹²⁶

¹²³ Article 46 of the ICSID Convention states that:

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

¹²⁴ Reply, at paragraph 138.

¹²⁵ *Id.*, at paragraphs 139-141. SGS observes that in at least one ICSID case, *Alex Genin Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, Case No. ARB/99/2, the State bought a counter-claim alleging violations of Estonian banking law and the tribunal's jurisdiction over the counter-claim was never questioned. SGS has also expressly confirmed its agreement to the submission of Pakistan's eventual counter-claims to the jurisdiction of this Tribunal.

¹²⁶ In *SPP*, the tribunal interpreted Egyptian investment legislation which gave an investor three options for resolving disputes: any method agreed between the parties, resolution under a bilateral investment treaty or resolution under the ICSID Convention. The tribunal found that the intention of the legislature was to give precedence to a specific agreement of the parties. But as there was no such agreement between the parties, the tribunal concluded they had given their consent to ICSID arbitration as one of the options provided for by the legislation. However, in the present case, there is no domestic legislation providing for a hierarchical order of alternatives for dispute resolution. "The Switzerland-Pakistan BIT is the only relevant 'investment law' at issue in this case and it provides exclusively for ICSID arbitration." Even if *SPP* did purport to establish a general principle that a contractual forum selection clause should have precedence over a dispute resolution clause in a BIT, it has not been followed by any other ICSID tribunal facing this question. The maxim *generalia specialibus non derogant* has no application here because the two dispute settlement clauses at issue in this case relate to different standards of protection. The BIT's Article 9 provides the investor with an essential procedural guarantee that cannot be ousted by the forum selection clause in the PSI Agreement. (Reply, at paragraphs 142-148.)

111. SGS submits further that the doctrine of *lis pendens* is inoperative here. That doctrine deals with “overlap between two pending proceedings.” In the instant case, there is at best concurrent jurisdiction arising from possible overlap between the scope of the two dispute resolution mechanisms.¹²⁷ Any *prima facie* concurrent jurisdiction of the Islamabad arbitrator on the basis of the forum selection clause in the PSI Agreement would be overridden by this Tribunal’s jurisdiction, based on Article 9 of the BIT which clearly takes precedence. As a result, only this Tribunal has actual jurisdiction over the present dispute and the argument of *lis pendens* is moot.¹²⁸

112. Even supposing the *lis pendens* theory did have some *prima facie* application here, Pakistan says that the theory would require this Tribunal to yield to the Islamabad arbitrator for three reasons: (a) the two matters allegedly involve the same parties; (b) the matters allegedly involve the same causes of action; and (c) the PSI Agreement arbitration is said to have commenced prior to the present proceeding.¹²⁹

113. In SGS’s submission, *lis pendens* cannot apply here because the first two of the three requisite elements are not present.¹³⁰

114. For the *lis pendens* principle to apply, the two tribunals must be of equal status and in SGS’s view they are plainly not in this case. International jurisprudence shows that international tribunals are not subject to *lis pendens* when the parallel case is pending in a domestic forum.¹³¹ The inequality of the two tribunals is underscored by the fact that only one, namely, this Tribunal, has jurisdiction over SGS’s claims alleging violations of the BIT. The *lis pen-*

¹²⁷ *Id.*, at paragraph 149.

¹²⁸ *Id.*, at paragraph 150.

¹²⁹ *Id.*, at paragraph 151.

¹³⁰ *Id.*, at 154.

¹³¹ *Id.*, at paragraph 157. For example, in the *Selwyn Case*, the British-Venezuelan Mixed Claims Commission noted that “international arbitration is not affected jurisdictionally by the fact that the same question is in the courts of one of the nations.” SGS also cites *Socaciu v. Romania*, where the Romanian-Austrian Mixed Arbitral Tribunal held that once international proceedings have begun, proceedings before the domestic courts had no object. In the *Jean-Baptiste Caire Case*, the French-Mexican Mixed Claims Commission refused to impose supplementary admissibility requirements (not provided for in the governing Convention) on the claimants merely because parallel proceedings were pending in a domestic forum. The commission viewed the domestic proceedings as irrelevant to the question of its jurisdiction and the admissibility of the claims presented to it.

SGS cites a more recent authority where the Iran-U.S. Claims Tribunal held in *E-Systems v. Iran & Bank Melli* that the Government of Iran should request that Iranian court proceedings be stayed until proceedings in the international tribunal were completed. Similar language was used in the second *Holiday Inns* jurisdiction decision which also stated that international tribunals have a superior status in comparison to domestic proceedings.

dens principle cannot apply here because it would leave SGS without a forum in which to pursue its BIT claims.¹³²

115. *Lis pendens* also does not apply because the two proceedings do not relate to the same causes of action. *Lis pendens* is based on the principle of *ne bis in idem* (not twice in the same matter), which means that the object (*petitum*) and the ground (*causa petendi*) of the two claims are the same. *Lis pendens* will not apply even if a claimant makes identical requests if those requests are based on different legal grounds (*i.e.*, where the petition is identical, but the *causa petendi* is different).¹³³ SGS notes that in a number of BIT cases the *lis pendens* doctrine has not been applied.¹³⁴

116. SGS also points out that in the PSI Agreement arbitration Pakistan has raised claims the sole cause of action of which is restitution, whereas in this case, SGS is pursuing claims alleging: (i) violations of the BIT including its “umbrella clause” and in the alternative, (ii) claims of breach of contract but not violations of the BIT. Restitution is not pleaded in this case. Therefore, SGS argues, the causes of action in the two jurisdictions are different and *lis pendens* cannot apply.¹³⁵

117. To SGS, the *lis pendens* argument is based on an incorrect premise, namely, that “SGS submitted its claims in the PSI Agreement arbitration first.” But, SGS merely filed a defensive counter-claim, expressly subject to objections to jurisdiction. In any event, this ICSID arbitration effectively precedes the PSI Agreement arbitration because the latter has only recently begun.¹³⁶ The arbitrator was appointed by the Pakistani courts on 2 July 2002, and Pakistan filed its Statement of Claim only on 18 October 2002.

¹³² Reply at paragraph 164.

¹³³ *Id.*, at paragraph 166.

¹³⁴ *Id.*, at paragraphs 167. In the *Ronald S. Lauder v. Czech Republic* case and the *CME Czech Republic B.V. v. Czech Republic* case, the respondent’s *lis pendens* arguments were rejected by both tribunals because they involved different parties and different causes of action (under different BITs).

SGS also questions Pakistan’s use of *S.A.R.L. Benvenuti & Bonfant v. People’s Republic of the Congo* (“*Benvenuti & Bonfant*”), ICSID Case No. ARB/77/12, and *Amco Asia Corporation v. Republic of Indonesia* (“*Amco Asia*”), ICSID Case No. ARB/81/1, as cases in support of its argument of *lis pendens*. In both cases, the tribunal rejected the principle’s application. SGS asserts, moreover, that these cases were dismissed not merely because the parties in the pending actions were not the same, but also because there was also a lack of identity in the causes of action. In *Benvenuti & Bonfant* the tribunal found the principle not to be applicable where there was no identity of the parties and no identity of “object and cause of action in the proceeding pending before both tribunals.” Likewise, in *Amco Asia* the tribunal held that neither the parties involved nor the claims raised were identical.

¹³⁵ *Id.*, at paragraph 174.

¹³⁶ *Id.*, at paragraph 176.

118. Pakistan has argued that SGS waived its right to seek relief under the ICSID Convention when it initiated the Swiss legal proceedings and presented counter-claims in the PSI Agreement arbitration. It also alleges estoppel on the same facts. But objections on waiver and estoppel assume that the causes of action and relief sought in the different proceedings are all identical. This is not so here and where there is no identity of cause of action or remedy sought, there can be no waiver or estoppel.¹³⁷

119. Finally, in its decision of 3 July 2002, the Supreme Court of Pakistan noted that the BIT had not been incorporated into the laws of Pakistan and that no Pakistan court could enforce any “treaty rights” arising from the BIT. SGS questions how the Islamabad arbitrator would have jurisdiction to consider SGS’s claims arising from the BIT when there is a denial of such rights in the Pakistan courts. The Supreme Court of Pakistan expressly stated that the “[Islamabad] arbitration proceedings shall be confined to the claims based on the terms and conditions of the [PSI] agreement.”¹³⁸ SGS asserts that Pakistan cannot argue that, by not giving its consent to ICSID arbitration prior to the commencement of the PSI Agreement arbitration (commenced on 7 April 2001) and the Swiss legal proceedings (commenced on 12 January 1998), SGS has waived its rights to consent to the jurisdiction of ICSID:

“... at neither of those times did SGS have an existing right to pursue its claims through ICSID arbitration. This right only arose on October 10, 2001, when SGS accepted Pakistan’s offer to arbitrate its disputes with SGS in ICSID arbitration.”¹³⁹

120. The BIT does not require the investor to consent to ICSID arbitration within any designated period of time.

¹³⁷ *Id.*, at paragraphs 177-178. SGS also denies Pakistan’s assertion that SGS has waived its right to pursue its claims before an ICSID tribunal when it commenced the Swiss legal proceedings or when it filed its counter-claims in the PSI Agreement arbitration. SGS argues that this right arose only when SGS accepted Pakistan’s offer to arbitrate its disputes with SGS in ICSID arbitration. It was only from the date of that agreement (10 October 2001) that Article 26 of the ICSID Convention and the exclusivity rule therein applied to prevent SGS from seeking relief in other *fora*. Pakistan cannot argue that SGS should have given its consent to ICSID arbitration before 10 October 2001, and that by not doing so, it waived its right to consent to the jurisdiction of ICSID by proceeding in the Swiss courts and PSI Agreement arbitration. Reply, at paragraphs 181-182.

¹³⁸ Reply, at paragraph 135.

¹³⁹ *Id.*, at paragraph 181.

121. In SGS's view, a party can be taken to have waived its right to consent to ICSID arbitration by first pursuing claims in local courts only if the BIT contained a "fork-in-the-road" clause providing a choice to pursue claims in domestic courts or in international arbitration. Once the investor's choice has been made, it is final. However, the Treaty here contains no such fork-in-the-road.¹⁴⁰

122. Finally in this regard, SGS argues that it is not estopped from pursuing its claims before the ICSID Tribunal by anything done in the domestic proceedings. Estoppel usually applies where a party has misrepresented the existence of facts and another party has acted upon this misrepresentation to its detriment. It does not apply where a claimant has used several remedies to pursue its rights. SGS has never represented to Pakistan that it would not seek to pursue claims in different *fora*.¹⁴¹ SGS describes its participation in the PSI Agreement arbitration as merely defensive and says that the Swiss proceedings did not make any findings on the merits of the dispute. Therefore, SGS argues it is "seeking to find the appropriate forum for the resolution of the claims it has now raised" and under these circumstances, no objection of estoppel or waiver can lie.¹⁴²

123. SGS then turns to Pakistan's claim that it has not invested within the territory of Pakistan and therefore the dispute before the Tribunal is not "with respect to an investment" as stipulated in Article 9 of the BIT. It notes that Pakistan did not contest that this dispute arises directly out of an investment within the meaning of Article 25(1) of the ICSID Convention.

124. SGS observes that in Article 1(2) of the BIT the word "investment" is specified to include "every kind of asset" including (*inter alia*): (c) claims to money or to any performance having an economic value; and (e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law. The PSI Agreement grants SGS "claims to performance having an economic value" and "rights given...by contract."¹⁴³ In addition, SGS argues that it made "substantial investments with-

¹⁴⁰ *Id.*, at paragraph 189. Also, SGS's participation was without prejudice to its legal rights under international law. The Swiss proceedings were dismissed without findings on the merits of the dispute and therefore did not resolve its claim.

¹⁴¹ *Id.*, at paragraphs 192-194.

¹⁴² *Id.*, at paragraph 189.

¹⁴³ *Id.*, at paragraph 197.

in the meaning of Article 1(2) when it leased, equipped and operated its liaison offices, which were essential to the performance of the PSI Agreement.”¹⁴⁴ SGS also submits that ICSID jurisprudence holds that an investment need not be physically or directly made in the territory to satisfy requirements of provisions such as Article 2(1) of the BIT.¹⁴⁵

125. Regardless of where activities arising out of the PSI Agreement occurred, SGS’s investment was, in any event, made within the territory of Pakistan because a significant transfer of value was made into Pakistan’s territory. The Pre-Shipment Inspection Programme was intended to allow Pakistan to increase its customs’ revenues by up to U.S.\$650 million, which was intended to flow into the State of Pakistan and arose directly from SGS’s performance. Further, SGS imported significant revenue-building know-how into Pakistan through assisting the Pakistani Revenue and Customs officials in improving their verification and inspection of goods by the establishment of Clean Reports of Findings. Training was provided to those officials through SGS internal seminars held in Pakistan.¹⁴⁶

126. Even if the PSI Agreement and SGS’s activities do not meet the “traditional” notion of an investment, they nevertheless fall within the category of new investments covered by BITs as illustrated by the *Fedax* and *CSOB* cases which demonstrate that ICSID is moving away from traditional notions of investment.¹⁴⁷

127. Assuming that a direct or physical investment in Pakistan’s territory were required, SGS did make such a direct and physical investment in Pakistani territory. The offices in Karachi and Lahore were “an instrumental part of the PSI Agreement and overall investment.”¹⁴⁸ While the pre-shipment inspections occurred outside Pakistan, the critical results of those inspections were funneled to and processed within the liaison offices in Pakistan. SGS staffed the offices with about 160 local and foreign employees and spent significant amounts in wages and training. It also paid rent and for their day-to-day maintenance. The offices contained moveable assets (including computers, office furniture and vehicles) valued as early as in 1993 at in excess of

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*, at paragraphs 200-204.

¹⁴⁶ *Id.*, at paragraphs 205-206.

¹⁴⁷ *Id.*, at paragraph 207. *Fedax N.V. (Netherlands Antilles) v. Republic of Venezuela* (“*Fedax*”). ICSID Case No. ARB/96/3 and *Ceskoslovenska Obchodni Banka, S.A. v. The Slovak Republic* (“*CSOB*”), ICSID Case No. ARB/97/4.

¹⁴⁸ *Id.*, at paragraph 212.

U.S.\$1.5 million.¹⁴⁹ SGS asserts that it forwarded “hundreds of thousands” of US dollars to a local bank to ensure the operation of the offices.

128. SGS believes that Pakistan itself recognized that SGS was making an investment. It required SGS to obtain an authorization from its Board of Investment for the opening and operation of the offices. The objection that these offices had no revenue-earning commercial activities is irrelevant because these offices were vital to the performance of the PSI Agreement.¹⁵⁰

129. Further, to the extent that intangible investments such as “claims to money” and “rights under contract” recognized in the BIT can be located anywhere, they were situated in Pakistan.

130. With respect to its alleged non-compliance with the BIT’s 12-month consultation period, SGS submits that waiting periods in BITs are not prerequisites for jurisdiction, but rather procedural rules intended to encourage consultations or negotiations that may lead to an avoidance of arbitration.¹⁵¹ Where it is clear that negotiations would have been futile, a claimant may submit its claims before the waiting period has expired.

131. SGS notes that nothing prevented Pakistan from initiating negotiations or discussions after SGS’s Request for Arbitration was filed. It is reasonable to believe that waiting out the 12-month consultation period would have been futile.¹⁵² If jurisdiction were denied on the ground that a waiting period in a BIT dispute resolution clause is a jurisdictional requirement, SGS could resubmit its claims to ICSID and proceedings would begin again after 12 months. This would only result in additional delay and more expense for both parties.

¹⁴⁹ *Id.*, at paragraph 215.

¹⁵⁰ *Id.*, at paragraph 217.

¹⁵¹ *Id.*, at paragraph 223. SGS also refers in this regard to *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4.

¹⁵² *Id.*, at paragraph 224. In this regard, SGS cites *Ethyl Corp. v. Canada* and *Ronald S. Lauder v. The Czech Republic*.

PART IV: THE TRIBUNAL'S DECISION

A. The legal issues to be resolved

132. Considering the principal objections to the jurisdiction of this Tribunal and the arguments adduced by the Respondent to support those objections, and having regard to the principal claims and arguments submitted by the Claimant to resist the Respondent's objections and to sustain the jurisdiction of this Tribunal, we believe that the principal issues that we must address in this Decision may be usefully formulated in the following manner:

- (a) Has the Claimant made an "investment" "in the territory" of the Respondent?
- (b) What effect may be given to the Claimant's characterization of its own claims, for purposes of these proceedings on jurisdiction?
- (c) Does the Tribunal have jurisdiction to determine the Claimant's BIT claims, that is, claims of violation of certain provisions of the Swiss-Pakistan BIT?
- (d) Does the Tribunal have jurisdiction to determine the Claimant's contractual claims that is, claims of violation of the PSI Agreement?
- (e) Does Article 11 of the Swiss-Pakistan BIT transform purely contract claims into BIT claims?
- (f) Does the Claimant's conduct in the Swiss legal proceedings and in the PSI Agreement arbitration give rise to estoppel?
- (g) Does the Claimant's conduct in the Swiss legal proceedings and in the PSI Agreement arbitration amount to waiver of its rights under the Swiss-Pakistan BIT?
- (h) Does the doctrine of *lis pendens* preclude the Claimant from pursuing its claims before the Tribunal?
- (i) What effect may be given to the requirement of consultations between the parties in Article 9 of the Swiss-Pakistan BIT?
- (j) Should this Tribunal dismiss or stay these proceedings as urged by the Respondent until the contract claims are addressed?

We address each of the above issues below.

B. Findings and Conclusions

1. Has the Claimant made an “investment” “in the territory” of the Respondent?

133. Article 25 of the ICSID Convention requires that there be an “investment” dispute, that is, a “legal dispute arising directly out of an investment,” between a Contracting Party and a national of another Contracting Party, in order that the ICSID’s jurisdictional requirements may be satisfied. The ICSID Convention does not delimit the term “investment,” leaving to the Contracting Parties a large measure of freedom to define that term as their specific objectives and circumstances may lead them to do so.¹⁵³ In this case, the BIT between the Swiss Confederation and the Islamic Republic of Pakistan does contain a definition of “investment.”

134. That BIT definition is broad. “Investment” is defined so as to

...include *every kind of asset* and particularly: ...

(c) *claims to money* or to any *performance having economic value*;

and

¹⁵³ That freedom does not, however, appear to be unlimited, considering that “investment” may well be regarded as embodying certain core meaning which distinguishes it from “an ordinary commercial transaction” such as a simple, stand alone, sale of goods or services. Thus, in *Fedax*, the Tribunal, in finding that six promissory notes issued by the Government of Venezuela constituted an investment, observed that “under both ICSID and the Additional Facility Rules the investment in question, even if indirect, should be distinguishable from an ordinary commercial transaction.” (At paragraph 14 of the Decision on Objections to Jurisdiction.) The tribunal held that promissory notes did constitute an investment within the meaning of the BIT, noting that the central characteristics of an investment involve a “certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State’s development.” *Fedax* also observed that only exceptionally has a treaty excluded claims to money that arise solely from commercial contracts for the sale of goods or services from the definition of investment, citing Article 1139 of the NAFTA and the comments of Mr. Antonio Parra, ICSID’s Deputy Secretary-General, that “[a] broad definition of investment such as that included in the Agreement is not at all an exceptional situation. On the contrary, most contemporary bilateral treaties of this kind refer to ‘every kind of asset’ or to ‘all assets’, including the listing of examples that can qualify for coverage; claims to money and to any performance having a financial value are prominent features of such listing.” (At paragraph 20 of *Fedax*, citing Antonio Parra, “The Scope of New Investment Laws and International Instruments” in Robert Prichard (ed.) *Economic Development, Foreign Investment and the Law* (1996), pp. 27-44 at pp. 35-36 ‘ICSID and Bilateral Investment Treaties’, News from ICSID, Vol 2, No. 1 (1985), pp. 12-20 at pp. 19-20.)

(e) *concessions under public law*, including concessions to search for, extract or exploit natural resources as well as *all other rights given by law, by contract* or by decision of the authority in accordance with law. (Emphases added)

135. This non-exhaustive definition is, in our view, sufficiently broad to encompass the PSI Agreement because: firstly, the Agreement's performance, by granting SGS the right to carry out pre-shipment inspection services, gave rise to "*claims to money*;" secondly, Pakistan effectively granted SGS a *public law concession* ("a concession under public law"), since SGS was conferred certain powers that ordinarily would have been exercised by the Pakistani Customs service (the identification and valuation of goods for duty purposes); and thirdly, such rights as SGS exercised pursuant to the PSI Agreement were "*rights given by law*" and "*by contract*."

136. The PSI Agreement defined the commitments of SGS in such a way as to ensure that SGS, if it was to comply with them, had to make certain expenditures in the territory of Pakistan. While the expenditures may be relatively small (Pakistan's Reply estimates them as amounting to approximately U.S.\$800,000, while SGS presents the estimate of U.S.\$1.5 million),¹⁵⁴ they involved the injection of funds into the territory of Pakistan for the carrying out of SGS's engagements under the PSI Agreement.¹⁵⁵

137. The Respondent asserts that those expenditures were "pre-contractual expenses" which, under the *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*¹⁵⁶ case, are not to be taken as investments. We do not believe that *Mihaly* offers material guidance in the present circumstances. The Claimant here did adduce evidence of expenditures it had incurred in Pakistan to establish and operate liaison offices in Pakistan necessary to enable it to perform its obligations under the PSI Agreement. It is not disputed that that Agreement was in fact eventually signed and went into effect. In *Mihaly*, no investment agreement was actually concluded by the par-

¹⁵⁴ Pakistan's Reply at paragraph 109 and SGS's Reply at paragraph 19(vi) and Exhibits S21 and S22.

¹⁵⁵ *Id.*, at S69 to 71. These documents are said to evidence expenditures made in 1992-1993 related to the liaison offices in Pakistan.

¹⁵⁶ *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* ("*Mihaly*"), ICSID Case No. ARB/00/2, Award of 7 March 2002, ICSID Rev.—FILJ, p. 142 (2002).

ties; there was, in other words, no agreement to be performed by either party and no investment actually made by the complainant.¹⁵⁷

138. It is also important to note certain statements made by the Government of Pakistan when it objected to the litigation pending in the Swiss courts. Pakistan's Brief on Objections to Jurisdiction filed with the Geneva Court of First Instance described certain aspects of the PSI Agreement as follows:

This Tender was made in the context of *a delegation to the private sector of part of the Customs power belonging to the State* by virtue of the Pakistan "Customs Act" 1969 more particularly Art. 25 which gives competence to the federal public servants to determine the value of the goods imported and exported...";

In enumerating *the services to be performed by SGS* it was : "generally speaking [to] *take care of raising the Customs revenue* by putting into place trustful and simplified proceedings", "conduct enquiries in conjunction with the Pakistan Customs," "educate the Pakistani Custom authorities on the techniques of evaluation and application of Customs rules."¹⁵⁸ (Emphases added)

139. In the same submission, the Government of Pakistan explicitly described the functions delegated to SGS as being *jure imperii* in character:

In the Contract of 29 September 1994, the Government of Pakistan entrusted SGS with the right to exercise its activity of control in the Customs field.

Identically to the right of a State to levy taxes, the right to levy Customs duties is a right belonging to the State sovereignty by essence. Only the State of Pakistan—excluding any individ-

¹⁵⁷ The *Mihaly* tribunal pointed out that under the parties' Letters of Intent, of Agreement and of Extension, the Respondent had made it clear that until and unless a contract was actually signed by the parties, no expenses incurred by the Claimant could be regarded as investment. (At paragraphs 59-60.)

¹⁵⁸ Brief on Objections to Jurisdiction filed with the Court of First Instance. Exhibit S58 to Claimant's Reply to the Respondent's Objections to Jurisdiction.

ual—has the power to levy Customs duties. If Pakistan entrusted SGS with certain powers in that field normally reserved to the State, it did so in the exercise of its public power...

This link to the State sovereignty of Pakistan seems tighter if one recalls that the activity of SGS was meant to increase the Customs revenue of the State. By doing this, SGS did not perform a simple commercial activity for the account of the State of Pakistan; it had to raise the financial revenue of the State (which indeed SGS alleges to have done)...

It appears from what has been said that the legal nature of the Contract of 29 September 1994 appears clearly to be a concession of public law by which the State of Pakistan granted to SGS the right (subject to acceptance) to be active—to the exclusion of any other public entity—in a field which is normally left to the public power of the State.

By concluding the Contract of 29 September 1994, the State of Pakistan acted *jure imperii*.¹⁵⁹ (Bold characters and italics in the original; underscoring added)

140. Accordingly, we hold that the expenditures made by SGS pursuant to the PSI Agreement constituted an investment within the meaning of the BIT and that the PSI Agreement amounted to “a concession under public laws” falling well within the BIT’s definition of investment. We hold, moreover, that the ICSID Convention’s requirement that there be a legal dispute arising directly out of an “investment” is satisfied.

141. We note, finally, that in its Memorial on Objections to Jurisdiction, the Respondent stated that proceedings are currently underway in both Switzerland and Pakistan involving the review of the lawfulness (under Pakistan law) of certain alleged conduct on the part of SGS and its employees relating to the conclusion of the PSI Agreement. The Respondent therefore reserved the right to argue—in the event that it is found in those proceedings that the PSI Agreement had been procured through bribery and corruption—that this Tribunal does not have jurisdiction over the claims set forth in the

¹⁵⁹ *Id.*

Request for Arbitration submitted to the ICSID on the additional ground that the claimant SGS had not invested “in accordance with the laws and regulations” of Pakistan as required by Article 2 of the BIT.¹⁶⁰

142. The Claimant, in its reply (Counter-Memorial) did not respond to this reservation, a fact pointed out by Pakistan in its subsequent Reply.¹⁶¹ In its Rejoinder, SGS stated it would deal with this issue if and when it arose.¹⁶²

143. Accordingly, we consider that the Tribunal is not in a position at this time to address this potential additional issue. The Respondent’s reservation is duly noted and placed on the record.¹⁶³

2. What effect may be given to the Claimant’s characterization of its own claims, for purposes of these proceedings on jurisdiction?

144. The parties disagree on this threshold point, each adverting to passages in the various cases that are adduced to support their respective contentions. The Respondent asks the Tribunal to subject the claims to a certain degree of scrutiny to determine whether they are properly characterized as alleged violations of the Treaty. For its part, SGS argues that Pakistan and the Tribunal must accept, at this stage, the claims as these have been formulated by SGS; the determination as to whether there truly have been breaches of the BIT is for the merits phase of the present proceedings.

145. At this stage of the proceedings, the Tribunal has, as a practical matter, a limited ability to scrutinize the claims as formulated by the Claimant. Some cases suggest that the Tribunal need not uncritically accept those claims at face value, but we consider that 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,¹⁶⁴ the Claimant should be able to have them considered on

¹⁶⁰ Respondent’s Memorial on Objections to Jurisdiction.

¹⁶¹ Pakistan’s Reply at paragraph 111.

¹⁶² Rejoinder at paragraph 159.

¹⁶³ By a letter dated 7 May 2003, the Respondent furnished the Tribunal, through its Secretary, as well as the Claimant and its counsel, a copy of a decision of the Swiss Supreme Court dated 4 April 2003, affirming a decision of the *Chambre d’accusation du Canton de Genève* of 15 January 2003, which admitted the Government of Pakistan as a civil party to the criminal proceedings in Switzerland against Ms. Benazir Bhutto, Mr. Arif Ali Zardari (her husband) and Mr. Jens Schlegelmilch (her advisor), in respect of Mr. Schlegelmilch. Ms. Bhutto and Mr. Zardari did not appeal the decision of the *Chambre d’accusation*.

¹⁶⁴ *E.g.*, *Amco Asia* at paragraph 38.

their merits.¹⁶⁵ We conclude that, at this jurisdiction phase, it is for the Claimant to characterize the claims as it sees fit. We do not exclude the possibility that there may arise a situation where a tribunal may find it necessary at the very beginning to look behind the claimant's factual claims, but this is not such a case.

3. Does the Tribunal have jurisdiction to determine the Claimant's BIT claims, that is, claims of violation of certain provisions of the BIT?

a. General considerations—Claims of violation of BIT provisions and claims of violation of contract provisions: BIT claims v. contract claims.

146. The central question which the Tribunal must address is whether we have jurisdiction to pass upon and determine SGS's claims which are grounded on alleged violations by Pakistan of certain provisions of the BIT ("the Claimant's BIT claims"), or its claims grounded on alleged breaches of certain provisions of the PSI Agreement ("the Claimant's contract claims"), or both such types of claims. Before, however, addressing this central issue, it is useful to examine in general terms BIT claims and contract claims.

147. As a matter of general principle, the same set of facts can give rise to different claims grounded on differing legal orders: the municipal and the

¹⁶⁵ At the hearing, the Claimant contended that the fact that the Request for Arbitration was registered by the ICSID Secretariat showed that the dispute was not manifestly outside the jurisdiction of the Centre and that took care of the *prima facie* test because that test was applied by the Secretariat itself. Transcript, Volume 1, pp. 131-132. The Tribunal does not consider this persuasive. The Secretariat's screening exercise is minimal and cannot be equated to a subsequent tribunal's evaluation of its jurisdiction to hear the case. For its part, the Respondent contended in response that the Tribunal should use the analysis employed by the *Klökner ad hoc* Annulment Committee and subject the claims to careful scrutiny to ensure that they fall within its mandate. Transcript, Volume 2, pp. 41-52. While the Tribunal agrees with Respondent's point that careful professionalism is warranted in establishing jurisdiction to pronounce on a State's obligations *vis-à-vis* an investor, the Tribunal finds the approach posited by the Respondent as too exacting at the present stage. The role of an *ad hoc* Annulment Committee is to review a tribunal decision to ensure that it meets the requirements of the ICSID Convention and does not offend any of the grounds set out in its Article 52. This 'after the fact' role is necessarily different from the role of a tribunal at the outset of the case. If the facts as pleaded are plainly incapable of supporting a finding of breach of the Treaty, part or all of the claim might be struck (see *United Parcel Service of America, Inc. v. Government of Canada*, Award on Jurisdiction, at paragraphs 33-37, available at www.dfait-maeci.gc.ca/tna-nac/document/jurisdiction%20Award.22Nov02.pdf). However, the Tribunal cannot subject the Request for Arbitration to too rigorous a standard of review at this stage as the Claimant is not obliged to set out extensive allegations of fact and arguments as to how the acts complained of might give rise to a breach of the Treaty.

international legal orders. Both the Claimant and Respondent in the present case do not dispute the soundness of this proposition.¹⁶⁶ In the event, this proposition has recently been discussed and documented *in extenso* in the *Vivendi Annulment* decision where the Annulment Committee said:

95. As to the relation between breach of contract and breach of treaty in the present case, it must be stressed that *Articles 3 and 5 of the BIT do not relate directly to breach of a municipal contract. Rather they set an independent standard. A state may breach a treaty without breaching a contract, and vice versa*, and this is certainly true of these provisions of the BIT. The point is made clear in Article 3 of the ILC Articles, which is entitled “Characterization of an act of a State as internationally wrongful”:

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law...

96. *In accordance with this general principle* (which is undoubtedly declaratory of general international law), *whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract*, in other words, the law of Tucumán. For example, in the case of a claim based on a treaty, international law rules of attribution apply with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. [Reference to authorities omitted.] By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.

¹⁶⁶ Transcript of Oral Hearing on Objections to Jurisdiction, Volume 1, at p. 21, lines 7-17 (by the Respondent) and at p. 187, lines 6-9 (by the Claimant).

97. The distinction between the role of international and municipal law in matters of international responsibility is stressed in the commentary to Article 3 of the ILC Articles, which reads in relevant part as follows:

(4) The International Court has often referred to and applied the principle. For example in the Reparation for Injuries case, it noted that “[a]s the claim is based on the breach of an international obligation on the part of the Member held responsible... The Member cannot contend that this obligation is governed by municipal law”. In the ELSI case, a Chamber of the Court emphasized this rule, stating that: “*Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision.* Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.”

Conversely, as the Chamber explained:

“...*the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise.* A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness... Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by

a municipal authority may be a valuable indication.”

...

(7) *The rule that the characterization of conduct as unlawful in international law cannot be affected by the characterization of the same act as lawful in internal law makes no exception for cases where rules of international law require a State to conform to the provisions of its internal law, for instance by applying to aliens the same legal treatment as to nationals.* It is true that in such a case, compliance with internal law is relevant to the question of international responsibility. But this is because the rule of international law makes it relevant, e.g. by incorporating the standard of compliance with internal law as the applicable international standard or as an aspect of it. Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provisions of internal law are relevant as facts in applying the applicable international standard, or else that they are actually incorporated in some form, conditionally or unconditionally, into that standard.¹⁶⁷ (Emphases added)

148. BIT claims and contract claims appear reasonably distinct in principle. Complexities, however, arise on the ground, as it were, particularly where, as in the present case, each party claims that one tribunal (this Tribunal or the PSI Agreement arbitrator) has jurisdiction over both types of claims which are alleged to co-exist. In the *Vivendi Annulment* decision, the Annulment Committee went on to say that:

¹⁶⁷ *Vivendi Annulment, supra*, at paragraphs 95 and 97.

98. In a case where the *essential basis of a claim* brought before an international tribunal is a *breach of contract*, the tribunal will give effect any valid choice of forum clause in the contract.¹⁶⁸

...

101. On the other hand, where the *fundamental basis* of the claim is a *treaty laying down an independent standard* by which the conduct of the parties is to be judged, *the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state*—cannot operate as a bar to the application of the treaty standard. At most, it might be relevant—as municipal law will often be relevant—in assessing whether there has been a breach of the treaty. (Emphases added)

b. Jurisdiction of the Tribunal to determine claims of violation of certain provisions of the BIT.

149. The pertinent portions of Article 9 of the BIT need to be recalled:

Article 9

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 10 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 twelve months and *if the investor concerned gives a written con-*

¹⁶⁸ The Committee went on to observe in a footnote and subsequent paragraph:

That is, unless the treaty in question otherwise provides. See *e.g.*, Article II (1) of the Claims Settlement Declaration of 19 January 1981, 1 Iran-U.S. Claims Tribunal Reports p. 9, which overrode exclusive jurisdiction clauses concerning United States courts but not Iranian courts: see the cases cited by C.N. Brower & J.D. Brueschks, *The Iran-United States Claims Tribunal* (The Hague, Martinus Nijhoff, 1998), pp. 60-72. The Committee does not need to consider whether the effect of Article 8 of the BIT is to override exclusive jurisdiction clauses in contracts underlying investments to which the BIT applies.

sent, the dispute shall be submitted to the arbitration of the International Centre for Settlement of Investment Disputes, instituted by the Convention of Washington of March 18, 1965, for the settlement of disputes regarding investments between States and nationals of other States. (Emphases added)

150. A treaty interpreter can scarcely avoid noting the sparseness of the language used in Article 9(1) and (2) of the BIT. Textually, Article 9(1) and (2) refer neither to disputes based on claimed violations of the BIT nor to disputes based on claimed violations of some contract between the investor of one Contracting Party and the other Contracting Party. But if Article 9 relates to any dispute at all between an investor and a Contracting Party, it must comprehend disputes constituted by claimed violations of BIT provisions establishing substantive standards of treatment by one Contracting Party of investors of the other Contracting Party. Any other view would tend to erode significantly those substantive treaty standards of treatment.

151. The difficult question has commonly been whether the jurisdiction to determine issues of violation of certain BIT provisions is exclusively vested in the ICSID tribunal formed under, *e.g.*, Article 9(2) of the BIT, or is shared with some other tribunal or a sole arbitrator constituted under some other agreement or instrument. It is important in this connection to observe that Article 9(2) of the BIT provides only one recourse to an investor, that is, recourse to a tribunal constituted under the ICSID Convention. No other option is given to the investor by the BIT. There is, therefore, no fork-in-the-road provision in Article 9 requiring an investor to stay with the forum it has opted for, whether in respect of BIT claims or of any other kind of claims. At the same time, the BIT does not set out any requirement of prior recourse to the municipal courts of the Contracting Party involved.

152. Cast in slightly different terms, in the BIT itself, the Contracting Parties have not stated that the jurisdiction of the ICSID-constituted tribunal is not exclusive. The written consent of the Claimant to the jurisdiction of this Tribunal is similarly silent on this specific point; it does not state that the jurisdiction of the Tribunal to determine claims of violation of the BIT is not exclusive.

153. It is also pertinent to recall that the PSI Agreement was concluded by the parties on 29 September 1994, while the BIT was signed by the

Contracting Parties on 11 July 1995. It hence cannot be reasonably assumed that the parties to the PSI Agreement intended to vest in an arbitrator appointed under that Agreement and the Pakistan Arbitration Act, 1940, Section 20, authority to pass upon and decide claimed violations of the BIT which was then still hidden in the future. At the same time, it should be noted that the BIT, by its express terms (Article 2), is made applicable to investments made in the territory of a Contracting Party on 2 September 1954 and onward. Thus, disputes arising in respect of investments made as early as 2 September 1954, in other words, pre-BIT disputes, may be brought before an ICSID tribunal constituted pursuant to the BIT.

154. Still another circumstance which bears noting is that, to the knowledge of the Tribunal, no claims grounded on violation of the substantive standards of the BIT have been submitted by either party to the arbitrator appointed pursuant to the PSI Agreement. The Claimant SGS has not done so. It would be difficult to suppose that the Respondent would do so, in the face of the 3 July 2002 decision, which has become final, of the Supreme Court of Pakistan¹⁶⁹ to the effect, *inter alia*, that the BIT has no legal effect inside Pakistan. Nevertheless, Pakistan has argued before us that the arbitrator seized of claims grounded on violation of the PSI Agreement would have jurisdiction not only over such contract claims but also over the BIT claims. We are not persuaded that SGS's BIT claims against Pakistan are subject to the jurisdiction of the Islamabad arbitrator if only because such claims are based not on the PSI Agreement, but rather allege a cause of action under the BIT. Even if BIT claims were somehow brought before the PSI Agreement arbitrator, and the arbitrator were to take cognizance of them, such filing will not divest the Tribunal of its jurisdiction to determine the Claimant's BIT claims.

155. We conclude that the Tribunal has jurisdiction to pass upon and determine the claims of violation of provisions of the Swiss-Pakistan BIT raised by the Claimant. We do not consider that that jurisdiction would to any degree be shared by the PSI Agreement arbitrator.

¹⁶⁹ See the Tribunal's Procedural Order No. 2, dated 16 October 2002, on the Claimant's Request for Provisional Measures.

4. **Does the Tribunal have jurisdiction to determine the Claimant's contractual claims, that is, claims of violation of the PSI Agreement?**

156. The Respondent argues vigorously that the Tribunal is bereft of jurisdiction to pass upon and decide the *Claimant's claims which are based on alleged violations by Pakistan of certain provisions of the PSI Agreement*. Pakistan has its own claims based on alleged breaches by SGS of the PSI Agreement; these claims of Pakistan are, however, clearly not before this Tribunal since these have been lodged before the PSI Agreement arbitrator and nowhere else. On the other hand, SGS asserts that this Tribunal has jurisdiction to take cognizance of and decide, not only the BIT claims of SGS, but also SGS's claims that Pakistan has breached the PSI Agreement. These claims of SGS grounded on contract are, however, asserted only in the alternative, that is, they are submitted to the Tribunal only if and to the extent that the Tribunal does not accept SGS's view of the legal effect of Article 11 of the BIT. SGS in effect contends that through the juridical medium of Article 11 of the BIT, SGS's claims grounded on alleged violation of the PSI Agreement have been transmuted or "elevated" into claims grounded on alleged breach of the BIT, specifically Article 11 thereof. Considering the conclusion we reach below in respect of the application of Article 11 of the BIT in the circumstances of this case, we do not believe that transmutation of SGS's contract claims into BIT claims has occurred. Accordingly, we must here address the issue of whether we have jurisdiction to determine claims grounded *solely* on contract, that is, contract claims which do not include any element of, or amount to, violation of a substantive BIT standard.

157. The evidence before the Tribunal is that when the PSI Agreement was under negotiation, the parties agreed that any disputes arising out of their relationship should be resolved by arbitration rather than by proceedings in the courts of Pakistan. SGS proposed UNCITRAL arbitration; Pakistan countered that the arbitration must be governed by the arbitration statute in force at the time in Pakistan. At the hearing on SGS's application for interim measures of protection, the Tribunal was informed by both parties that this was considered to be a "deal-breaker" for Pakistan and SGS therefore agreed to arbitration under Pakistan law.¹⁷⁰

¹⁷⁰ Transcript of hearing on the Claimant's Application for Provisional Measures held at The Hague on 23 September 2002, at p. 48, lines 27-28.

158. The resulting PSI arbitration clause is cast in the following terms:

11.1 Arbitration. Any *dispute, controversy or claim arising out of, or relating to this Agreement, or breach, termination or invalidity thereof,* shall as far as it is possible, be settled amicably. Failing such amicable settlement, any such dispute *shall be settled by arbitration in accordance with the Arbitration Act of the Territory* as presently in force. *The place of arbitration shall be Islamabad, Pakistan* and the language to be used in the arbitration proceedings shall be the English language.¹⁷¹ (Emphases added)

159. The Tribunal is not faced with a situation where the parties have entered into different contracts establishing differing dispute resolution mechanisms. The question is more fundamental: How does the parties' contractually established dispute settlement mechanism relate to a general offer made by Pakistan to arbitrate disputes arising under a BIT that entered into force *after* the PSI Agreement? Does the prior contractual dispute settlement mechanism *take priority over* the BIT for some or all of the disputes between the parties, or *does the BIT take priority over the PSI Agreement's mechanism* for some or all of the disputes between the parties? These are the questions that this Tribunal must confront.

160. By any objective reading, Article 11.1 of the PSI Agreement encompasses at a minimum contractual and other non-treaty-related disputes arising out of the PSI Agreement, including its alleged unlawful termination. While SGS rejects Pakistan's characterization of its claims as "Contract," "Defamation," and "BIT Claims," we do not take SGS to be contending that allegations of breach of the PSI Agreement and related claims are not covered by the PSI Article 11.1. Indeed, it could not seriously be contended that this was so. SGS argues instead that the PSI Agreement procedure must give way to the ICSID procedure contemplated in the BIT (Article 9) precisely because the contract claims are transformed into BIT claims by the operation of Article 11 of the BIT.

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

¹⁷¹ Pre-Shipment Inspection Agreement, Article 11.1.

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 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.

5. Does Article 11 of the BIT transform purely contractual claims into BIT claims?

163. Article 11 of the BIT states:

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.

As noted earlier, during the hearing on the Respondent's Objections to Jurisdiction, counsel for the Claimant characterized this clause as an "elevator" or "mirror effect" clause that takes breaches of contract under municipal law and elevates them immediately to the level of a breach of an international treaty.¹⁷² Counsel for the Claimant freely acknowledged that this interpretation was "far-reaching", but asserted that nevertheless this is what the article means and that the Claimant's view of its meaning was supported by the commentary on articles of this type found in other bilateral investment treaties.¹⁷³

164. It appears that this is the first international arbitral tribunal that has had to examine the legal effect of a clause such as Article 11 of the BIT. We have not been directed to the award of any ICSID or other tribunal in this regard, and so it appears we have here a case of first impression. We begin, as we commonly do, by examining the words actually used in Article 11 of the BIT, ascribing to them their ordinary meaning in their context and in the light of the object and purpose of Article 11 of the Swiss-Pakistan Treaty and of that Treaty as a whole.

165. A treaty interpreter must of course seek to give effect to the object and purpose projected by that Article and by the BIT as a whole. That object and purpose must be ascertained, in the first instance, from the text itself of Article 11 and the rest of the BIT.¹⁷⁴ Applying these familiar norms of customary international law on treaty interpretation, we do not find a convincing basis for accepting the Claimant's contention that Article 11 of the BIT has had the effect of entitling a Contracting Party's investor, like SGS, in the face of a valid forum selection contract clause, to "elevate" its claims grounded solely in a contract with another Contracting Party, like the PSI Agreement, to claims grounded on the BIT, and accordingly to bring such contract claims to this Tribunal for resolution and decision.

166. Firstly, textually, Article 11 falls considerably short of saying what the Claimant asserts it means. The "commitments" the observance of which a Contracting Party is to "constantly guarantee" are not limited to *contractual*

¹⁷² Transcript, Volume 1, pp. 140-187.

¹⁷³ *Id.*, at p. 149, lines 5-6.

¹⁷⁴ *ADF Group Inc. v. United States of America*, ("ADF") ICSID Case No. ARB(AF)/00/1, Final Award, available at www.state.gov/documents/organization/16586.pdf.

commitments.¹⁷⁵ The commitments referred to may be embedded in, *e.g.*, the municipal legislative or administrative or other unilateral measures of a Contracting Party. The phrase “constantly [to] guarantee the observance” of some statutory, administrative or contractual commitment simply does not to our mind, necessarily signal the creation and acceptance of a new international law obligation on the part of the Contracting Party, where clearly there was none before. Further, the “commitments” subject matter of Article 11 may, without imposing excessive violence on the text itself, be commitments of the State itself as a legal person, or of any office, entity or subdivision (local government units) or legal representative thereof whose acts are, under the law on state responsibility, attributable to the State itself. As a matter of textuality therefore, the scope of Article 11 of the BIT, while consisting in its entirety of only one sentence, appears susceptible of almost indefinite expansion. The text itself of Article 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically “elevated” to the level of breaches of international treaty law. Thus, it appears to us that while the Claimant has sought to spell out the consequences or inferences it would draw from Article 11, the Article itself does not set forth those consequences.

167. Considering the widely accepted principle with which we started, namely, that under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law, and considering further that the legal consequences that the Claimant would have us attribute to Article 11 of the BIT are so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party, we believe that clear and convincing evidence must be adduced by the Claimant. Clear and convincing evidence of what? Clear and convincing evidence that such was indeed the shared intent of the Contracting Parties to the Swiss-Pakistan

¹⁷⁵ The Claimant has, for instance, not tried to distinguish between (a) a contract between a Contracting Party and an investor of the other Contracting Party, the applicable law of which is the national law of the Contracting Party and (b) a State contract with a private investor the applicable law of which is specified as “international law” or “general principles of law.” The seminal lectures of Prosper Weil, *Problèmes Relatifs aux Contrats Passés Entre un État et un Particulier*, *Hague Recueil des Cours* (Vol. III, 1969), Tome 128, pp. 157-188, explored the theoretical consequences of “internationalization” of contracts the *lex contractus* of which is determined to be international law or general principles of law, such as the natural resources concessions granted, in an earlier day, by, *e.g.*, Iran, Abu Dhabi and Qatar. The Claimant’s reading of Article 11 of the BIT apparently extends to every contract, or other commitment, that a Contracting Party has entered into or assumed, or may in the future enter into or undertake with respect to an investor of the other Contracting Party.

Investment Protection Treaty in incorporating Article 11 in the BIT. We do not find such evidence in the text itself of Article 11. We have not been pointed to any other evidence of the putative common intent of the Contracting Parties by the Claimant.

168. The consequences of accepting the Claimant's reading of Article 11 of the BIT should be spelled out in some detail. Firstly, Article 11 would amount to incorporating by reference an unlimited number of State contracts, as well as other municipal law instruments setting out State commitments including unilateral commitments to an investor of the other Contracting Party. Any alleged violation of those contracts and other instruments would be treated as a breach of the BIT. Secondly, the Claimant's view of Article 11 tends to make Articles 3 to 7 of the BIT substantially superfluous. There would be no real need to demonstrate a violation of those substantive treaty standards if a simple breach of contract, or of municipal statute or regulation, by itself, would suffice to constitute a treaty violation on the part of a Contracting Party and engage the international responsibility of the Party. A third consequence would be that an investor may, at will, nullify any freely negotiated dispute settlement clause in a State contract. On the reading of Article 11 urged by the Claimant, the benefits of the dispute settlement provisions of a contract with a State also a party to a BIT, would flow only to the investor. For that investor could always defeat the State's invocation of the contractually specified forum, and render any mutually agreed procedure of dispute settlement, other than BIT-specified ICSID arbitration, a dead-letter, at the investor's choice. The investor would remain free to go to arbitration either under the contract or under the BIT. But the State party to the contract would be effectively precluded from proceeding to the arbitral forum specified in the contract unless the investor was minded to agree. The Tribunal considers that Article 11 of the BIT should be read in such a way as to enhance mutuality and balance of benefits in the inter-relation of different agreements located in differing legal orders.

169. Another consideration that appears to us to support our reading of Article 11 of the BIT, is the location of Article 11 in the BIT. The context of Article 11 includes the structure and content of the rest of the Treaty. We note that Article 11 is not placed together with the substantive obligations undertaken by the Contracting Parties in Articles 3 to 7: promotion and admission of investments in accordance with the laws and regulations of the Contracting Party (Article 3); prohibition of impairment, by "unreasonable or discriminating measures," of the management, use, enjoyment, *etc.* of such investments

and according “fair and equitable treatment” to investors of the other Contracting Party (Article 4); free cross-border transfer of payments relating to the protected investments (Article 5); prohibition of expropriation or other measures having the same nature or effect, unless taken in the public interest, on a non-discriminatory basis, under due process of law and with provision for effective and adequate and prompt compensation (Article 6); and the most-favored-investor provision (Article 7). These substantive standards are marked off by Article 8 (“Principle of Subrogation”) from the two dispute settlement procedures recognized in the BIT: investor v. Contracting Party (Article 9); and Contracting Parties *inter se* (Article 10). Then follows Article 11 (“Observance of Commitments”) which in turn is followed by the “Final Provisions” (Article 12) and the signature clause.

170. Given the above structure and sequence of the rest of the Treaty, we consider that, had Switzerland and Pakistan intended Article 11 to embody a substantive “first order” standard obligation, they would logically have placed Article 11 among the substantive “first order” obligations set out in Articles 3 to 7. The separation of Article 11 from those obligations by the subrogation article and the two dispute settlement provisions (Articles 9 and 10), indicates to our mind that Article 11 was *not* meant to project a substantive obligation like those set out in Articles 3 to 7, let alone one that could, when read as SGS asks us to read it, supersede and render largely redundant the substantive obligations provided for in Articles 3 to 7.¹⁷⁶

171. We believe, for the foregoing considerations, that Article 11 of the BIT would have to be considerably more specifically worded before it can reasonably be read in the extraordinarily expansive manner submitted by the Claimant.¹⁷⁷ The appropriate interpretive approach is the prudential one

¹⁷⁶ We do not, of course, here suggest that the particular location by itself of a provision within the Treaty affords anything like conclusive indication of the specific intent of the Contracting Parties. We are saying that the interpretation urged by the Claimant raises questions as to the coherence of the structuring of the BIT.

¹⁷⁷ The Claimant also invites our attention to Article II (2) of the UK-Pakistan BIT and contends that on the basis of the most-favored-investor clause in Article 7 of the Swiss-Pakistan BIT and *Maffezini v. Kingdom of Spain* (“*Maffezini*”), ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, paragraphs 38-64, the Claimant is entitled to the benefit of the UK-Pakistan BIT. Without passing upon the applicability of Article 7 of the Swiss-Pakistan BIT to the specific issue we are addressing, we consider that Article II(2) of the UK-Pakistan BIT does not exhibit the kind of clarity and specificity that is appropriately demanded in this respect by a treaty interpreter. We do not see a significant difference between Article 11 of the Swiss-Pakistan BIT and Article II(2) of the UK-Pakistan BIT.

summed up in the literature as *in dubio pars mitior est sequenda*, or more tersely, *in dubio mitius*.¹⁷⁸

172. The Claimant vigorously submits that any view of Article 11 of the BIT other than the one urged by it, would render Article 11 inutile, a result abhorrent to the principle of effectiveness in treaty interpretation. We are not persuaded that rejecting SGS's reading of Article 11 would necessarily reduce

¹⁷⁸ See in this connection, e.g., Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R; WT/DS48/AB/R, adopted 16 January 1998, paragraphs 163-165. Footnote 154 in this Appellate Body Report sets out a representative collection of the pertinent literature on this interpretative principle.

In the very recent decision in *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* ("Loewen"), ICSID Case No. ARB(AF)/98/3, 26 June 2003, available at www.state.gov/documents/organization/22094.pdf, the claimants contended that NAFTA Article 1121, which requires an investor to waive its right to initiate or continue before any administrative tribunal or court under the law of any Party to NAFTA any proceedings with respect to the measure of a Party, if the investor wishes to proceed under Chapter Eleven of the NAFTA, in effect dispenses with the requirement that a decision of a lower court be challenged through the judicial process before a Party can be held responsible for a breach of international law constituted by a judicial decision. The *Loewen* Tribunal rejected this contention and refused to read NAFTA Article 1121 as the claimants urged. The *Loewen* Tribunal said:

160. *An important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so (Elettronica Sicula SpA (ELSI) United States v. Italy (1989) ICJ 15 at 42). Such an intention may be exhibited by express provisions which are at variance with the continued operation of the relevant principle of international law.*

161. Although the precise purpose of NAFTA Article 1121 is not altogether clear, it requires a waiver of domestic proceedings as a condition of making a claim to a NAFTA tribunal. Professor Greenwood and Sir Robert Jennings agree that Article 1121 "is not about the local remedies rule". *One thing is, however, reasonably clear about Article 1121 and that is that it says nothing expressly about the requirement that, in the context of a judicial violation of international law, the judicial process be continued to the highest level.*

162. *Nor is there any basis for implying any dispensation of that requirement. It would be strange indeed if sub silentio the international rule were to be swept away.* And it would be very strange if a State were to be confronted with liability for a breach of international law committed by its magistrate or low-ranking judicial officer when domestic avenues of appeal are not pursued, let alone exhausted. If Article 1121 were to have that effect, it would encourage resort to NAFTA tribunals rather than resort to the appellate courts and review processes of the host State, an outcome which would seem surprising, having regard to the sophisticated legal systems of the NAFTA Parties. *Such an outcome would have the effect of making a State potentially liable for NAFTA violations when domestic appeal or review, if pursued, might have avoided any liability on the part of the State. Further, it is unlikely that the Parties to NAFTA would have wished to encourage recourse to NAFTA arbitration at the expense of domestic appeal or review when, in the general run of cases, domestic appeal or review would offer more wide-ranging review as they are not confined to breaches of international law.*

...

164. For the reasons given, Article 1121 involves no waiver of the duty to pursue local remedies in its application to a breach of international law constituted by a judicial act. (Emphases added)

We agree with the interpretative approach of the *Loewen* Tribunal.

that Article to “pure exhortation”, that is, to a non-normative statement. At least two points may be usefully made in this connection. Firstly, we do not consider that confirmation in a treaty that a Contracting Party is bound under and pursuant to a contract, or a statute or other municipal law issuance is devoid of appreciable normative value, either in the municipal or in the international legal sphere. That confirmation could, for instance, signal 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 (like Article 11 of the BIT) enjoining a Contracting Party constantly to guarantee the observance of contracts with investors of another Contracting Party. For instance, if a Contracting Party were to take action that materially impedes the ability of an investor to prosecute its claims before an international arbitration tribunal (having previously agreed to such arbitration in a contract with the investor), or were to refuse to go to such arbitration at all and leave the investor only the option of going before the ordinary courts of the Contracting Party (which actions need not amount to “denial of justice”), that Contracting Party may arguably be regarded as having failed “constantly [to] guarantee the observance of [its] commitments” within the meaning of Article 11 of the Swiss-Pakistan BIT. The modes by which a Contracting Party may “constantly guarantee the observance of” its contractual or statutory or administrative municipal law commitments with respect to investments are not necessarily exhausted by the instant transubstantiation of contract claims into BIT claims posited by the Claimant.

173. The Tribunal is not saying that States may not agree with each other in a BIT that henceforth, all breaches of each State’s contracts with investors of the other State are forthwith converted into and to be treated as breaches of the BIT. What the Tribunal is stressing is that in this case, there is no clear and persuasive evidence that such was in fact the intention of both Switzerland and Pakistan in adopting Article 11 of the BIT. Pakistan for its part in effect denies that, in concluding the BIT, it had any such intention. SGS, of course, does not speak for Switzerland. But it has not submitted evidence of the necessary level of specificity and explicitness of text. We believe and so hold that, in the circumstances of this case, SGS’s claim about Article 11 of the BIT must be rejected.

174. In view of the conclusion we have reached in respect of the application of Article 9 of the BIT to the facts of this case, the Tribunal finds it unnecessary to address Article 26 of the ICSID Convention in any detail.

6. Does the Claimant's conduct in the Swiss legal proceedings and in the PSI Agreement arbitration give rise to estoppel?

175. The Tribunal notes that the estoppel argument has been advanced by the Respondent on a general basis regarding SGS's contract and tort claims and its BIT claims. However, as SGS points out, whatever may have occurred in the prior proceedings, SGS has not alleged a breach of the BIT either in the Swiss courts or in its counter-claim before the PSI Agreement arbitrator.

176. Unlike some BITs and investment protection treaties, the Swiss-Pakistan BIT does not contain a "fork in the road" provision akin to Article 8(3) of the France-Argentina BIT, which provides that "[o]nce an investor has submitted the dispute to the courts of the Contracting Party concerned or to international arbitration, the choice of one or the other of these procedures is final."¹⁷⁹ Neither does the BIT set out a provision like Article 1121 of the NAFTA which requires that the would-be claimant must waive its "right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing [NAFTA] Party that is alleged to be a breach" of Section A of Chapter Eleven of NAFTA¹⁸⁰ and must desist from pursuing claims for damages in relation to such measure.

177. In the absence of such treaty language, we are not free to read into the Swiss-Pakistan BIT a requirement that would preclude a would-be claimant from resorting to other remedies in respect of contract claims prior to the exercise of its BIT rights. Moreover, given the general purpose of the ICSID Convention and the object and purpose of the BIT, we would be hesitant to imply estoppel (or waiver for that matter) with respect to BIT claims that have not in fact been alleged in another forum. As they have not been advanced, and SGS did not hold out in any way that they would not be advanced, we cannot find that it is estopped from advancing its BIT claims now.

¹⁷⁹ United Nations Treaty Series, vol. 1819, p. 456.

¹⁸⁰ NAFTA, Article 1121.

7. **Does the Claimant's conduct in the Swiss legal proceedings and in the PSI Agreement arbitration amount to waiver of its rights under the BIT?**

178. In its pleadings and at the oral hearing, Pakistan emphasized that SGS of its own volition not only objected to the jurisdiction of the PSI Agreement arbitrator, but also filed a counter-claim in the PSI arbitration proceeding.¹⁸¹

179. The counter-claim filed by SGS did contain a general reservation, stating that SGS's participation in that arbitration was conditional¹⁸² and "without prejudice to the respondent's other legal rights under the laws of Pakistan as well as such other law of the domicile of the respondent or international law as may be applicable."¹⁸³ Pakistan countered, arguing that SGS's objections were baseless, and that SGS had gone further than what was necessary to do in order to object to the jurisdiction of the Islamabad arbitrator by filing a counter-claim setting out substantive claims, and that none of SGS's objections referred at all to the possibility of ICSID arbitration.¹⁸⁴

180. The Tribunal must note that SGS did object to the jurisdiction of the PSI Agreement arbitrator and did reserve its rights "without prejudice to [its] ...rights under...international law." While it is true that in doing so SGS made no reference to the possibility of ICSID arbitration, it cannot be said that SGS unequivocally submitted to the jurisdiction of the PSI Agreement arbitrator. Since the BIT does not contain a provision that requires a would-be claimant to refrain from pursuing claims for damages in other *fora* in order to invoke ICSID jurisdiction, the Tribunal cannot read such a requirement into the BIT.

181. Pakistan describes the BIT claims as "dressed up" contract claims. Whatever the merits of the BIT claims (and we do not speak to those merits at this time), SGS has alleged them as separate BIT claims, and it is entitled to have this Tribunal pass upon them.¹⁸⁵ To accept the argument of the Respondent that the BIT claims are in reality contract claims and that SGS has waived the right to come to this Tribunal, would deny the Claimant its right to make out its arguments that they are not and would require the Tribunal to

¹⁸¹ Transcript, Volume 1, pp. 60-65.

¹⁸² Transcript, Volume 1, p. 73, lines 17-23.

¹⁸³ Respondent's Reply. Exhibit S26.

¹⁸⁴ Transcript, Volume 1, pp. 73-83.

¹⁸⁵ Transcript, Volume 1, pp. 129-130.

pass upon, here and now, the merits of the BIT claims. While SGS has presented contractual counter-claims in the PSI Agreement arbitration and has sought relief that in six of seven heads is identical to that claimed in this proceeding, SGS has not presented claims expressly based on alleged violations of the BIT before any other court or tribunal. We must reject the waiver argument with respect to the Claimant's BIT claims.

8. Does the doctrine of *lis pendens* preclude the Claimant from pursuing its claims before the Tribunal?

182. The Tribunal's earlier finding that it has no concurrent jurisdiction over the PSI Agreement claims leads it to the conclusion that the *lis pendens* doctrine has no application in this case. Pakistan asserted that the doctrine of *ne bis in idem* dictates a dismissal; however, if the claims are not *idem*, *bis* does not arise. As the causes of action are not identical, the doctrine of *lis pendens* cannot operate to preclude us from exercising jurisdiction over the BIT claims.

9. What effect may be given to the requirement of consultations between the parties in Article 9 of the BIT?

183. The Respondent underscores the fact that SGS filed its Request for Arbitration only two (2) days after filing its consent to the ICSID arbitration under the BIT. Article 9(1) of the BIT provides that "for the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party...consultations shall take place between the parties concerned." Article 9(2) goes on to state that "[i]f these consultations do not result in a solution within twelve months" and the investor concerned gives its consent, the dispute shall be submitted to ICSID arbitration.

184. Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature.¹⁸⁶ Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction. The investor's consent was given in October 2001 and the Respondent has not (to our knowledge) tried to enter into consultations in respect of the BIT claims. Indeed, considering what the Supreme Court of Pakistan has said about the BIT, it would

¹⁸⁶ E.g., *Ethyl Corporation v. The Government of Canada*, Award on Jurisdiction, 24 June 1998, 38 I.L.M. 708, 724.

have been surprising had the Respondent manifested an inclination to comply with Article 9's consultation provisions. It should also be noted that in the prolonged period of time from termination of the PSI Agreement by Pakistan to the submission of SGS's written consent under the BIT, there was little indication of any inclination on the part of either party to enter into negotiations or consultations in respect of the unfolding dispute. Finally, it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant's BIT claims to this Tribunal.

10. Should this Tribunal dismiss or stay the proceeding as urged by the Respondent until the contract claims are addressed?

185. The Respondent urges the Tribunal to dismiss or stay this proceeding because all of SGS's BIT claims will require a prior finding that Pakistan has breached Sections 10.4 and 10.6 of the PSI Agreement.¹⁸⁷ Pakistan asserts that in such circumstances, international tribunals have either dismissed or stayed the claims, without prejudice to the claimant's right to re-file its case when the underlying factual claims are resolved or to stay proceedings until such factual issues can be resolved.¹⁸⁸

186. This Tribunal has jurisdiction over the Treaty claims. The right to exercise that jurisdiction does not depend upon the findings of the PSI Agreement arbitrator; that is, such findings are not a factual or legal predicate for the consideration of whether Pakistan violated the Treaty obligations to which SGS points.¹⁸⁹ This Tribunal can and must consider all facts relevant to determination of the BIT causes of action, including facts relating to the terms of the PSI Agreement. In doing so, we shall not seek to determine the claims asserted under the PSI Agreement; we will determine only the BIT claims of the Claimant. As the *Vivendi* Annulment Committee observed:

105. ... *it is one thing to exercise contractual jurisdiction* (arguably exclusively vested in the administrative tribunals of Tucumán by virtue of the Concession Contract) *and another to*

¹⁸⁷ Transcript, Volume 1, at pp. 115-124.

¹⁸⁸ Reply at paragraphs 113-114. Transcript, Volume 2, pp. 1126-128.

¹⁸⁹ While SGS contended that the Tribunal was the judge of the contract breaches in light of Articles 9 and 11, it went on to say that "in any event if you were not, you don't need to be the judge of the contract in order to be the judge of the violation of the treaty, be it the classic violations or be it the violations because of the observance of commitments provision." Transcript, Volume 2, p. 114, lines 3-7.

*take into account the terms of a contract in determining whether there has been a breach of a distinct standard of international law...*¹⁹⁰ (Emphases added)

187. We agree with the above observation. This Tribunal is bound to exercise its jurisdiction and proceed to consider the BIT claims that are properly before it. Accordingly, we cannot grant the request for a stay of these proceedings.

188. The Claimant can proceed with the BIT claims that are within the subject-matter jurisdiction of this Tribunal without having the factual predicate of a determination by the PSI Agreement arbitrator that either party breached that Agreement. SGS would be in the same position as the claimant in the *Vivendi* case. It is entitled to assert that the acts complained of, individually or collectively, rise to the level of a breach of the BIT, but must make a clear showing of conduct which is, in the circumstances, contrary to the relevant BIT standard.¹⁹¹

189. The determination of the PSI Agreement arbitrator as to whether the Respondent (or the Claimant, for that matter) acted in accordance with that Agreement is in any event not dispositive of whether Pakistan acted consistently with its BIT obligations. The completion of the PSI Agreement arbitration is thus not a necessary pre-condition to the resolution of SGS's BIT claims.

PART V: DECISION

190. In light of the foregoing, the Tribunal decides as follows:

- (a) This Tribunal has jurisdiction over SGS's claims that Pakistan breached the Agreement between the Swiss Confederation and the Islamic Republic of Pakistan on the Promotion and Reciprocal Protection of Investments of 11 July 1995;
- (b) This Tribunal does not have jurisdiction over SGS's claims that Pakistan breached the PSI Agreement or over Pakistan's claims that SGS breached the PSI Agreement;

¹⁹⁰ *Vivendi Annulment*, *supra*, at paragraph 105.

¹⁹¹ *Id.*, at paragraph 113.

- (c) The Tribunal's second recommendation in its Procedural Order No. 2, dated 16 October 2002, that the PSI Agreement arbitration be stayed pending a resolution of this jurisdictional objection is hereby withdrawn;
- (d) The balance of Procedural Order No. 2 remains fully in effect;
- (e) Pakistan's request that this Tribunal stay this arbitration pending a resolution of the PSI Agreement arbitration is denied; and
- (f) The Tribunal will proceed to the merits phase of the proceeding.

191. Both parties requested an award of costs. The Tribunal declines to issue such an award at this time.

FLORENTINO P. FELICIANO

President of the Tribunal

CHRISTOPHER THOMAS Q.C.

Arbitrator

ANDRÉ FAURÈS

Arbitrator

August 6, 2003

