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Arbitration — Applicable law — Relation between concession contract, bilateral investment treaty and ICSID Convention — Dispute with provincial authorities relating to interpretation and application of contract to be submitted to administrative courts

Economics, trade and finance — Bilateral investment treaty — Argentina–France bilateral investment treaty, Article 8(2) — "Fork in the road" provision — Relevance to Tribunal's jurisdiction over treaty claim — Relevance to merits of claim

Arbitration — Jurisdiction — Jurisdiction issue joined to merits — Failure to designate or consent to application of ICSID Convention to province under Article 25(1) and (3) does not deprive Tribunal of jurisdiction — Local forum clause in concession contract does not divest Tribunal of jurisdiction for claims against State

State responsibility — Imputability — Attribution of responsibility for actions of political subdivisions — Responsibility not limited by federal or decentralized character of State — No factual basis for attribution — State's obligation under bilateral investment treaty to pursue in good faith and with reasonable efforts the resolution of the dispute — State's constructive role in renegotiation process

Relationship of international law and municipal law — Impossibility of separating claims for breaches of contract from bilateral investment treaty violation without prior resort to administrative courts — Claimant required under contract to assert its rights in proceedings before administrative courts prior to invoking ICSID procedure — Claimant not precluded from asserting its rights in administrative courts — No evidence that courts lacked independence or fairness or would have denied claimant's rights procedurally or substantively — No principle of exhaustion of remedies

Claims—Exhaustion of local remedies—Requirement incompatible with Article 8 of bilateral investment treaty and Article 26 of ICSID Convention — Resort to administrative courts required under contract for purposes of interpretation and application

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Compañía de Aguas del Aconquija SA and Compagnie Générale des Eaux *v.* Argentine Republic

(Award)[1]

(Case No ARB/97/3)

ICSID Arbitration Tribunal. 21 *November* 2000

(Rezek, *President*; Buergenthal and Trooboff, *Members*)

Summary: *The facts*:—In 1995, Compagnie Générale des Eaux, a French company, and its Argentine affiliate, Compañía de Aguas del Aconquija SA (collectively referred to as "CGE"), entered into a Concession Contract ("the Contract") with the Argentine province of Tucumán pursuant to which CGE assumed responsibility for the operation of the provincial water and sewage system. At the time of the CGE takeover, there were serious technical and commercial deficiencies in the structure and operation of the system related primarily to the inadequate and antiquated infrastructure, deferred maintenance, low tariffs and low tariff recovery.

From an early point in CGE's performance under the Contract, disputes arose between CGE and the authorities of Tucumán. These ultimately led to the active involvement of the Governments of France and Argentina in attempts to resolve the dispute. CGE contended that the provincial government sought to interfere with its performance of the Contract with the aim of undermining the Contract and forcing CGE to renegotiate. Argentina, which was not a party to the Contract and played no role in its negotiation, submitted that the actions of the Tucumán authorities were the result of alleged deficiencies by CGE in its performance under the Contract affecting the delivery of water and sewage services. Further, it argued that the actions of the provincial authorities in response to the alleged failures in performance were not directed, encouraged or condoned by the Argentine Republic.

In May 1996, the Argentine Republic and Tucumán entered into an agreement pursuant to which the National Government provided assistance and expertise for the renegotiation of the Contract. The negotiations ultimately failed, and on 27 August 1997, CGE notified the Governor of Tucumán that it was rescinding the Contract because of alleged default by Tucumán. On 27 September 1997, Tucumán rejected CGE's notice of rescission and terminated the Contract, alleging default in performance by CGE. Officials of the Argentine Republic were involved with a broad range of technical, political and legal aspects of the efforts to renegotiate the Contract from the initial attempts

[1] For further proceedings, see p. 43 below. A list of counsel appears in para. 15 of the award.

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to resolve the dispute in early 1996 until the turnover in 1998 of the water and sewage concession to an agency of the Argentine Republic.

The Argentine Republic was party to a bilateral investment treaty of July 1991 with the Republic of France, the Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments ("the BIT"). CGE commenced arbitration proceedings before an ICSID tribunal, relying on the terms of the BIT as the basis for jurisdiction.

Held:—The claim on the merits was dismissed.

(1) Article 16.4 of the Contract provided for the resolution of disputes concerning both its interpretation and application to be submitted to the exclusive jurisdiction of the administrative courts of Tucumán. The core issue concerned the legal significance of this forum-selection provision in the Contract in light of the remedial provisions of the BIT and the ICSID Convention. Because of the close relationship between the jurisdictional issue and the underlying merits, the Tribunal joined consideration of the two issues (p. 5).

(2) Under the BIT, Argentina was liable to CGE only if the Government violated a legal duty to CGE. CGE claimed, first, that the actions of the officials of Tucumán were attributable to Argentina under international law and served as a basis for a claim of expropriation (Article 5) or of failure to provide fair and equitable treatment (Article 3), and, secondly, that the inaction of the Argentine Republic itself constituted a violation of the BIT and international law. Argentina argued that as a non-party to the Contract it owed no duty to CGE, and that the actions of the provincial authorities could not be attributed to it. Under international law, however, actions of a political subdivision of a federal State were attributable to the central government. Argentina's failure to designate Tucumán under Article 25(1) of the ICSID Convention, and to give consent under Article 25(3), did not preclude the jurisdiction of the Tribunal. Rather, as confirmed by the negotiating history of the ICSID Convention, the designation and consent provisions in Article 25 paragraphs (1) and (3) facilitated submission to ICSID jurisdiction by a subdivision or agency of a Contracting State, with the permission of that State (pp. 19-23).

(3) Article 16.4 of the Contract did not operate to divest the Tribunal of jurisdiction because that provision could not constitute a waiver by CGE of its rights under Article 8 of the BIT to file claims against Argentina. Thus, the Contract did not prevent the investor from proceeding against Argentina under the ICSID Convention on the basis of its alleged violation of the BIT. Likewise a suit against Tucumán in the administrative courts for a violation of the terms of the Contract would not have foreclosed CGE from subsequently seeking a remedy against Argentina as provided in the BIT and the ICSID Convention (pp. 24-6).

(4) Although Article 16.4 did not exclude the Tribunal's jurisdiction in respect of breaches of the BIT, whether by the Argentine federal authorities or by officials of Tucumán, its existence was relevant to determining whether

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there had been a breach of the BIT. All CGE's claims concerning the action of Tucumán arose from disputes concerning the performance of the Contract, and CGE had agreed to submit these disputes to the exclusive jurisdiction of the Tucumán courts. There was no evidence that these courts were not available or were biased. Given the impossibility of separating breaches of the Contract on the part of Tucumán from potential violations of the BIT, CGE would first have to assert its rights in proceedings before the administrative courts of Tucumán as provided for in Article 16.4 of the Contract. In respect of allegations associated with contractual disputes, Argentina could not be held liable under the BIT unless CGE had sought to assert its rights in proceedings before the administrative courts of Tucumán and had been denied its rights, either procedurally or substantively. Since CGE had failed to seek relief from the courts, there was no basis to hold Argentina liable under the BIT (pp. 32-4).

(5) Independently of the contractual disputes, there was no evidence of a breach of the BIT by Argentina. There was no evidence that Argentina failed to take any specific action requested by CGE, nor had CGE ever notified Argentina that actions it or Tucumán had taken, or not taken, constituted a breach of the BIT (pp. 34-8).

(6) Each side was to bear its own expenses for the proceedings and share equally the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre (pp. 38-9).

The following is the text of the award:

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A. INTRODUCTION AND SUMMARY

This case arises from a complex and often bitter dispute associated with a 1995 Concession Contract that a French company, Compagnie Générale des Eaux, and its Argentine affiliate, Compañía de Aguas del Aconquija, SA (collectively referred to as "Claimants" or "CGE"), made with Tucumán, a province of Argentina, and with the investment in Tucumán resulting from that agreement. The Republic of Argentina ("Argentine Republic") was not a party to the Concession Contract or to the negotiations that led to its conclusion.

The Argentine Republic is a party to a bilateral investment treaty of July 1991 with the Republic of France, the Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments (hereinafter, "the Argentine–French BIT" or "BIT").[1] Both the Argentine Republic and France are also parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"), which **[300]** entered into force for both States prior to signature of the Concession Contract by CGE and Tucumán.[2]

The Concession Contract itself makes no reference to either the BIT or ICSID Convention or to the remedies that are available to a French foreign investor in Argentina under these treaties. Articles 3 and 5 of the BIT provide that each of the Contracting Parties shall grant "fair and equitable treatment according to the principles of international law to investments made by investors of the other Party," that investments shall enjoy "protection and full security in accordance with the principle of fair and equitable treatment," and that Contracting Parties shall not adopt expropriatory or nationalizing measures except for a public purpose, without discrimination and upon payment of "prompt and adequate compensation."[3] Article 8 of the Argentine–French BIT provides that,

[1] Signed on July 3, 1991, approved Argentine Law No 24.100, Boletin Oficial, July 14, 1992.

[2] Opened for signature on March 18, 1965, entered into force on October 14, 1966, *reprinted in* ICSID Basic Documents, Doc. ICSID/15 (available at <http://www.worldbank.org/icsid/basicdoc>); entered into force for Argentina, November 18, 1994; entered into force for France, September 20, 1967.

[3] The English translation of the text of Articles 3 and 5 is set forth in Appendix 1 to this Award.

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if an investment dispute arises between one Contracting Party and an investor from another Contracting Party and that dispute cannot be resolved within six months through amicable consultations, then the investor may submit the dispute either to the national jurisdictions of the Contracting Party involved in the dispute or, at the investor's option, to arbitration under the ICSID Convention or to an ad hoc tribunal pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law.[4]

Article 16.4 of the Concession Contract between CGE and Tucumán provided for the resolution of contract disputes, concerning both its interpretation and application, to be submitted to the exclusive jurisdiction of the contentious administrative courts of Tucumán.[5] While this case presents many preliminary and other related questions, the core issue before this Tribunal concerns the legal significance that is to be attributed to this forum-selection provision of the Concession Contract in light of the remedial provisions in the BIT and the ICSID Convention. This question bears both on the jurisdiction of the Centre and the competence of this Tribunal under the ICSID Convention and on the legal analysis of the merits of the dispute between CGE and the Argentine Republic.

When CGE invoked the jurisdiction of ICSID in reliance on the terms of the BIT and the ICSID Convention and sought damages of over US $300 million, the Argentine Republic responded that it had not consented to submission of the dispute for resolution under the ICSID Convention. Because of the close relationship between the jurisdictional issue and the underlying merits of the claims, the Tribunal decided that it would not be able to resolve the jurisdictional question without a full presentation of the factual issues relating to the merits. Accordingly, the Tribunal, after receiving memorials from the parties and hearing oral argument, joined the jurisdictional issue to the merits.

For the reasons set forth in this Award, the Tribunal holds that it has jurisdiction to hear the claims of CGE against the Argentine Republic for violation of the obligations of the Argentine Republic under the BIT. Neither the forum-selection provision of **[301]** the Concession Contract nor the provisions of the ICSID Convention and the BIT on which the Argentine Republic relies preclude CGE's recourse to this Tribunal on the facts presented.

With respect to the merits, CGE has not alleged that the Republic itself affirmatively interfered with its investment in Tucumán. Rather,

[4] The English translation of the text of Article 8 is set forth in Appendix 1 to this Award.

[5] The text of Article 16.4 of the Concession Contract in Spanish and as translated by the parties into English is set forth in Appendix 1 to this Award.

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CGE alleges that the Argentine Republic failed to prevent the Province of Tucumán from taking certain action with respect to the Concession Contract that, Claimants allege, consequently infringed their rights under the BIT. CGE also alleges that the Argentine Republic failed to cause the Province to take certain action with respect to the Concession Contract, thereby also infringing Claimants' rights under the BIT. In addition, CGE maintains that international law attributes to the Argentine Republic actions of the Province and its officials and alleges that those actions constitute breaches of the Argentine Republic's obligations under the BIT.

While CGE challenged actions of Tucumán in administrative agencies of the Province, CGE concedes that it never sought, pursuant to Article 16.4, to challenge any of Tucumán's actions in the contentious administrative courts of Tucumán as violations of the terms of the Concession Contract. CGE maintains that any such challenge would have constituted a waiver of its rights to recourse to ICSID under the BIT and the ICSID Convention.

The Tribunal does not accept CGE's position that claims by CGE in the contentious administrative courts of Tucumán for breach of the terms of the Concession Contract, as Article 16.4 requires, would have constituted a waiver of Claimants' rights under the BIT and the ICSID Convention. Further, as the Tribunal demonstrates below, the nature of the facts supporting most of the claims presented in this case make it impossible for the Tribunal to distinguish or separate violations of the BIT from breaches of the Concession Contract without first interpreting and applying the detailed provisions of that agreement. By Article 16.4, the parties to the Concession Contract assigned that task expressly and exclusively to the contentious administrative courts of Tucumán. Accordingly, and because the claims in this case arise almost exclusively from alleged acts of the Province of Tucumán that relate directly to its performance under the Concession Contract, the Tribunal holds that the Claimants had a duty to pursue their rights with respect to such claims against Tucumán in the contentious administrative courts of Tucumán as required by Article 16.4 of their Concession Contract.

CGE presented certain additional claims regarding allegedly sovereign actions of Tucumán that Claimants maintained were unrelated to the Concession Contract. CGE asserted that these actions of the Province gave rise to international responsibility attributable to the Argentine Republic under the BIT as interpreted by applicable international law. Furthermore, CGE alleged that the Argentine Republic was also liable for its failures to perform certain obligations under the BIT that Claimants submitted gave rise to international responsibility

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independent of the performance of Tucumán under the Concession Contract. The Tribunal finds that many of these other claims arose, in fact, from actions of the Province relating to the merits of disputes under the Concession Contract and, for that reason, were subject to initial resolution in the contentious administrative tribunals of Tucumán under Article 16.4. To the extent such claims are the result of actions of the Argentine Republic or of **[302]** the Province that are arguably independent of the Concession Contract, the Tribunal holds that the evidence presented in these proceedings did not establish the grounds for finding violation by the Argentine Republic of its legal obligations under the BIT either through its own acts or omission or through attribution to it of acts of the Tucumán authorities.

B. PROCEDURAL HISTORY

1. On December 26, 1996, the International Centre for Settlement of Investment Disputes (hereinafter "ICSID" or "the Centre") received a request for the institution of arbitration proceedings (hereinafter "the request") under the ICSID Convention against the Argentine Republic, submitted on behalf of Compagnie Générale des Eaux, a company established under the laws of France, and Compañía de Aguas del Aconquija, SA, a company established under the laws of Tucumán, Argentina.

2. The request invoked the provisions of the Argentine–French BIT.

3. By letter of January 3, 1997, the Centre acknowledged receipt of the request and asked the Claimants to furnish information concerning authorization to submit the request on behalf of Compañía de Aguas del Aconquija, SA. The Claimants supplied such information by letter of January 14, 1997. On January 15, 1997, the Centre accordingly transmitted copies of the request and of its accompanying documentation to the Argentine Republic. By letter of January 21, 1997, the Centre transmitted to the Argentine Republic additional documentation received from the Claimants concerning such authorization.

4. By letters of January 29 and February 3, 1997, the Centre asked the Claimants to provide specific information concerning certain administrative steps that were mentioned in the request and that were said to have been taken in Argentina by Compañía de Aguas del Aconquija, SA. The Claimants responded by letters of February 3 and 14, 1997, respectively, which were transmitted to the Argentine Republic by the Centre. In such letters the Claimants provided an explanation of the meaning of the terms "administrative recourse" and "administrative action" used in the request, and of their relationship to the conditions for submitting a dispute to arbitration under the Argentine–French Agreement.

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5. On February 19, 1997, the Acting Secretary-General of ICSID registered the request and, on the same day, notified the parties of the registration, inviting them to proceed to constitute an arbitral tribunal under the ICSID Convention as soon as possible. In accordance with Article 36 of the ICSID Convention, such registration was required because, on the basis of the information contained in the request, as supplemented, the dispute was not manifestly outside the jurisdiction of the Centre.

6. By letter of March 3, 1997, the Claimants informed the Centre that the parties had agreed to suspend for 30 days all time limits applicable to the proceeding. By letters of April 8 and May 7, 1997, the Claimants informed the Centre that the parties had agreed to suspend such time limits for a further 20 days, and then a further 60 days, respectively.

7. By a letter of September 16, 1997, the Claimants informed the Secretary-General of ICSID that they were choosing the formula set forth in Article 37(2)(b) of the ICSID Convention regarding the number of arbitrators and the method of their **[303]** appointment. On that same date, the Centre accordingly informed the parties that the Arbitral Tribunal was to consist of three members, one appointed by each party and the third arbitrator, who was to be the President of the Tribunal, to be appointed by agreement of the parties.

8. On October 1, 1997, the Claimants appointed as arbitrator Mr Peter D. Trooboff, a United States national. On October 17, 1997, the Argentine Republic not having named an arbitrator, the Claimants requested the Chairman of ICSID's Administrative Council to appoint, under Article 38 of the ICSID Convention, the arbitrators not yet appointed. By a letter of that same date, the Centre explained to the parties its normal consultation procedures for making such appointments. The Centre accordingly wrote to the parties on October 20, November 6 and November 14, 1999, in regard to the recommendations that the Secretary-General intended to make to the Chairman of its Administrative Council concerning such appointments. Having received no objection from either party, the Chairman of the Administrative Council designated Judge Francisco Rezek, a national of Brazil, and Judge Thomas Buergenthal, a United States national, as arbitrators in this proceeding, and designated Judge Rezek as the President of the Arbitral Tribunal. The Centre informed the parties of this designation by letter of November 14, 1997.

9. By letter to the parties of December 1, 1997, the Secretary-General of ICSID informed the parties that, having received from each arbitrator the acceptance of his appointment, the Arbitral Tribunal (hereinafter "the Tribunal") was deemed to have been constituted, and the

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proceeding to have begun, on that date, in accordance with Arbitration Rule 6. Mr Alejandro A. Escobar, Senior Counsel, ICSID, was designated to serve as Secretary of the Tribunal.

10. On December 11, 1997, the Secretary of the Tribunal first wrote to the parties to inform them of the Tribunal's wish to hold its first session with them in Paris on January 15, 1998. By letter of January 8, 1998, the Argentine Republic communicated with ICSID for the first time in this proceeding and raised objections to jurisdiction, besides requesting the postponement of the first session of the Tribunal. The Argentine Republic also urged that all sessions of the Tribunal should be held at the seat of the Centre in Washington, DC. After receiving the Claimants' views, the Tribunal decided to postpone, exceptionally, its first session, and proposed to hold such session with the parties in Washington, DC on February 6, 1998. Under Arbitration Rule 13(1), the Tribunal was to hold its first session within 60 days after its constitution, that is, by January 30, 1998, or such other period as the parties may agree. There was no agreement between the parties, however, for holding the session on February 6, 1998.

11. In these circumstances, and upon notice to the parties, the Tribunal held its first session by telephone conference call through the Secretariat on January 20, 1998. Among the matters considered at its first session, the Tribunal noted that it had been duly established under the provisions of the ICSID Convention. In addition, the Tribunal determined dates for holding a session with the parties. Copies of the minutes of such session, prepared by the Secretary and approved by the Tribunal, were distributed to the parties together with copies of each of the Tribunal members' declarations made under Arbitration Rule 6.

12. On January 14, 1998, counsel for the Argentine Republic submitted a memorandum to the Secretary-General setting forth the grounds for finding that the [304] dispute was manifestly not within the jurisdiction of the Centre. Copies of that memorandum were distributed to the members of the Tribunal and to the Claimants under cover of the Secretariat's letter of January 15, 1998. On January 23, 1998, counsel for the Claimants submitted a letter to the Secretary-General setting forth their arguments for finding that the request for arbitration was properly registered and contending that any objection to jurisdiction was for the Tribunal, and not the Secretary-General, to decide.

13. At the request of counsel for the Argentine Republic, the Secretary-General of the Centre met at his offices on January 27, 1998, with counsel for the Argentine Republic and with counsel for the Claimants. At that meeting, the Secretary-General informed the parties

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