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Recommended Citation

Khumprakob, Malissa. "The Vivendi-Argentina Water Dispute: ICSID Creates New Arbitration Tribunal to Hear the Longest Running Case on its Docket." *Sustainable Development Law & Policy*, Winter 2005, 68-69.

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LITIGATION UPDATES

THE VIVENDI-ARGENTINA WATER DISPUTE: ICSID CREATES NEW ARBITRATION TRIBUNAL TO HEAR THE LONGEST RUNNING CASE ON ITS DOCKET

By Malissa Khumprakob*

INTRODUCTION

The case of *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, often referred to as the “Vivendi-Argentina water dispute,” has been ongoing for almost eight years. The case stems from a dispute surrounding a 1995 concession contract (hereinafter “Concession Contract”) made between a French company, Compagnie Generale des Eaux (“CGE”) (acting with its Argentine affiliate, Compañía de Aguas del Aconquija, S.A) and the Argentine province of Tucuman.¹

After a lengthy series of arbitrations and appeals, the International Center for Settlement of Investment Disputes (“ICSID”) agreed in May 2004 to create a new three-member arbitration tribunal to hear the case once more.

THE DISPUTE’S ORIGINS AND CENTRAL ISSUES

Prior to signing the Concession Contract, the Argentine Republic was a party to a 1991 bilateral investment treaty² with the Republic of France (often referred to as the “Argentine-French BIT”). Additionally, the Argentine Republic and France were also parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”) at the time of the signing of the Concession Contract.

Although a provision of the Concession Contract between CGE and Tucuman provided for the resolution of contract disputes to be submitted solely to the Tucuman administrative courts,³ CGE preferred ICSID⁴ to hear the company’s claim, which sought over USD \$300 million. The Argentine Republic opposed this choice of forum, arguing that it had not consented to the dispute resolution methodology proposed by the ICSID Convention. Further, the Argentine Republic, relying on the provision in the Concession Contract, defended that the administrative courts of Tucuman should have exclusive jurisdiction.

Because the Concession Contract itself makes no reference to the BIT or ICSID Convention, the primary issue facing the ICSID Tribunal was to determine the underlying significance

of the forum selection provision (Article 16.4) of the Concession Contract.

ARBITRATION HISTORY

On November 21, 2000, the ICSID Tribunal heard Vivendi’s claim accusing Argentina of breaching its bilateral investment treaty with France.⁵ The tribunal rejected Vivendi’s claims on the basis that they were primarily based upon contract issues—a matter left to the sole jurisdiction of the Tucuman administrative courts according to Article 16.4 of the Concession Contract.

Then on July 2002, a three-member committee (“ICSID Ad Hoc Committee”) partially annulled the preceding arbitration award in holding that the original tribunal failed to exercise its powers in declining to review the alleged treaty breaches.

On May 28, 2003, the same committee reached an additional decision on the request for supplementation and rectification of its decision concerning annulment of the award, which permitted Vivendi to register its claim with the ICSID yet again.

NEW ARBITRATION TRIBUNAL SELECTED

In May 2004, ICSID selected a new three-member arbitration tribunal to hear the claim. The members are J. William Rowley, Gabrielle Kaufmann-Kohler, and Carlos Bernal Vera. Mr. Rowley’s⁶ arbitration experience includes serving as a member of the National Panel of Arbitrators for Canada, International Chamber of Commerce in Paris, as well as numerous other arbitration panels. Ms. Kaufmann-Kohler is a Professor of Law at the University of Geneva and is currently serving as an arbitrator in three additional ICSID water company claims against various provinces of Argentina.⁷ Mr. Bernal Vera has also served as an arbitrator in previous, high-profile ICSID arbitration disputes. Most notably, he arbitrated the dispute involving the treatment of a hazardous waste disposal business between Técnicas Medioambientales Tecmed, S.A. and Mexico.⁸



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ENDNOTES: VIVENDI-ARGENTINA

¹ *Compañía de Aguas del Aconquija S.A. and Compagnie Generale des Eaux v. Argentine Republic*, Award of the Tribunal, ICSID ARB/97/3 (Nov. 21, 2000) (clarifying, “The Republic of Argentina was not a party to the Concession Contract or to the negotiation that led to its conclusion”).

² *See* Agreement between the Argentine Republic and the Republic of France for the Promotion and Reciprocal Protection of Investments, signed on July 3, 1991, approved Argentine Law No. 24.100, Boletín Oficial, July 14, 1992.

³ *See* *Compañía de Aguas del Aconquija S.A. and Compagnie Generale des Eaux v. Argentine Republic*, Award of the Tribunal, ICSID ARB/97/3 (Nov. 21, 2000) (indicating “Article 16.4 provided for the resolution of contract disputes, concerning both interpretation and application, to be submitted to the exclusive jurisdiction of the contentious administrative courts of Tucuman”).

⁴ *See* Argentine-French BIT, Articles 3 and 5 (providing 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,” and 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.” *See id.* at Art. 8 (conditioning, “if an investment dispute arises between one Contracting Party and an investor from another Contracting Party and that dispute cannot be resolved within 6 months through amicable consultations, then the investor may submit the dispute either to the national jurisdictions of the Contracting Convention or to an ad hoc tribunal pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law.)

⁵ *See* *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Decision on the Challenge to the President of the Committee, ICSID ARB/97/3 (Oct. 3, 2001) (citing the new parent company as Vivendi Universal).

⁶ *See* Biography of J. William Rowley, Q.C., Federated Press Home Page, at <http://federatedpress.com/DirOfProf/Rowley.html> (last visited Nov. 30, 2004).

⁷ *See* Luke Eric Peterson, *New Tribunal Constituted in Long-Running Vivendi-Argentina Water Dispute*, INVEST-SD News Bulletin, May 11, 2004, at <http://www.iisd.org/investment/invest-sd> (last visited Nov. 30, 2004).

⁸ *Id.*