



Treaty Arbitration and National Courts -- Friends or Foes

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BG Group PLC v Republic of Argentina: Facts

- Non-compliance with BIT's requirement that aggrieved investor seek resolution of its claims in the national court for 18 months prior to initiating arbitration
- UNCITRAL Tribunal (Garra, van den Berg, Aguilar-Alvarez) rejected jurisdictional challenge in December 2007 award:
 - **BIT's requirement to seek resolution in national courts could not be construed as "an absolute impediment to arbitration"**
 - **In light of the restrictions that Argentina's emergency measures had placed on recourse to its own courts, any other interpretation would lead to an "absurd and unreasonable result"**

BG Group PLC v Republic of Argentina: Facts (2)

- District Court rejected Argentina's challenge and confirmed award.
 - **Considered it had no choice but to defer to the arbitrators' "colorable, if not reasonable interpretation" of the BIT**
- In January 2012, Court of Appeals vacated the award.
 - **Arbitrators had "exceeded their powers" in interpreting the relevant provisions of the BIT.**
- In February 2012, Court of Appeals denied BG Group's request for a rehearing.
- U.S. Supreme Court proceedings are currently pending.

BG Group PLC v Republic of Argentina: Reasoning of Court of Appeals

- Because Court of Appeals considered compliance with litigation precondition to be one of arbitrability, it required “clear and unmistakable evidence” that the parties had agreed that the arbitrators determined this question.
- In the Court of Appeals’ view there was no such evidence:
 - **Temporal limitation on the applicability of the UNCITRAL Rules**
 - **In light of litigation pre-condition, the UK and Argentina would not have been surprised “to have a court, and not an arbitrator” decide arbitrability question.**
- U.S. pro-arbitration policy could not “function to override the intent” of the UK and Argentina in requiring an 18-month attempt to resolve the disputes in national courts

Position of Argentina

- Question is whether there was a valid agreement to arbitrate, not whether a condition precedent under a valid arbitration agreement was satisfied.
- Here, BG never accepted Argentina's offer according to its terms, i.e., an offer to arbitrate disputes that have litigated in Argentine courts for 18 months.
- No "clear and unmistakable" evidence that Argentina agreed to have an arbitral tribunal decide the question whether it agreed to arbitrate.

Position of BG Group and Amici

- Inconsistent with US case law on the question of whether procedural requirements imposed by an arbitration clause are satisfied is for the arbitrators to decide?
- Inconsistent with US case law on the effect of arbitral rules on the allocation of competence between courts and arbitral tribunals?
- Threat to U.S. as seat of international arbitration?
- Threat to efficacy of investor-State adjudication?

Noncompliance With Litigation Precondition -- Treatment By Other Arbitral Tribunals

- Compliance with litigation precondition no jurisdictional pre-requisite
 - **E.g., Ethyl Corp. v Gov't of Canada, NAFTA Award on Jurisdiction (June 24, 1998) 38 Int'l Legal Mat. 78.**
- Reliance on MFN clauses
 - **E.g., Siemens A.G. v Argentine Republic, ICSID Case No. ARB/02/08, Decision on Jurisdiction (Aug. 3, 2004), at paras. 104-110**
- Futility exception
 - **E.g., BG Group v Argentine Republic, Ad-hoc UNCITRAL Arbitration, Final Award, Dec. 24, 2007, para. 140 et seq.**
- Strict enforcement
 - **E.g., ICS Inspection & Control Servs. Ltd. v. Argentine Republic, UNCITRAL, PCA Case No 2010-9, Award on Jurisdiction (Feb. 10, 2012), at para. 262; Daimler Fin. Servs. AG v Argentina, ICSID Case No. ARB/05/01, Final Award (Aug. 22, 2012) , para. 194.**

Conclusions

- Investment tribunals only rarely require compliance with pre-litigation provisions in bilateral investment treaties
- Widespread perception of dysfunctionality of national court systems across the globe, coupled with self-perception of investment treaty tribunals as providers of "enclaves of justice"
- Risk of generalizations and wholesale condemnations of national judiciaries
- Respect for intentions of states as enshrined in treaties



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