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TREATY CLAIMS VERSUS CONTRACTUAL CLAIMS IN INVESTOR-STATE DISPUTES: DETERMINING THE JURISDICTION IN LIGHT OF THE PEL-MOZAMBIQUE CASE

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Introduction

Investor-State Dispute Settlement ["**ISDS**"] or Investment Arbitration is a method to resolve disputes between foreign investors and countries, commonly referred to as 'host States'.[1] There are two major aspects of an ISDS – *first*, the treaty and *second*, the contract. The treaties are usually in the form of a Bilateral Investment Treaty ["**BIT**"] or a Multilateral Investment Treaty ["**MIT**"] entered into by two or more countries. In contrast, the contracts concerned with direct investments are made between a private investor and an agency of another country where the investment takes place.[2] While the treaties contain the host States' consent to investment arbitration under specific rules, many times, the contracts also contain choice-of-forum clauses, which lead to issues of jurisdiction as one investment may lead to claims of different nature, either based on the treaties or based on the contracts.[3]

In *Mozambique and Ministry of Transport and Communications (MTC) v. Patel Engineering Limited* ["**PEL**"],[4] the contract-based International Chamber of Commerce ["**ICC**"] issued an anti-arbitration injunction to stay the treaty-based proceedings of *Patel Engineering Limited (PEL) v. Mozambique*[5] under the India-Mozambique BIT and the UNCITRAL Rules. However, such an injunction is unprecedented, as was correctly argued by Mr Stephen Anway in his dissenting

[1] Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration* (6th edn, Kluwer Law International and OUP 2015) 441 – 500.
[2] ibid.
[3] Mr. Christie Konstantin, 'Treaty Claims *v* Contractual Claims in ISDS' (*Jus Mundi*, 19 Dec 2022) <https://jusmundi.com/en/document/publication/en-treaty-claims-vs-contractual-claims-in-isds#:~:text=Cause%20of%20the%20Claim%3A%20while,in%20BITs%20and%20international%20law> accessed 1 January 2023.
[4] *Mozambique and Ministry of Transport and Communications (MTC) v Patel Engineering Limited* ICC Case No. 25334/JPA.
[5] *Patel Engineering Limited (PEL) v Mozambique* PCA Case No. 2020-21.

opinion in the ICC proceeding.[6] Further, the ICC Tribunal also violated the Treaty Tribunal's *Kompetenz-Kompetenz* principle.[7]

This article examines the general view on the treaty and contractual claims in ISDS in light of the ICC Tribunal's anti-arbitration injunction. In addition, the article also analyses the PEL-Mozambique case, along with the faults in the ICC Tribunal's order. In this regard, the article argues that the ICC Tribunal's award violated the principle established in *Vivendi v Argentina* ["**the Vivendi principle**"].[8] Further, the anti-arbitration injunction violated the 'hierarchy of legal norms.'[9]

Treaty Claims and Contractual Claims in ISDS

Two types of claims can arise in ISDS claims - treaty-based and contract-based claims. Treaty-based claims are brought under the terms of international investment agreements, such as BITs and MITs, and contain the allegations that the host states have breached their obligations under that agreement. On the other hand, contractual claims are based on allegations that the host State has breached an investment contract between the foreign investor and the host State.[10] This distinction was first made in the *Vivendi v. Argentina* case ["**Vivendi judgement**"].[11] A tribunal stated that the question of whether there has been a breach of the treaty differs from the question of whether there has been a breach of contract. This approach was followed by subsequent tribunals, which led to the establishment of several criteria to distinguish between treaty-based and contract-based claims.[12] Some of these criteria are:

- Cause of the claim: The cause of a treaty claim is based on the violation of a BIT or an MIT, whereas the cause of a contract claim is based on the breach of a contract clause.

[6] Mr. Stephen Anway, 'Dissenting Opinion of Arbitrator Stephen Anway' (*Jus Mundi*, 24 Nov 2022) <https://jusmundi.com/en/document/opinion/en-the-republic-of-mozambique-and-the-mozambique-ministry-of-transport-and-communications-v-patel-engineering-limited-dissenting-opinion-of-arbitrator-stephen-anway-thursday-24th-november-2022#opinion_3015> accessed 3 January 2023.

[7] Mrs. Bhatty Saadia, 'Competence-Competence' (*Jus Mundi*, 27 Sept 2022) <https://jusmundi.com/en/document/publication/en-competence-competence> accessed 3 January 2023.

[8] *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v Argentine Republic (I)* ICSID Case No. ARB/97/3.

[9] *The Greco-Bulgarian "Communities"*, Advisory Opinion, 31 July 1930, PCIJ Series B, No. 17, p. 32.

[10] Mr. Christie Konstantin, 'Treaty Claims *v* Contractual Claims in ISDS' (*Jus Mundi*, 19 Dec 2022) <https://jusmundi.com/en/document/publication/en-treaty-claims-vs-contractual-claims-in-isds#:~:text=Cause%20of%20the%20Claim%3A%20while,in%20BITs%20and%20international%20law> accessed 1 January 2023.

[11] *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v Argentine Republic (I)* ICSID Case No. ARB/97/3.

[12] G.S. Tawil, 'The Distinction Between Contract Claims and Treaty Claims: An Overview', in A.J. Van den Berg, (eds), *International Arbitration 2006: Back to Basics?* (ICCA & Kluwer Law International 2007) 492-544.

- Content of the right: Treaty rights are established by investment treaties and international law, whereas contractual rights are determined by the terms of the contract and the host state's domestic laws.
- Parties to the claim: In ISDS, the claimants are usually a qualifying investor and the host state, whereas, in contractual disputes, the claimants are merely those who signed the agreement.
- Applicable Law: Treaty claims are governed by the treaty's provisions, the general principles of international law, and international customs. The host state's domestic laws usually govern contractual claims.
- Host State's Responsibility: A treaty breach triggers the host state's international liability, while the breach of a contract triggers the host state's contractual responsibility.

Therefore, to determine if a claim is based on a treaty or a contract, it is important to understand the fundamental basis of the claim and consider the criteria as enumerated above. Further, the recent trends in rulings have also complied with the Vivendi judgement. Usually, when there is a forum selection clause in the contract between the investor and the state, the general rule followed by investment tribunals is that a forum selection clause does not deny the tribunal's power to consider claims for breach of the investment treaty or to interpret the contract in assessing whether or not a breach has occurred.

Several specific cases illustrate this trend, including the dissenting opinion of Professor Gary Born in *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*,[13] in which he argues that an investment tribunal has the authority to decide claims under a BIT and international law. In contrast, national courts or commercial arbitral tribunals have the mandate to determine claims under national law and the parties' contractual agreements. Further, even in the recent case of *Malicorp v. Egypt*,[14] the tribunal ruled that the protection of an investment treaty does not necessarily cover purely contractual claims if the parties to the contract have consented to another section allowing jurisdiction, provided the parties are the same.

Analysing the PEL-Mozambique Case

Patel Engineering Limited (PEL) is an Indian company that entered into a contract with the Government of Mozambique and its Ministry of Transport and Communications to design and build a bridge in Mozambique. There appears to be a dispute between PEL and Mozambique involving the infrastructure project that PEL claims was wrongly awarded to a third party. The

[13] *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania ICSID Case No.ARB/05/22.*
[14] *Malicorp Limited v Arab Republic of Egypt* ICSID Case No. ARB /08/18.

dispute involves two tribunals: one treaty-based and one contract-based. The contract-based tribunal comprises members under the ICC[15] and issued an anti-arbitration injunction against PEL, arguing that PEL's claims in the treaty case constituted a breach of the memorandum of understanding ["**MOI**"] of the arbitration agreement. However, the treaty tribunal declined to stay its proceedings, stating that the injunction could not be interpreted as suspending the treaty proceedings. Both tribunals have been proceeding with their cases, with the contract tribunal upholding its jurisdiction in a partial award, and the treaty tribunal holding a full hearing of the dispute.

In this case, the parties in this dispute agreed on a four-fold test for determining whether to grant provisional measures. The test requires that (i) the tribunal has jurisdiction over the dispute; (ii) the claimant has a *prima facie* case on the merits; (iii) there is urgency in protecting the right being claimed, and (iv) it is necessary to take the requested measure based on the balance of equities. The tribunal noted that it had already upheld its jurisdiction in a partial award.

The key question before the ICC tribunal was whether Mozambique had a *prima facie* case that PEL had breached the MOI's arbitration agreement. The majority of the tribunal found this was the case, stating that the ICC tribunal's jurisdiction over contractual matters was exclusive, as per investor-state jurisprudence established in the Vivendi judgement. This decision was based on the fact that PEL was pursuing claims in the treaty arbitration that overlapped with contractual issues that were pending before the ICC tribunal and that the ICC tribunal had exclusive jurisdiction over such issues. The contract tribunal also believed that the urgency test was met out of the four tests and issued an anti-arbitration injunction against PEL.

The injunction enjoined PEL from pursuing the determination of matters in the dispute arising out of the MOI in any other forum, even if it's only for adjudicating its treaty claims. The injunction was issued with the understanding that it would only last until the ICC tribunal had ruled on the contractual issues at stake in the parallel proceedings.

The Faults in the ICC Tribunal's Order

In our opinion, the ICC Tribunal erred in its decision by enjoining PEL from seeking the determination of contractual claims in the treaty-based proceedings. While the ICC Tribunal restricted only PEL, it indirectly restrained the Treaty Tribunal's right to adjudicate the dispute. In doing so, the ICC Tribunal violated the widely-accepted Vivendi principle. Further, the anti-

[15] Will Kenton, 'International chamber of commerce(ICC) definition, activities', (*Investopedia*, 11 Oct 2021) <https://www.investopedia.com/terms/i/international-chamber-of-commerce-icc.asp> accessed 10 January 2023.

arbitration injunction issued by the ICC Tribunal was unprecedented and violative of the Treaty Tribunal's *Kompetenz-Kompetenz* principle.

The ICC Tribunal violated the Vivendi principle

The ICC Tribunal assumed that PEL had waived all its rights to pursue the contractual issues in all other forums other than the ICC Tribunal.[16] This assumption led to a faulty interpretation of the Vivendi principle,[17] which states that a tribunal would give effect to any valid choice-of-forum clause where the essential basis of a claim is a contractual breach. Further, the principle also states that where the fundamental basis of a claim is a treaty that lays down a standard through which the conduct of the parties can be judged, the tribunal will give effect to the choice of forum in the treaty. The ICC Tribunal adopted the proposition that a treaty-based tribunal cannot determine the breach of a treaty based on a contract,[18] which goes against the Vivendi principle. The Vivendi principle is widely accepted as a settled principle of law under which the Treaty Tribunal had jurisdiction to decide the matter. Further, under the principle of *Kompetenz-Kompetenz*, the Treaty Tribunal could decide on its own jurisdiction.[19]

The ICC Tribunal's anti-arbitration injunction was unprecedented

The ICC Tribunal's anti-arbitration injunction violated the 'hierarchy of legal norms', according to which the provisions of Municipal law cannot override the provisions of the treaty. Further, it is a widely accepted principle that when there is a conflict between two bodies of law, the rules of Public International Law will prevail.[20] The ICC Arbitration Rules empower tribunals to grant interim measures,[21] but whether these measures include anti-arbitration injunctions has to be decided after analysing the *lex arbitri* or the law of the place of arbitration.[22] In this case, the *lex arbitri* is the Mozambiquan law, which doesn't contain any provisions or judgements that empower

[16] Mr. Stephen Anway, 'Dissenting Opinion of Arbitrator Stephen Anway' (*Jus Mundi*, 24 Nov 2022) 6 <https://jusmundi.com/en/document/opinion/en-the-republic-of-mozambique-and-the-mozambique-ministry-of-transport-and-communications-v-patel-engineering-limited-dissenting-opinion-of-arbitrator-stephen-anway-thursday-24th-november-2022#opinion_3015> accessed 3 January 2023.
[17] *Compañía de Aguas del Aconquija S.A. (formerly Aguas del Aconquija) and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v Argentine Republic (I)* ICSID Case No. ARB/97/3.
[18] *Mozambique and Ministry of Transport and Communications (MTC) v Patel Engineering Limited* ICC Case No. 25334/JPA, ¶ 69.
[19] Mrs. Bhatty Saadia, 'Competence-Competence' (*Jus Mundi*, 27 Sept 2022) <https://jusmundi.com/en/document/publication/en-competence-competence> accessed 3 January 2023.
[20] *Compañia del Desarrollo de Santa Elena S.A. v Republic of Costa Rica*, ICSID Case No. ARB/96/1¶ 64.
[21] ICC Arbitration Rules 2021, rule 28(1).
[22] M. W. Bühler and T. H. Webster, *Handbook of ICC Arbitration* (5th edn, Sweet & Maxwell 2021), ¶ 28-25, RL-154.

the ICC Tribunal to grant an anti-suit injunction.[23] Moreover, under the India-Mozambique BIT, the treaty is governed by Public International Law. In this case, the ICC Tribunal's anti-suit injunction violated the hierarchy of legal norms as the Mozambiquan law couldn't have overridden the rules of the treaty, which Public International Law governed. Even in a traditional Court system, a national Court cannot prohibit an international Court from hearing a case, and this case is no exception. Further, anti-suit injunctions are usually accepted when both disputes arise from the same arbitration agreement.[24] In this case, the treaty proceedings were governed by the UNCITRAL Rules, whereas the ICC Rules governed the contractual proceedings.

Conclusion

The number of ISDS claims is on the rise at present, and the confusion in respect of two parallel jurisdictions is a bone of contention. The *PEL v. Mozambique* case can be said to be a landmark case in the field of Investment arbitration as the case deals with the complex issue of the jurisdiction of treaty claim tribunals in contrast to contract claim tribunals. In distinguishing between the jurisdiction of treaty and contract tribunals, it is crucial to rely on the Vivendi principle, which continues to be a landmark precedent in this area.

We believe the ICC tribunal erred in its decision to grant the anti-arbitration injunction. The decision violated the *kompetanz-kompetanz* principle and went against the principles laid down in *Vivendi v. Argentina*. By passing such an order, the ICC tribunal has set a wrong precedent that a treaty-based tribunal cannot decide a breach of the treaty based on a contract claim and that when there is a conflict between two bodies of law, the rules of public international law will not prevail.

Applying the four-fold test agreed by the parties, it can be said that the dissenting judgement given by Mr. Anway is correct, and the ICC tribunal erred in its decision to grant the anti-arbitration injunction against the parallel treaty proceedings.

[23] Mr. Stephen Anway, 'Dissenting Opinion of Arbitrator Stephen Anway' (*Jus Mundi*, 24 Nov 2022) ¶ 40 <https://jusmundi.com/en/document/opinion/en-the-republic-of-mozambique-and-the-mozambique-ministry-of-transport-and-communications-v-patel-engineering-limited-dissenting-opinion-of-arbitrator-stephen-anway-thursday-24th-november-2022#opinion_3015> accessed 3 January 2023.

[24] S. Besson, 'Anti-Suit Injunctions by ICC Emergency Arbitrators' in Alexis Mourre and others (eds), *International Arbitration Under Review: Essays in Honour of John Beechey* (ICC 2015) ¶ 37; M. Scherer & W. Jahnel, 'Anti-Suit and Anti-Arbitration Injunctions in International Arbitration: A Swiss Perspective' (2009) 4 Int A.L.R. 66, 73.