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Are a Bilateral Investment Treaty Arbitration and a Proceeding Before the European Court of Human Rights Compatible?

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Although a bilateral investment treaty ("BIT") arbitration and an application made before the European Court of Human Rights ("the Court") could, at first glance, present opposite objectives, investors alleging a violation of their rights by a State may be inclined to make use of both remedies. As it will be elaborated below, the case law shows that a strict application of the triple identity test (i.e. same parties, same facts, same cause of action) by the arbitral tribunals and the Court generally entails the rejection of *lis pendens* or admissibility objections based on BITs' "fork in the road" provisions or Article 35, §2, b) of the Convention, which provides that the Court shall not deal with a matter already submitted to another procedure of international investigation or settlement. Investors can therefore make use of both remedies, even in parallel, provided they carefully formulate their petitions.

Concurrent jurisdiction of a BIT arbitral tribunal and the European Court of Human Rights

A situation where an investment would be jeopardised by a State's behaviour could give rise to an alleged violation of both a BIT and the European Convention on Human Rights ("the Convention"). This is particularly the case where investors invoke, in one way or another, a breach to their right to property since this right is both enshrined in Article 1 of Protocol No. 1 to the Convention and classically protected by BITs under non-expropriation or unfair treatment clauses. One may also think about the overlapping of provisions on protection from discrimination, guaranteed by Article 14 of the Convention and its Protocol No. 12, as well as under national treatment or most favoured nation treatment clauses usually found in BITs. In some sensitive sectors, it is also conceivable that jeopardising an investment may constitute a "structural obstacle" to certain rights or freedoms guaranteed by the Convention (for an example of structural obstacle to the freedom of expression in the media sector, see *Centro Europa 7 S.R.L. and di Stefano v. Italy* [GC], no. 38433/09, 7 June 2012, §§ 129 to 138).

In all these hypothesises, a case brought before both the BIT arbitral tribunal and the European Court of Human Rights is conceivable. May these two remedies be undertaken by investors?

The arbitral tribunal's perspective

Some BITs, such as the Energy Charter Treaty ("ECT"), provide for so-called "fork in the road" provisions that require investors to choose a single avenue of relief at the outset of a dispute and preclude them from switching forums after having filled a request for arbitration or having started a proceeding in court. Others refer to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") which provides, in its Article 26, that *"[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy".*

However, arbitral tribunals usually consider that such provisions do not impede investors to make use of the two remedies. For instance, in the *Yukos* and *Amto* cases (PCA Case No. AA 226, *Hulley Enterprises Ltd (Cyprus) and others v. Russia*, Interim award on jurisdiction and admissibility, 2009, §§ 586 to 593 ; Final award, 2014, §§ 1256 to 1272 / Arbitration Institute of the Stockholm Chamber of Commerce, n°080/2005, *Amto v. Ukraine*, 2008, p. 44), parallel applications based on similar facts were brought before the European Court of Human Rights and an arbitral tribunal. The latter held that a "triple identity" test should be applied in the context of "fork in the road" provisions: namely, identity of parties, cause of action and object of the dispute. Since the causes of action (the Convention and the Energy Charter Treaty) and the parties to the proceedings were different in these cases, the tribunal rejected *lis pendens* objections invoked by the defendant States. As stated in the final award of *Amto*,

> "This is a case of an international tribunal and a supra-national court having concurrent jurisdiction over a dispute arising out of similar facts. With regard to the parties, EYUM-10 is not a party to the present arbitration and AMTO is not a party to the ECHR proceedings. With respect to the causes of action, the present arbitration is based on alleged breaches of the ECT, while proceedings before the ECHR are based on Article 6(1) of the European Convention and its Protocol No. 1, Article 1. These circumstances are sufficient to disqualify the Respondent's lis pendens objection".

The same solution *a fortiori* applies where no "fork in the road" provisions are provided for by the applicable BIT.

The European Court of Human Rights perspective

Pursuant to Article 35, §2, b) of the Convention, *"[t]he Court shall not deal with any application that is substantially the same as a matter that (…) has already been submitted to another procedure of international investigation or settlement".* At the outset, it must be stressed that it is not the date of submission to a parallel set of proceedings that is decisive, but whether a decision on the merits has already been taken in those proceedings by the time the Court examines the case (*Peraldi v. France* (dec.), no. 2096/05, 7 April 2009). The mere fact that an arbitration is ongoing will

therefore not be a procedural ground for inadmissibility; it may only be so if an award were issued before the judgment of the Court.

Where a decision on the merits has been taken, the Court verifies whether the applications to the different international institutions concern substantially the same matter. In doing so in the *Yukos* case (*Oao Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, 20 September 2011), the Court has strictly applied a triple identity test, in a way reminiscent of the arbitral tribunal cases highlighted above. The Court has indeed highlighted that *"the assessment of similarity of the cases would usually involve the comparison of the parties in the respective proceedings, the relevant legal provisions relied on by them, the scope of their claims and the types of the redress sought"* and has concluded that the majority shareholders of the applicant (three companies) as well as several groups of its minority shareholders were different parties than the applicant. The Court has also emphasised the applicant's own right under the Convention, which is different from the investment complaints (§§ 521 to 525).

Besides this strict application of the triple identity test, it is also doubtful that an arbitral proceeding could be qualified of *"procedure of international investigation or settlement"* in the meaning of Article 35, §2, b) of the Convention. In the above-mentioned *Yukos* case, the Court considered that, since the applications were not substantially the same, there was no need to examine whether the arbitral proceedings could be seen as another procedure of international investigation or settlement (§523). This *dicta* can be read in conjunction with the *Lukanov v. Bulgaria* case where the European Commission on Human Rights – a body that used to consider whether an application was admissible to the Court but was abolished in the wake of the European Court of Human Rights' restructuring in 1988 – has held that the *"terms 'international investigation or settlement' refers to institutions and procedures set up by States, thus excluding non-governmental bodies"* (no. 21915/93, 12 January 1995). It has therefore held that the procedure before the Human Rights Committee of the Inter-Parliamentary Union was not a procedure of international investigation or settlement since this Union was a non-governmental organisation.

It seems to us that, despite the State's involvement as party to the BIT and to the arbitration proceedings, a BIT arbitration may generally not be considered as an institution or procedure set up by States. It may be different only in exceptional hypothesises, where tribunals are organised through intergovernmental institutions such as the Permanent Court of Arbitration in the Hague, in so far as the arbitral panel itself (as opposed to merely the appointing authority) is composed of arbitrators appointed by the member States of the institution.

Conclusion

It follows from the above that, because of a strict application of the triple identity test by arbitral tribunals and the European Court of Human Rights, investors that carefully draft their petitions are likely to overcome *lis pendens* or admissibility objections and be able to lodge, even in parallel, a petition before both the BIT arbitral tribunal and the Court. In this regard, distinguishing the causes of action (the investment rights on the one hand, human rights and fundamental freedoms on the other) and/or the plaintiffs (usually the shareholder(s) of a company operating in the State that allegedly

violated the investment rights on the one hand, this latter company on the other) of the two remedies is of paramount importance.

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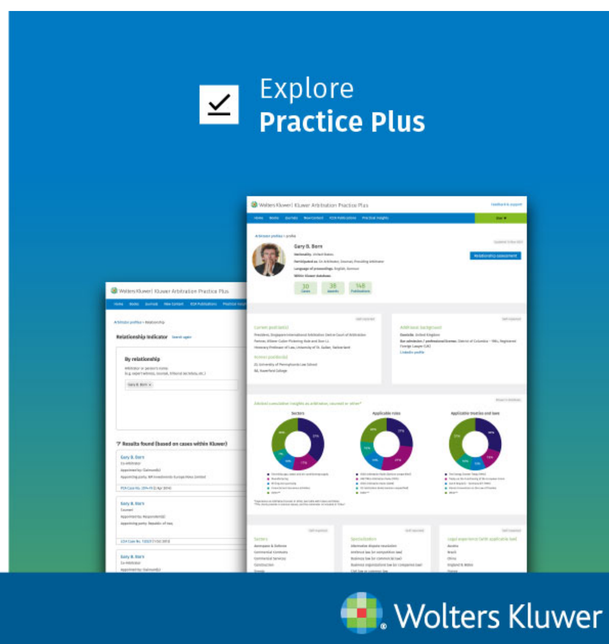

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