INTERNATIONAL ARBITRATION LAW

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'Vivendi' and Bilateral Investment Treaty Arbitration

IN MATTERS relating to international investments, where a contractual agreement involving an international investment coexists with a Bilateral Investment Treaty (BIT) entered into between the host state and the state of the national making the investment, it is increasingly frequent that, confronted with prejudicial measures by the host state, the investor finds a cause of action in the contract and, separately, in the BIT.

There is nothing extraordinary per se in the coexistence of two different bases of jurisdiction and possibly two different disputes (one relating to the violation of the contract, the other to the violation of the international obligations of the host state) regarding the same set of facts. The difficulty, however, arises when the relationship between the jurisdictions inserted respectively in the contract and in the BIT is structured by the exclusive nature of either of these options and/or by the applicability of what is known as a "fork in the road" provision.

The "fork in the road" clause, which exists within the context of international investment treaties, provides that when initiating judicial proceedings, investors have a choice between the national courts and the international forum — usually International Convention for the Settlement of Investment Disputes (ICSID) or ad hoc tribunals, but that as soon as the choice is made, it is irrevocable. Faced with such a clause, an investor will justifiably hesitate to initiate local proceedings, even if he proceeds solely on the basis of a contractual violation, the risk being that such a referral will be interpreted as triggering the "fork in the road" provision. This risk has been so far compounded by the uncertainty of the legal position surrounding this question.

The critical issue of the relationship between the jurisdictional provisions of an investment agreement and a BIT, and their respective scope, was considered and dealt with convincingly in a much-anticipated decision rendered on July 3, 2002 in the case of *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentina Republic* by an ad hoc committee established under the auspices of the ICSID and composed of Yves Fortier as president, Professor James Crawford and Professor José Carlos Fernandez Rozas (see 41 ILM 1135 (2002)). The guidance that the decision provides in this regard is all the more welcome that this type of situation may arise increasingly in the future, in light of the significant proliferation of the number of ICSID arbitrations initiated on the basis of BITs (15 out of new 19 cases referred to ICSID arbitration in 2002, more than in any previous year).

'Vivendi Universal v. Argentina'

Vivendi's claims against Argentina arose out of a concession contract between Vivendi's Argentine affiliate, Compañía de Aguas de Aconquija SA and Tucumán, a province of Argentina (the Concession Contract). Under that agreement, Vivendi was granted the right to exploit Tucumán's water and sewer system. Shortly after the agreement was entered into, Vivendi made a series of allegations as to the conduct of Tucumán, many of which involved measures allegedly taken in bad faith. Such action included alleged unauthorized tariff changes, the incorrect imposition of fines for allegedly deficient water quality and the refusal on the part of officials to allow Vivendi to invoice for municipal and provincial taxes.

The jurisdiction clause at Article 16.4 of the concession contract provided that "[f]or purposes of interpretation and application of this Contract" disputes shall be submitted to the exclusive jurisdiction of the Contentious Administrative Tribunals of Tucumán. On the other hand, the applicable BIT between Argentina and France contained a jurisdiction clause of its own. Article 8 of the BIT, relating to the settlement of disputes, provides that where a dispute arises between an investor and the host state, the investor has the right to initiate proceedings either before the domestic courts of that state or to international arbitration. Article 8 also contains a "fork in the road" provision, according to which "[o]nce an investor has submitted the dispute either to the jurisdiction of the Contracting Party involved or to international arbitration, the choice of one or the other of those procedures shall be final."

Vivendi never brought any action against Tucumán in the local administrative courts in accordance with Article 16.4. Instead, Vivendi commenced proceedings against Argentina before the ICSID Tribunal under Article 8 of the BIT. It argued that Argentina's alleged failure to protect its investment constituted a violation of its BIT obligations.

The Initial Award

Vivendi used a broad range of arguments before the ICSID Tribunal against Argentina, either on the basis of Argentina's direct actions (failure to prevent Tucumán from violating the claimants' rights under the BIT, failure to cause Tucumán to respect its obligations under the concession contract) or on the basis of the attributability to Argentina of the acts of Tucumán under international law.

Argentina argued that the ICSID Tribunal did not have jurisdiction to hear the dispute, that the actions of the provincial authorities in response to the alleged failures of performance were not directed, encouraged or condoned by Argentina, and, as far as Tucumán is concerned, that the jurisdiction clause contained in the concession contract provided that all disputes should be referred to the local administrative courts.

In the award it rendered on Nov. 21, 2000 (40 ILM 426 (2001)), the tribunal held that it had jurisdiction to hear Vivendi's claims on the basis that they were not based on the concession contract but on a cause of action under the BIT itself. With respect to the merits of the dispute, however, the tribunal dismissed Vivendi's claims and implicitly referred the claimants to the administrative

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courts of Tucumán, which were competent on the basis of the jurisdiction clause of the concession contract.

Tribunal Holding

The tribunal distinguished between the alleged violations committed directly by Argentina (the federal claims) and the claims relating to conduct of the Tucumán authorities (the Tucumán claims). It dismissed the federal claims on the basis that there was no evidence of any failure on the part of Argentina in response to the situation in Tucumán. With respect to the Tucumán claims, the tribunal considered that "it is not possible for this Tribunal to determine which actions of [Tucumán] were taken in exercise of its sovereign authority and which in the exercise of its rights as a party to the Concession Contract" (§79). Because it found that it was for the administrative courts of Tucumán, which were given exclusive jurisdiction by Article 16.4 to interpret and apply the Concession Contract, the tribunal declined to examine the Tucumán claims:

> [T]he Tribunal holds that, because of the crucial connection in this case between the terms of the Concession Contract and these alleged violations of the BIT, the Argentine Republic cannot be held liable unless and until Claimants have, as Article 16.4 of the Concession Contract required, asserted their rights in proceedings before the contentious administrative courts of Tucumán and have been denied their rights, either procedurally or substantively. (§78).

Thus, the tribunal maintained that it had jurisdiction to hear the dispute against Argentina while adopting, at the same time, an extremely narrow understanding of the scope of the BIT, such that its decision to assert jurisdiction was devoid of all practical meaning.

The implications of the tribunal's analysis are twofold. First, by rejecting the causes of action brought by Vivendi solely on the basis that such claims were not raised before the administrative courts in Tucumán, which were exclusively competent to examine the performance of the concession contract (see §79), the tribunal did not seem, paradoxically, to consider that this conclusion would amount to reintroducing the obligation to exhaust local remedies before proceeding to international arbitration, something which was incompatible with Article 8 of the BIT and the convention (see §81).

Secondly, the tribunal appears to have considered that had Vivendi referred its dispute to the administrative courts in Tucumán, it would not have exercised the BIT's "fork in the road" option:

> By this same analysis, a suit by Claimants against Tucumán in the administrative courts of Tucumán for violation of the terms of the Concession Contract would not have foreclosed Claimant from subsequently seeking a remedy against the Argentine Republic as provided in the BIT and ICSID Convention.

That is, submission of claims against Tucumán to the contentious administrative tribunals of Tucumán for breaches of the contract, as Article 16.4 required, would not, contrary to Claimants' position, have been the kind of choice by Claimants of legal action in national jurisdictions (i.e., courts) against the Argentine Republic that constitutes the 'fork in the road' under Article 8 of the BIT, thereby foreclosing future claims under the ICSID Convention. (§55).

Causes of Action

These findings, which imposed on the claimants to submit their claims to the local courts first and to limit the recourse to ICSID arbitration to the denial of justice, could hardly be reconciled with the fundamental distinction between the cause of action under the BIT and the cause of action under the contract, rightly recognized by the tribunal itself:

> In this case the claims filed by [the Claimants] against Respondent are based on violations by the Argentine Republic of the BIT through acts or omissions of that government and acts of the Tucumán authorities that Claimants assert should be attributed to the central government. As formulated, these claims against the Argentine Republic are not subject to the jurisdiction of the contentious administrative tribunals of Tucumán, if only because, ex hypothesi, those claims are not based on the Concession Contract but allege a cause of action under the BIT. (§53).

Both these proposition were sanctioned by the ad hoc committee in the subsequent annulment proceedings.

Annulment Proceedings

Vivendi filed a request for annulment of the tribunal's award, arguing on the basis of three separate grounds (serious departure from a fundamental rule of procedure, manifest excess of powers, failure to state reasons). The ad hoc committee annulled the tribunal's award on Vivendi's second ground, which argued that the tribunal had manifestly exceeded its powers. The committee stated from the outset that "an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments" (§86).

The main issue of contention centered on the tribunal's findings in relation to the Tucumán claims. In light of the fundamental distinction between the causes of action under the contract and under the BIT, the committee held that:

> [...] 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 or one of its subdivisions 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.

> In the Committee's view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. [...] (§§101-102).

On this basis, the committee proceeded to determine whether the tribunal, which, in the committee's view, had an obligation to consider and render an opinion with respect to the Tucumán claims, neglected to do so. It held that the tribunal had failed in this regard:

> [I]t is clear, from the core discussion of the Tucumán claims, [...] that the Tribunal declined to decide key aspects of the Claimants' BIT claims on the ground that they involved issues of contractual performance or non-performance. The Tribunal itself characterized these passages, in paragraph 81, as embodying its 'decision' with respect to the Tucumán claims. [...]
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> [This passage] is couched in terms not of decision but of the impossibility of decision, the impossibility being founded on the need to interpret and apply the Concession Contract. Yet under Article 8(4) of the BIT the Tribunal had jurisdiction to base its decision upon the Concession Contract, at least so far as necessary in order to determine whether there had been a breach of the substantive standards of the BIT. Second, the passage appears to imply that conduct of Tucumán carried out in the purported exercise of its rights as a party to the Concession Contract could not, a priori, have breached the BIT. However, there is no basis for such an assumption: whether particular conduct involves a breach of a treaty is not determined by asking whether the conduct purportedly involves an exercise of contractual right. (§§108-110).

On this basis, the committee found that the tribunal had failed to decide whether the conduct in question constituted a breach of the BIT and annulled the tribunal's award in relation to the Tucumán claims.

The ad hoc committee's decision is perfectly well founded. Indeed, the coexistence of two jurisdiction clauses, one contained in a contractual agreement and another in an international treaty, is not pathological. This could only be the case where each of these jurisdictions were competent to determine identical causes of action in instruments developing their effects on the same plane. This was not the situation in Vivendi, where one clause was concerned with contractual obligations, while the other was concerned with the international obligations of the state hosting the investment. Admittedly, the same factual situation may constitute the basis of two separate claims, one relating to the violation of a contract, and the other in relation to the international law obligations of a state. It is even possible that a contractual violation may constitute a violation of such international obligations. This will be the case for example where the terms of the international treaty indicate that a breach of the terms of the contract constitutes, in and of itself, a breach of the treaty as well.

The committee's decision in *Vivendi* is welcome in that it clarifies an area of law in which such guidance was necessary. The two previous cases which permit investors to refer disputes to international arbitration despite the existence of a jurisdiction clause in the contractual agreement are *Lanco v. Argentina* (40 ILM 457 (2001)) and *Salini v. Morocco* (JDI 2002.196). Although both of these awards held that all disputes relating to a violation of the international obligations of a state should be referred to the tribunal selected by the international treaty's jurisdiction clause, both focused in part on the fact that the jurisdiction clauses contained in the litigious contractual agreements granted jurisdiction to local administrative courts. The tribunals in those cases considered that the jurisdiction of administrative courts cannot ordinarily be selected or waived, and thus seemed to imply, at least as a subsidiary ground, that their selection in a jurisdiction clause could not constitute a real choice by the parties. The committee in *Vivendi* eliminates this ambiguity, its rationale being based solely on the distinction between the separate causes of action based on the contract, taken in isolation, and on the treaty, even where it encapsulates in turn a violation based on the contract. Thus the committee's decision rightly maintains that the same factual circumstances may constitute the basis of one claim relating to a contractual violation and of another relating to the international obligations of a state.

Overall, the committee in *Vivendi* has fulfilled its function of annulment body on the basis of the grounds set out in Article 52 of the ICSID Convention. Its approach should be contrasted with that of the ad hoc committees established in the early ICSID annulment cases of *Amco* and *Klöckner*, which acted rather as appellate bodies (see, e.g., W. Michael Reisman, "The Breakdown of the Control Mechanism in ICSID Arbitration," Duke Law Journal 739 (1989); Emmanuel Gaillard, JDI 1987.184). In that regard, the decision of July 3, 2002 continues the trend set by *Wena Hotels Ltd v. Arab Republic of Egypt*, another recent annulment decision rendered in the context of ICSID arbitration, which also explored the distinction between the international responsibility of a state under a BIT and the contractual obligations resulting from an investment contract, and its consequences vis-à-vis the notable issue of the applicability of the rules of international law in the absence of a choice of law by the parties to a treaty dispute (see 41 ILM 933 (2002); see also Emmanuel Gaillard, "Landmark in ICSID Arbitration : Committee Decision in 'Wena Hotels,' " New York Law Journal, April 4, 2002.).

New York Law Journal

"'Vivendi' and Bilateral Investment Treaty Arbitration", *New York Law Journal*, February 6, 2003.