ICSID Case No. ARB/01/13

SGS Société Générale de Surveillance S.A.

v.

Islamic Republic of Pakistan

Decision on Claimant's Proposal to Disqualify Arbitrator

19 December 2002

[1] In accordance with ICSID Arbitration Rule 9(4), the President of the Tribunal (the President) and Mr André Faurès address in this Decision the proposal of SGS Société Générale de Surveillance SA (SGS or the Claimant) of 22 November 2002, as supplemented by its submission dated 27 November 2002, to disqualify Mr J. Christopher Thomas as arbitrator in this case.

[2] The proposal was made under Article 57 of the ICSID Convention, the first sentence of which provides that "[a] party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14".

[3] Article 14(1) of the ICSID Convention sets forth that "[p]ersons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."

Background Facts

[4] Mr Thomas was appointed by the Islamic Republic of Pakistan (Pakistan or the Respondent) by letter of 9 August 2002 to fill the vacancy on the Arbitral Tribunal created by the resignation of Mr Toby Landau. The Respondent attached to its letter appointing Mr Thomas a copy of his curriculum vitae. Mr Thomas accepted his appointment on 9 August 2002.

[5] On 13 August 2002, the Secretary of the Tribunal (the Secretary) distributed to the parties copies of the declarations referred to in ICSID Arbitration Rule 6(2), signed by all three members of the Tribunal and including a separate statement accompanying the declaration of Mr Thomas. Mr Thomas wrote in his separate statement that he noted that one of the claims advanced by the Claimant related to a topic that he had addressed in an article that he had just completed on the fair and equitable treatment standard in the North American Free Trade Agreement to be published by ICSID in *ICSID Review—Foreign Investment Law Journal*. Mr Thomas wished to bring this to the attention of the parties in case they had any concerns

in this respect. Copies of Mr Thomas' article were distributed to the parties by the Secretary on 14 August 2002.

[6] By letter of 19 August 2002, the Claimant stated that it had reviewed Mr Thomas' curriculum vitae and noted a reference in it to "his retainer with Mexico". SGS also noted that Mr Thomas' ICSID experience appears to be exclusively as counsel to Mexico in a number of Additional Facility arbitrations and sought in this respect a "clarification by Mr Thomas of the terms of his retainer with Mexico, and for his confirmation that his retainer does not impair his ability to exercise independent judgment as an arbitrator in a dispute between a State and a foreign investor".

[7] Complying with the Claimant's request, Mr Thomas informed the parties, by letter of 19 August 2002 via the Secretary, that "he has a continuing retainer with the Government of Mexico for advice to, and the representation of Mexico in relation to matters arising under the NAFTA and WTO Agreement, including disputes under the ICSID Additional Facility Rules" and that "he [has] advised on NAFTA investment obligations from both the complainants' and respondents' perspective". He further stated that "his retainer with the Government of Mexico does not preclude him from exercising independent judgment as arbitrator, as required under the ICSID Convention, in this or any other case to which he would accept appointment".

[8] The first session of the Tribunal was held on 21 August 2002, at which the parties expressed their agreement that the Tribunal had been properly constituted.

[9] On 12 November 2002, Mr Thomas stated in a letter to the President that he wished to bring a recent development to the attention of the Tribunal and the parties. Mr Thomas stated that his law firm is working on a NAFTA claim brought by a US investor, GAMI Investments Inc. (GAMI) against the United Mexican States. In that case, Mexico is represented by Lic. Hugo Perezcano Díaz, although Mr Thomas expects "that [his] firm's name would be listed on Mexico's pleadings and that [his] colleagues would appear at the oral hearings". He explained that counsel for the claimant GAMI in that case, Messrs Charles Roh, Jr of Weil Gotschal & Manges LLP and Lic. Guillermo Aguilar Alvarez of SAI Law and Economics in Mexico City, had proposed the appointment of Mr Jan Paulsson as President of the three member tribunal and that Mr Perezcano had agreed with the claimant's proposal. Mr Paulsson, who is representing the Respondent in the present case, subsequently accepted the appointment. Mr Thomas further stated in this respect that "[i]n view of the fact that Mr Paulsson's firm is appearing in this proceeding, I have consulted with Mexico and if the Tribunal is of the view that it would prefer me not to appear personally before the *GAMI Investments* Tribunal, I would agree not to do so. I wish to assure the Tribunal and the parties that Mexico's appearing before Mr Paulsson and his two colleagues will in no way affect my view of my responsibilities and duties in the *SGS* case." Mr Thomas' letter was transmitted to the parties, which were invited by the Tribunal to submit any observations they may have thereon by 22 November 2002.

[10] On 22 November 2002, the Claimant proposed the disqualification of Mr Thomas under Article 57 of the ICSID Convention. In its proposal, SGS noted that Mr Thomas had previously disclosed a retainer with Mexico and, in view of his disclosure made on 12 November 2002, stated that it "believes that Mr Thomas' role (and/or that of his firm) as counsel representing what appears to be a very large client of his firm, if not the largest, before a tribunal presided by counsel for Pakistan in this case indicates that, in his role as arbitrator in this case, he may manifestly not be relied upon to exercise independent judgement".

[11] By letter of 22 November 2002, Pakistan observed that "Mr Thomas has himself proposed in the letter a process for management of the *GAMI* Tribunal situation, to which Pakistan has nothing to add." In addition, the Respondent transmitted a message from Mr Paulsson on 25 November 2002 providing the following information on the *GAMI* case:

> The ad hoc arbitration in question was commenced in April 2002. Both parties agreed to appoint me as chairman in the late summer of 2002, and I accepted in early September. The Government of Mexico is a party to that case, and it is represented by the Consultor Juridico of the Office of the Deputy Secretary for International Business Negotiations and his team, who I know to be perfectly bilingual and experienced in international arbitration. The first procedural conference in the case was held on 20 November 2002. In anticipation of that conference, the Consultor Juridico informed the arbitral tribunal that his team would be assisted by outside co-counsel from a US law firm and a Canadian law firm, the latter being Thomas & Partners. This was my first intimation that Mexico would have recourse to outside counsel. The individual identified as participating from Thomas & Partners was Mr Mowatt. Ultimately, however, no one from Thomas & Partners participated, and the sole advocate speaking on behalf of Mexico in the course of the procedural conference was the Consultor Juridico.

[12] Noting the offer "to provide further support for or clarification of [its] proposal" in the Claimant's letter of 22 November 2002, the Tribunal asked the Claimant to provide such additional information by 27 November 2002. On 27 November 2002, the Claimant made additional submissions in respect of its proposal to disqualify Mr Thomas. SGS presented allegations of fact and standards in ICSID case law in respect of proposals of disqualification made on the ground that an arbitrator manifestly could not be relied upon to exercise independent judgment, as required under Article 14(1) of the ICSID Convention. SGS noted that Mr Thomas had also disclosed in his curriculum vitae that one of the NAFTA cases in which he represented Mexico was *Robert Azinian and Others* v. *United Mexican States*.[1] In the *Azinian* case, SGS observed, the presiding arbitrator was Mr Paulsson, as in the *GAMI* case. The Claimant further commented that the *Azinian* tribunal had dismissed all claims brought against Mexico, but that neither Mr Thomas nor his firm are described as counsel to Mexico in the award. SGS stated that, "although Mr Thomas' representation of Mexico in the *Azinian* case does appear on his CV, Mr Thomas had not specifically drawn the attention of the parties or his fellow arbitrators to that representation, or to the fact that Mr Paulsson presided over the tribunal in *Azinian* and issued an award, with his co-arbitrators, which was entirely in

[1] ICSID Case No. ARB(AF)/97/2; award dispatched to the parties on 1 November 1999; text in 39 ILM 537 (2000) [5 *ICSID Reports* 269].

favour of Mr Thomas' client".

[13] SGS further stated that:

> SGS's very real and serious concern is that Mr Thomas may feel indebted to Mr Paulsson—whether consciously or not—following the issuance by Mr Paulsson's tribunal in the *Azinian* case of an award that was very favourable to Mexico, represented in that case by Mr Thomas. SGS reasonably apprehends, as a result, that there is a real risk of partiality on the part of Mr Thomas, that the appearance of impartiality of Mr Thomas is placed in clear doubt, and that there is some reasonable doubt as to Mr Thomas' impartiality. SGS's entirely reasonable concerns are compounded when the relationship between Messrs Thomas and Paulsson arising out of the *Azinian* dispute is considered together with the relationship between the two gentlemen in the *GAMI* matter.

[14] SGS indicated in its proposal that it does not suggest that, "generally speaking", Mr Thomas lacks any of the qualities required under Article 14(1) of the ICSID Convention other than independence and impartiality with respect to the dispute in the present case.

[15] The Tribunal invited Pakistan to comment on the Claimant's submissions by 6 December 2002. Following an extension requested by Pakistan and granted by the President, the Respondent filed a "Response to Claimant's Challenge to Mr Thomas" on 11 December 2002.

[16] In its response, the Respondent states that there is no reasonable basis for SGS's alleged apprehension that Mr Thomas manifestly lacks the independence and impartiality necessary under Article 14(1) of the ICSID Convention. That apprehension, in the view of the Respondent, is not based on facts, but is purely speculative. Pakistan emphasizes that Mr Thomas did not appoint Mr Paulsson in the *Azinian* dispute, that the award in that case was unanimous with two highly reputable co-arbitrators and was not subsequently challenged. It added that Mr Thomas' role in the *Azinian* arbitration had been disclosed in his curriculum vitae and in his above-mentioned article on fair and equitable treatment. Pakistan goes on to say that:

> [w]hen Mr Thomas was appointed by Pakistan, Mr Paulsson was not involved as an arbitrator in any matters in which Mr Thomas was counsel. At the time Mr Paulsson was appointed President in the *GAMI* Arbitration, neither Mr Thomas nor his partners were to Mr Paulsson's knowledge acting as counsel for Mexico. Furthermore, as noted by Mr Thomas and confirmed by Mr Paulsson, the proposal to nominate Mr Paulsson as President of the tribunal in the *GAMI* Arbitration came from counsel for the investor. Clearly, the investor would not propose Mr Paulsson as the President of the tribunal if there was so much as a hint of a possibility that Mr Paulsson was predisposed toward Mexico's position. Finally, Mr Thomas has already advised the Government of Mexico that he is prepared not to appear in the *GAMI* Arbitration if the Tribunal is of the view that it would prefer him not to appear.

[17] The Respondent concludes that SGS's proposal for disqualification of Mr Thomas should be dismissed.

[18] By letter of 13 December 2002, Mr Thomas provided further statements to the Tribunal concerning the Claimant's proposal for disqualification. Mr Thomas firmly rejects the suggestion that he may feel indebted to Mr Paulsson or any member of the tribunal or to the tribunal as a whole, following rendition of the *Azinian* award in favour of Mexico and stresses his conviction that that award was rendered on its merits and the matter handled "in a professional manner on all sides". He expresses the same belief in respect of the *GAMI* proceeding that counsel on both sides will do their job in marshalling the facts and the governing law and that the tribunal will discharge its duties to the parties in accordance with applicable law. Mr Thomas closes by emphasizing vigorously that he is disinterested in the outcome of the present proceeding in the sense that he is content accepting the judgment, "either way", of the other members of the Tribunal, as the ICSID Rules require.

Discussion: Appraisal of the Challenge to Arbitrator

[19] We begin by noting that the applicable standard for appraising a challenge or proposal to disqualify an arbitrator in an ICSID case is set out with clarity and economy in the ICSID Convention. Article 57 of the Convention provides that a party may propose an arbitrator's disqualification "on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14" of the Convention. Article 14(1) requires, among other things, that an arbitrator must be a person "who may be relied upon to exercise independent judgment". This is the quality demanded of arbitrators that is under contention in this challenge proceeding. SGS does not dispute that Mr Thomas possesses the other prescribed qualifications. Neither does SGS allege that Mr Thomas cannot *generally* be relied upon to exercise independent judgment. What SGS claims in this proceeding is that it "reasonably apprehend[s] a real risk of partiality on the part of Mr Thomas" *in respect of the instant case*.

[20] The standard of appraisal of a challenge set forth in Article 57 of the Convention may be seen to have two constituent elements: (a) there must be a fact or facts (b) which are of such a nature or character as to "indicat[e] a manifest lack of the qualities required by" Article 14(1). The party challenging an arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case where the challenge is made. The first requisite that facts must be established by the party proposing disqualification, is in effect a prescription that mere speculation or inference cannot be a substitute for such facts. The second requisite of course essentially consists of an inference, but that inference must rest upon, or be anchored to, the facts established. An arbitrator cannot, under Article 57 of the Convention, be successfully challenged as a result of inferences which themselves rest merely on other inferences.

[21] It is important to stress that the inference which constitutes the second constituent element must itself be reasonable. There must, in other words, if the challenge is to succeed, be a clear and reasonable

relationship between the constituent facts and the constituent inference they generate. The facts established or undisputed must, in the circumstances of the particular case, be plainly capable of giving rise to the inference claimed to be derived from such facts. The inference resulting from the facts must be that, manifestly, that is, clearly, the person challenged is not to be relied upon for independent judgment, or that a readily apparent and reasonable doubt as to that person's reliability for independent judgment has arisen from the facts established or not disputed. More succinctly, the critical inference must be reasonable in view of the facts from which it springs and should accord with the common experience of the pertinent community of arbitrators and lawyers.

[22] The above view is in line with the careful substantive statement made in *Compañía de Aguas del Aconquija & Vivendi Universal* v. *Argentine Republic*; Decision on the Challenge to the President of the Committee:

> [I]t is clear that that term ["manifest"] cannot preclude consideration of facts previously undisclosed or unknown, *provided that these are duly established at the time the decision is made ... [T]he term must exclude reliance on speculative assumptions or arguments*—for example, assumptions based on prior and in themselves innocuous social contacts between the challenged arbitrator and a party. But in cases *where* (as here) *the facts are established* and no further inference of impropriety is sought to be derived from them, *the question seems to us to be whether a real risk of lack of impartiality based upon those facts (and not on any mere speculation or inference) could reasonably be apprehended by either party.* If (and only if) the answer is yes can it be said that the arbitrator may not be relied on to exercise independent judgment. That is to say, *the circumstances actually established (and not merely supposed or inferred) must negate or place in clear doubt the appearance of impartiality. If the facts would lead to the raising of some reasonable doubt as to the impartiality of the arbitrator or member,* the appearance of security for the parties would disappear and a challenge by either party would have to be upheld. Once the other arbitrators or Committee members had become convinced of this conclusion, there would no longer be room for the view that the deficiency was not "manifest". (Emphasis added)[2]

[2] Text in 17 *ICSID Review—Foreign Investment Law Journal,* 168, 179–80 (2002) [6 *ICSID Reports 330]*. The above view is also consistent with the Decision made by Professor Berthold Goldman and Professor Isi Foighel on the Proposal to Disqualify an Arbitrator (24 June 1982), in *Amco Asia Corporation and Others* v. *The Republic of Indonesia* (ICSID Case No. ARB/81/1), pp. 12, 14, unpublished. The Decision on Respondent's Proposal to Disqualify Arbitrator, by Arbitrators Davis R. Robinson and Seymour J. Rubin, dated 19 January 2001, in *Zhinvali Development Limited* v. *Republic of Georgia* (ICSID Case No. ARB/00/1), p. 7, unpublished, is similarly instructive. The decision of the Tribunal de Grande Instance de Paris of 28 October 1988 in *Société Drexel Burnham Lambert Limited et autres* c. *Société Philipp Brothers et autres*, Rev. arb., 497, 503 (1990), is quite helpful: "Attendu que si la société Philipp Brothers allègue l'existence de 'liens privilégiés' et de relations de subordination, entre les arbitres et les sociétés en litiges, ou même d'lnimitié notoire à son égard, il n'est pas établi, autrement que de façon générale et trop souvent indistincte, la realité de faits, comportements ou attitudes précis de nature à pouvoir considérer que l'indépendance et l'impartialité de chacun d'eux font défaut." See also D. Hascher, ICC Practice in Relation to the Appointment, Confirmation, Challenge and Replacement of Arbitrators; in The ICC International Court of Arbitration Bulletin, Vol. 6, No. 2, 4, at 16 (1995): "For challenges before the ICC Court to be successful, *it is necessary that the information collected from the challenged arbitrator, the other members of the arbitral tribunal and the parties corroborate the pleas set out in the challenge. In every case, substantiated objective grounds*—in other words, *precise full and relevant proof of the facts that adversely affect the arbitrator's independence or judgment must be submitted* . . . After the tribunal is constituted, if the party submitting the challenge can merely proffer *vague assertions, unsupported by evidence that can be checked objectively,* the Court will reject the challenge." (Emphasis added)

[23] In the instant challenge proceeding, the principal facts which appear to us relevant and which have been established, or are not disputed, may be summarized in the following manner:

(a) In another ICSID case, *GAMI* v. *United Mexican States*, bearing no relationship to the instant case, Mr Jan Paulsson, member of the firm Freshfields Bruckhaus Deringer (Freshfields), was nominated as President of the tribunal by the claimant GAMI. Respondent Mexico, represented by its agent and lead counsel, Lic. Hugo Perezcano Díaz, agreed to the proposal. Mr Paulsson accepted the appointment.

(b) Mr Thomas, co-arbitrator in the instant case, played no role in the identification and nomination of Mr Paulsson as President of the *GAMI* tribunal. Those events took place after Mr Thomas had been appointed as arbitrator, and commenced acting as such, in the instant case, by the Respondent. By his letter to the Tribunal of 12 November 2002, which per his request was provided to the parties, Mr Thomas, of his own accord, invited attention to the nomination and appointment of Mr Paulsson as President of the *GAMI* tribunal. In the same letter, Mr Thomas re-affirmed his independence and impartiality in the instant case.

(c) Freshfields is co-counsel, with the Attorney General of Pakistan and Mr Salman Talibuddin of the law firm M/s Kabraji & Talibuddin, for the Respondent in the instant case.

(d) Mr Thomas' firm, Thomas and Partners, has a continuing retainer relationship with Mexico and has assisted Lic. Hugo Perezcano Díaz, Consultor Juridico, Subsecretaria de Negociaciones Comerciales Internacionales, Direccion General de Consultoria Juridica de Negociaciones, Secretaria de Comercio y Fomento Industrial, Government of Mexico, in NAFTA and ICSID cases. In the *GAMI* case, Mr C. Mowatt of Mr Thomas' firm will be assisting Mr Perezcano Díaz, who customarily is agent and lead counsel for Mexico in such cases. Mr Perezcano Díaz is also customarily assisted by a firm of US lawyers. Mr Thomas volunteered not to appear before the *GAMI* tribunal, *ex abundante cautela.*

(e) In *Robert Azinian and others* v. *The United Mexican States*, the tribunal, with Mr Paulsson as President, rendered on 1 November 1999 a unanimous award that dismissed all the claims and contentions of the Claimants and ruled in favour of the Respondent. The award mentions that Mexico was represented by Mr Perezcano Díaz; no reference was made either to the US or Canadian lawyers who, in other cases, have assisted Mr Perezcano Díaz. However, in his curriculum vitae submitted to ICSID and the parties to the instant case, Mr Thomas stated that he, in fact, had assisted the Mexican lead counsel in the *Azinian* case. This fact is also noted in an article Mr Thomas wrote on the fair and equitable treatment clause in Article 1105(1) of NAFTA, a copy of which was furnished to the parties in the present case at the time of his appointment as arbitrator.

[24] On the basis of the above facts, established or undisputed, the Claimant asserts that it "reasonably apprehends" that there is "a real risk that Mr Thomas will improperly favour—unconsciously at least—Mr Paulsson's client over SGS".

[25] We are not persuaded that the established or undisputed facts in this challenge proceeding are of such a nature as reasonably to give rise to the inference that SGS claims to derive from them. Such an inference is, so far as we can see, bereft of any basis in the facts of this proceeding; what we have here is simply a supposition, a speculation merely. It is commonplace knowledge that in the universe of international commercial arbitration, the community of active arbitrators and the community of active litigators are both small and that, not infrequently, the two communities may overlap, sequentially if not simultaneously. It is widely accepted that such an overlap is not, by itself, sufficient ground for disqualifying an arbitrator. Something more must be shown if a challenge is to succeed. In the instant case, that "something more" has not been shown by the Claimant.

[26] The Claimant states that if this Tribunal eventually makes an award in favour of the Respondent, that will serve the [professional] interests of Mr Paulsson. If such eventuality materializes, the professional interests of Mr Paulsson might well be served; but if so, that will simply follow from the fact that Mr Paulsson's firm represents the Respondent here. Similarly, it may well be that, as a professional matter, Mr Thomas' interests would be served if the *GAMI* tribunal were, after the pleadings are all in and the oral hearing completed, to make an award favourable to Mexico. What the circumstances of professional representation of Pakistan in one case, and of Mexico in the other case, do *not* show is what the Claimant asserts: that is, that "there is a clear relationship of dependency between Mr Thomas and Mr Paulsson", if the Claimant means to imply by "dependency" that there is an understanding, express or implicit, between Mr Thomas and Mr Paulsson that each would vote in favour of the other's client. Such a "reciprocal partisanship"[3] is precisely what the Claimant needs to show if its challenge is to prosper. It appears to us that the Claimant merely supposes the existence of what it must prove. The facts of record certainly do not reveal such an understanding. The facts of record are not, by themselves, sufficient reasonably to lead to the conclusion that such an understanding exists or ever existed between Mr Paulsson and Mr Thomas. As stressed earlier, supposition is no substitute for proof of facts. A supposition (that there is a "real risk" that Mr Thomas may not be relied upon to act with independence and impartiality in this case) standing on the shoulders of another assumption (that Mr Thomas and Mr Paulsson are "dependent" on each other) which itself rests on still another speculation (that Mr Paulsson and Mr Thomas have mutually agreed to favour each other's client) will not sustain the challenge in the instant case.

[27] We note that the Claimant's reference to the tribunal's award in *Azinian* as "very favorable" to Mexico

[3] The phrase is borrowed by the Claimant from an article of Mr Paulsson, quoted by the Claimant in its 27 November

is followed promptly by the assertion that there is a "real risk of partiality" on the part of Mr Thomas. We are bound to observe that, after a careful reading of that award, we find no basis whatsoever for the inference of partiality on the part of the tribunal that the Claimant obliquely invites us to make. Having regard to the facts proved in *Azinian* and the law there applicable, we find it difficult to suppose that any conclusion other than rejection and dismissal of the claims of Azinian et al. could reasonably have been reached by a conscientious and impartial tribunal.

[28] For the foregoing reasons, we believe and so hold that the Claimant's proposal for disqualification must be dismissed.

2002 Submission.