STANDING AND JURISDICTION IN INVESTMENT TREATY ARBITRATION: Pre-Arbitration Requirements

Andrea J. Menaker
Partner, White & Case LLP
Washington, DC
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Pre-Arbitration Requirements

- Notification
- Attempt at Amicable Settlement
  - Consultations
  - Negotiation
- Waiver of Other Proceedings
- Domestic Court Litigation
- Use of MFN Clause to Circumvent Requirements

Purpose of Notice and Consultation/Negotiation Requirement

- "'notice to the respondent State that a dispute exists and delimits the scope of the dispute and its subject-matter ….
- encourages the Parties to attempt to settle their dispute by mutual agreement, thus avoiding recourse to binding third-party adjudication ….
- indicat[es]the limit of consent given by States' ….
- confer[s] upon the State Party an opportunity to address a potential claimant's complaint before it becomes a respondent in an international investment dispute."

(*Tulip v. Turkey*, Decision on Bifurcated Jurisdictional Issue ¶ 61 (quoting *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011 (ICJ))

Notification Requirement

- Birani-Anchuria BIT, Article 11(1):

  "A dispute between an investor of one Contracting Party and the other Contracting Party concerning an investment of the former in the territory of the latter which has not been settled amicably, shall, after a period of **six months from written notification** of the claim be submitted to [ICSID]."

- Also known as "Cooling Off Period" or "Waiting Period"

Notification Requirement

- Notification and Waiting Periods may be Separate
  - NAFTA, Chapter 11 provides for concurrent notice and waiting periods
    - Article 1120(1):

      "provided that **six months** have elapsed **since the events giving rise to the claim**, a disputing investor may submit the claim to arbitration …."

    - Article 1119:

      "The disputing investor shall deliver to the disputing Party written **notice of its intention** to submit a claim to arbitration at least **90 days before the claim is submitted** …."

Content of Notification Requirement

Tulip v. Turkey:

"Article 8(2) **does not require** the investor **to spell out its legal case in detail** during the initial negotiation process. Nor does Article 8(2) require the investor, on the giving of notice of a dispute arising, **to invoke specific BIT provisions** at that stage. **Rather**, what Article 8(2) requires is that the investor **sufficiently informs the State party of allegations of breaches of the treaty** made by a national of the other Contracting State that may later be invoked to engage the host State's international responsibility before an international tribunal."

(*Tulip v. Turkey*, Decision on Bifurcated Jurisdictional Issue ¶ 83)

Tulip v. Turkey

- Tribunal examined 9 letters and meetings for compliance with notification requirement
- Tribunal rejected all but one letter because the letters failed to establish:
  - Notice to the Government; or
  - Notice of the alleged treaty violations

(*Tulip v. Turkey*, Decision on Bifurcated Jurisdictional Issue ¶¶ 94-123)

Implied Notice Requirement

- US-Ecuador BIT, Article VI:

  1. For purposes of this Article, an investment dispute is a **dispute** between a Party and a national or company of the other Party arising out of or **relating to…(c) an alleged breach of any right conferred** or created **by this Treaty** with respect to an investment.

  2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution: [….]

  3. (a) Provided that…six months have elapsed **from the date on which the dispute arose**, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding [ICSID] arbitration.

- No express notice requirement

  (*Burlington v. Ecuador*, Decision on Jurisdiction ¶ 333)

Burlington v. Ecuador

- Tribunal dismissed one of the claims because Claimant made no allegation of treaty breach in that regard 6 months prior to filing the Request for Arbitration:

  "the 'dispute' to which Article VI(3)(a) refers is one that relates to 'an alleged breach of any right conferred or created by this Treaty with respect to an investment.' Stated otherwise, **as long as no allegation of Treaty breach is made, no dispute will have arisen giving access to arbitration under Article VI**. This requirement makes sense as it **gives the state an opportunity to remedy a possible Treaty breach and thereby avoid arbitration proceedings under BIT, which would not be possible without knowledge of an allegation of Treaty breach**. Because a dispute under Article VI(3)(a) only arises once an allegation of Treaty breach is made, **the six-month waiting period only begins to run at that point in time**."

  (*Burlington v. Ecuador*, Decision on Jurisdiction ¶¶ 335-36; *accord Murphy v . Ecuador*, Decision on Jurisdiction ¶¶ 93-109)

Ethyl Corp. v. Canada

"There … is an issue as to whether a six-month "cooling off period" should be applicable at all in this case …. The Tribunal has been given no reason to believe that any 'consultation or negotiation' pursuant to Article 1118, which Canada confirms the six-month provision in Article 1120 was designed to encourage, was even possible. … **[I]n any event six months and more have passed following … coming into force of the MMT Act. It is not doubted that today Claimant could resubmit the very claim advanced here** …. No disposition is evident on the part of Canada to repeal the MMT Act or amend it. Indeed, it could hardly be expected. **Clearly a dismissal of the claim at this juncture would disserve, rather than serve, the object and purpose of NAFTA**."

(*Ethyl Corp. v. Canada*, Award on Jurisdiction ¶¶ 84-85)

Consultation/Negotiation Requirement

- Birani-Anchuria BIT, Article 11(2):

  "**If consultations do not result in a solution** within **six months from the date of request for consultations** and if the investor concerned gives a written consent, the dispute shall be submitted to [ICSID]."

- "Request for consultations" triggers 6-month period
- More than a mere notice requirement
- A notice of dispute, notice of intention to arbitrate, or acceptance of offer of consent may not suffice

Negotiation Requirement

- Singapore-Vietnam BIT, Article 13:

(1) Any dispute between a national or company of one Contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party **shall, as far as possible, be settled amicably through negotiations** between the parties to the dispute. The party intending to resolve such dispute through negotiations shall give notice to the other of its intentions.

(2) **If the dispute cannot be thus resolved** as provided in paragraph (1) of this Article **within six months from the date of the notice** given thereunder, then the Contracting Party and the investor concerned shall refer the dispute to either conciliation … or to arbitration ….

Consultation Requirement

- 2009 ASEAN Comprehensive Investment Agreement, Art. 31:

  (1) In the event of an investment dispute, the disputing parties **shall initially seek to resolve the dispute through consultation and negotiation**, which may include the use of non-binding, third party procedures. Such **consultations shall be initiated by a written request for consultations** delivered by the disputing investor to the disputing Member State.

  (2) **Consultations shall commence within 30 days** of receipt by the disputing Member State of the request for consultations, unless the disputing parties otherwise agree.

  (3) With the objective of resolving an investment dispute through consultations, **a disputing investor shall make all reasonable efforts** to provide the disputing Member State, prior to the commencement of consultations, with **information regarding the legal and factual basis** for the investment dispute.

Consultation or Negotiation Requirement

- "Negotiations" may be more formal than "Consultations"
  - Often used interchangeably
- Purpose:

"The general purpose and aim of [a consultation] provision … is **to allow amicable settlement where such settlement is wanted and supported by both Parties**. Where one or both Parties did not have the good will to resort to consultation as an amicable means of settlement, it would be futile to force the Parties to enter into a consultation exercise which is deemed to fail from the outset. **Willingness to settle is the *sine qua non* condition for the success of any amicable settlement talk**."

(*Abaclat* et al. *v. Argentina*, Decision on Jurisdiction and Admissibility ¶ 564)

How is Compliance Measured?

- Claimants "**must have tried to reach an amicable settlement**" with the host State, but

- "the Treaty does not set out any procedure to be followed in relation to reaching an amicable settlement of the dispute between the two Parties. [It] only fixes a term of six months during which the Parties should try to resolve their disputes amicably. **The mission of this Tribunal is not to set strict rules that the Parties should have followed; the Tribunal is satisfied to determine if it is possible to deduce from the entirety of the Parties' actions whether, while respecting the term of six months, the Claimants actually took the necessary and appropriate steps to contact the relevant authorities in view of reaching a settlement, thereby putting an end to their dispute**."

(*Salini v. Morocco*, Decision on Jurisdiction ¶¶ 16, 19)

How is Compliance Measured?

- Obligation of means, not of result:
  - "an obligation to negotiate does not imply an obligation to reach an agreement"
- "as far as possible":
  - The obligation to consult "is not violated if it is established that (a) the sufficient minimum amount of consultations was actually conducted, or at least offered, or that (b) amicable consultations in order to resolve the case at stake were not possible in the first place."

(*Ambiente Ufficio* et al. *v. Argentina*, Decision on Jurisdiction and Admissibility ¶¶ 581-83)

Effect of Non-Compliance

1. Jurisdictional Prerequisite

"[P]rovisions directing the parties to consult or negotiate **may well constitute legally binding obligations, non-compliance with them having legal effects, including the dismissal of the case**. Whether and to which extent they set forth binding obligations, is a matter of **interpretation of the relevant provisions**."

(*Ambiente Ufficio* et al. *v. Argentina*, Decision on Jurisdiction and Admissibility ¶ 579)

Effect of Non-Compliance

2. No Jurisdictional Effect

"[P]roperly construed, the six-month period is **procedural** and **directory** in nature, rather than jurisdictional and mandatory. Its underlying **purpose is to facilitate opportunities for amicable settlement**. Its purpose is **not to impede or obstruct arbitration proceedings, where such settlement is not possible**. . . . Treaties often contain hortatory language, and there is an obvious advantage in a provision that specifically encourages parties to attempt to settle their disputes. **There is no reason, however, why such a direction need be a strict jurisdictional condition**."

(*Biwater Gauff v. Tanzania*, Award ¶¶ 343, 345)

3. No Jurisdictional Effect if Compliance Likely Would be Futile or Not Meaningful

Not mandatory as against investor **where the host State does not engage** in consultations in response to the investor's request.

(*Bayindir v. Pakistan*, Decision on Jurisdiction ¶ 102)

Ability to Amend the Claim

- *CMS v. Argentina*: "[I]ncidental or additional claims … do not require either a new request for arbitration or a new six-month period for consultation or negotiation."

  (*CMS v. Argentina*, Award ¶ 123)

- *LG&E Energy v. Argentina*: "According to the pleas submitted by the Respondent, no negotiations took place between LG&E and the Argentine Republic with regard to the additional request of the Claimants. Since more than six months elapsed from the date on which the dispute arose (i.e., 24 January 2002 for the so-called 'Additional Dispute'), there is no bar to initiating the arbitral proceeding."

  (*LG&E Energy v. Argentina*, Decision on Jurisdiction ¶¶ 79-80)

Interplay With Domestic Courts

- Fork in the Road
- No U-Turn
- Exhaustion of Local Remedies
- Resort to Court for a Limited Amount of Time

Fork in the Road

- Argentina-US BIT, Article VII:

"2. … If the dispute cannot be settled amicably the national or Company concerned may choose to submit the dispute for resolution:

(a) to **the courts or administrative tribunals of the Party that is a party to the dispute**; or

(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(c) in accordance with the terms of paragraph 3.

3.(a) **Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b)** ... the national or Company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration ...."

Pantechniki v. Albania

"Albania's position in this respect may have been wrong; the refusal to pay may have been unlawful. But that was **precisely what** Mr Sarantopoulos understood **was being tested in the Albanian courts** . . . . Its final submission . . . was that it was entitled to payment of US$1,821,796 . . . . **To the extent that this prayer was accepted it would grant the Claimant exactly what it is seeking before ICSID – and on the same 'fundamental basis'**. . . . The Claimant chose to take this matter to the Albanian courts. It cannot now adopt the same fundamental basis as the foundation of a Treaty claim. **Having made the election to seise the national jurisdiction the Claimant is no longer permitted to raise the same contention before ICSID**. . . . This conclusion (commanded by both Article 26 of the ICSID Convention and Article 10(2) of the Treaty) does not exclude a claim for mistreatment at the hands of the Albanian courts: denial of justice."

(*Pantechniki v. Albania*, Award¶¶ 67-68)

No U-Turn/Waiver Requirement

- NAFTA, Article 1121(1)(a):

  "A disputing investor may submit a claim … to arbitration **only if** … the investor and … the enterprise … **waive their right to initiate or continue** before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, **any proceedings with respect to the measure** of the disputing Party that is alleged to be a breach [of NAFTA Chapter 11 Section A], except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party."

Waste Management v. Mexico

"In effect, it is possible to consider that proceedings instituted in a national forum may exist which do not relate to those measures alleged to be in violation of the NAFTA by a member state of the NAFTA, in which case it would be feasible that such proceedings could coexist simultaneously with an arbitration proceeding under the NAFTA. However, **when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously** in light of the imminent risk that the Claimant may obtain the **double benefit** in its claim for damages. This is precisely what NAFTA Article 1121 seeks to avoid."

(*Waste Management v. Mexico*, Award (2 June 2000) ¶ 27)

Domestic Court Litigation Requirement

- Argentina-Italy BIT, Article 8:

"1. Any dispute in relation to the investments between a Contracting Party and an investor of the other Contracting Party in relation to the issues governed by this Agreement shall be settled, if possible, by means of amicable consultation between the parties to the dispute.

2. If the dispute has not been settled in such consultation, it may be subject to the competent ordinary or administrative court of the Contracting Party in the territory of which the investment is located.

3. **If, after 18 months from the notification of commencement of an action before the national courts indicated in the above paragraph 2, the dispute between the Contracting Party and the investors still continues to exist, it may be subject to international arbitration**."

Ambiente Ufficio v. Argentina

- **Futility**

  "Given the jurisprudence of the Supreme Court of Argentina and in the light of the circumstances prevailing in the present case, the Tribunal concludes that **having recourse to the Argentine domestic courts** and eventually to the Supreme Court **would not have offered Claimants a reasonable possibility to obtain effective redress from the local courts and would have accordingly been futile.** Hence, Claimants did not violate the duty to have recourse to Argentine courts under Art. 8(2) and (3) of the Argentina-Italy BIT when they submitted the Request for Arbitration on 23 June 2008."

  (*Ambiente Ufficio* et al. *v. Argentina*, Decision on Jurisdiction and Admissibility ¶ 620)

Abaclat v. Argentina

- **Weighing of Interests**

  "In the light of the Emergency Law and other relevant laws and decrees, which prohibited any kind of payment of compensation to Claimants, the Tribunal finds that **Argentina was not in a position to adequately address the present dispute within the framework of its domestic legal system**. As such, Argentina's interest in pursuing this local remedy does not justify depriving Claimants of their right to resort to arbitration for the sole reason that they decided not to previously submit their dispute to the Argentinean courts."

  "This conclusion derives more from a weighting of the specific interests at stake **rather than from the application of the general principle of futility: It is not about whether the 18 months litigation requirement may be considered futile**."

  (*Abaclat* et al. *v. Argentina*, Decision on Jurisdiction and Admissibility ¶¶ 584, 588)

BG Group v. Argentina Award

- **UNCITRAL Tribunal found the claim to be admissible:**

  "As a matter of Treaty interpretation, [the 18-month domestic litigation requirement] cannot be construed as an absolute impediment to arbitration. **Where recourse to the domestic judiciary is unilaterally prevented or hindered by the host State**, any such interpretation would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, **allowing the State to unilaterally elude arbitration**, which has been the engine of the transition from a politicized system of diplomatic protection to one of direct investor-State adjudication."

  (*BG Group v. Argentina*, Award ¶ 147)

Argentina v. BG Group

- **US Court of Appeals for the District of Columbia Circuit vacated the Award:**

  "Because the Treaty provides that a precondition to arbitration of an investor's claim is an initial resort to a contracting party's court, and the Treaty is silent on who decides arbitrability when that precondition is disregarded, we hold that **the question of arbitrability is an independent question of law for the court to decide**. ... The district court therefore erred as a matter of law by failing to determine whether there was clear and unmistakable evidence that the contracting parties intended the arbitrator to decide arbitrability where BG Group disregarded the requirements of Article 8(1) and (2) of the Treaty to initially seek resolution of its dispute with Argentina in an Argentine court."

Use of MFN Clause to Circumvent Pre-Arbitration Requirements

- Argentina-Italy BIT, Article 3(1):

  "Each Contracting Party shall, within its own territory, accord to investments made by investors of the other Contracting Party, to the income and activities related to such investments **and to all other matters regulated by this Agreement**, a **treatment** that is no less favorable than that accorded to its own investors or investors from third-party countries."

- *Impregilo v. Argentina*:

- "the term 'treatment' is in itself wide enough to be applicable also to procedural matters such as dispute settlement. Moreover, the wording 'all other matters regulated by this Agreement' is certainly also wide enough to cover the dispute settlement rules."

  (*Impregilo v. Argentina*, Award ¶ 99)

Use of the MFN Clause to Circumvent Pre-Arbitration Requirements

- Argentina-UK BIT, Article 3(2):

  "Neither Contracting Party shall **in its territory** subject investors of the other Contracting Party, **as regards their management, maintenance, use, enjoyment or disposal of their investments**, to treatment less favourable than that which it accords to its own investors or to investors of any third State."

- *ICS Inspection v. Argentina*:
- "treatment" is defined narrowly, not including dispute resolution procedures
- International arbitration is not "in its territory"
- In its treaty practice, Argentina signed BITS with and without an 18-month clause during the same period of time. If Argentina had intended the MFN clause to cover dispute resolution, that would have rendered those clauses meaningless as soon as the respective BITs entered into effect

  (*ICS Inspection v. Argentina*, Award ¶¶ 299, 309, 316)