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KIEV ARBITRATION DAYS 2011

INVESTOR'S FAILURE TO SEEK AMICABLE SETTLEMENT MAY PRECLUDE ARBITRATION OF THE DISPUTE

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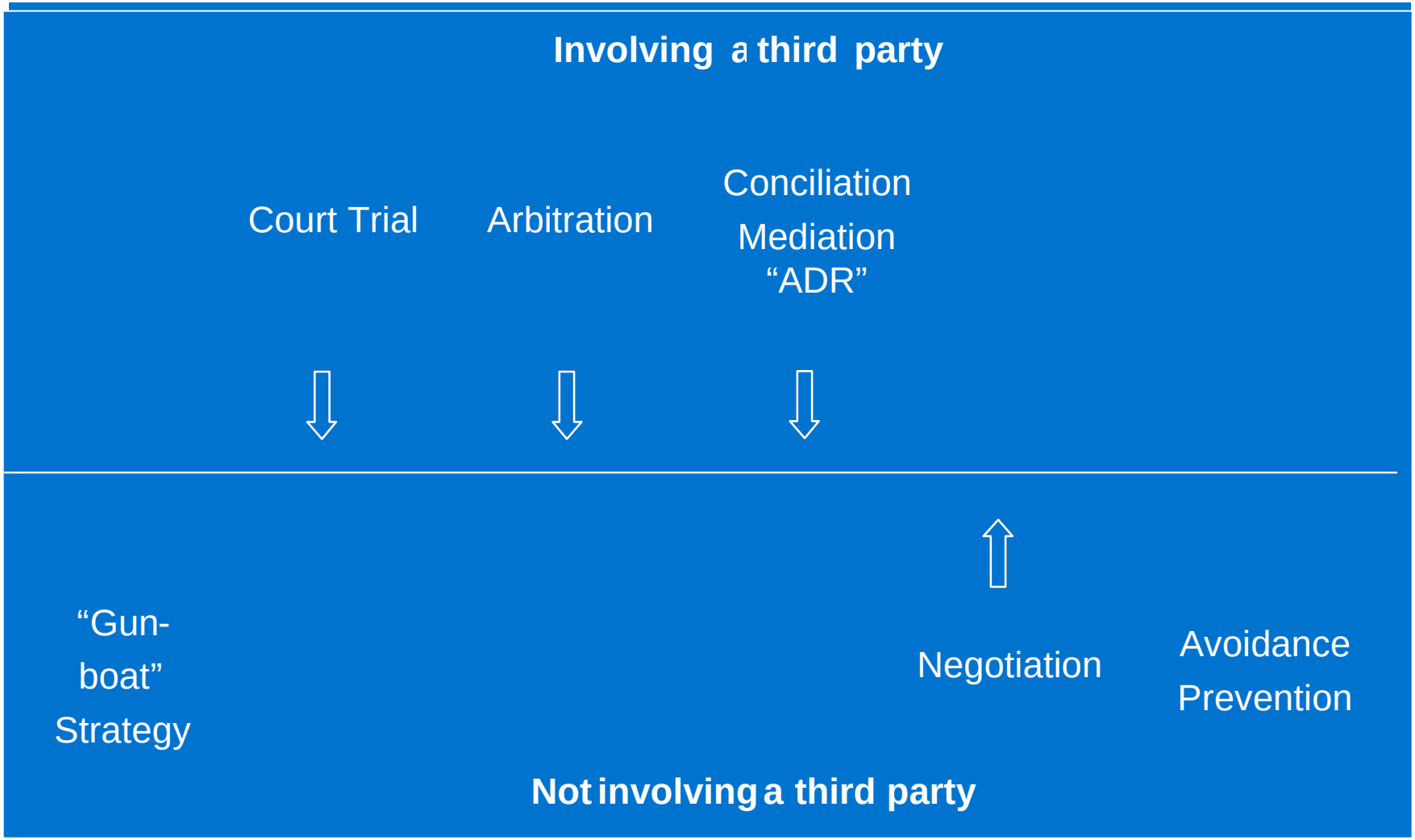
Approaches to addressing investor-State disputes and conflicts



Difficulty for the State to enter into an amicable settlement process

- **The State is not easier to maneuver than an aircraft carrier [*Who knows what and who can decide ?*],**
- **The State is bound by its own laws and procedures,**
- **Officials may fear to put themselves at risk when entering into such settlements.**

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Amicable settlement is nevertheless preferable for the parties to investment disputes

- Sovereignty problems, publicity of international arbitration vs. confidentiality of amicable negotiations,
- Possibility of involving interested third parties,
- No issue of enforcement for the investor,
- Substantial saving of costs for all parties,
- No loss of face for any party.

March 4, 1994 US-Ukraine Treaty concerning the encouragement and reciprocal prosection of investment

Article VI

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 for resolution:

   a) …

   b) …

   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) and **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 arbitration**:

November 27, 1998 Russia-Ukraine Agreement on the Encouragement and Mutual Protection of Investments

ARTICLE 9

Resolution of Disputes Between Contracting Party and the Investor of the other Contracting Party

1. In case of any dispute between either Contracting Party and the investor of the other Contracting Party, which may arise in connection with the investments, including […], **a notification in writing shall be handed in accompanied with detailed comments which the investor shall forward to the Contracting Party involved in the dispute. The parties to the dispute shall exert their best efforts to settle that dispute by way of negotiations**.

2. **In the event the dispute cannot be resolved through negotiations within six months as of the date of the written notification as mentioned in Item 1** hereof above, then the dispute shall be passed over for consideration to:

   a) …

   b) the Arbitration Institute of the Chamber of Commerce in Stockholm,

   c) an "ad hoc" arbitration tribunal, in conformity with the Arbitration Regulations of the United Nations Commission for International Trade Law (UNCITRAL).

1994 France-Ukraine Agreement on Encouragement and Reciprocal Protection of Investments

ARTICLE 8

- **Tout différend relatif aux investissements** entre l'une des Parties contractantes et un national ou une société de l'autre Partie contractante **est régie à l'amiable entre les deux parties concernées**.

- **Si un tel différend n'a pas pu être réglé dans un délai de six mois à partir du moment ou il a été soulevé par l'une ou l'autre des parties au différend, il est soumis à la demande de l'une ou l'autre de ces parties à l'arbitrage du Centre international pour le règlement des différends relatifs aux investissements** (C.I.R.D.I.), créé par la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, signée à Washington le 18 mars 1965.

Inconsequential Procedural Rule or Condition to Consent?

Lauder v. Czech Republic:

"However, the Arbitral Tribunal considers that this requirement of a six-month waiting period of Article VI(3)(a) of the Treaty **is not a jurisdictional provision**, i.e. a limit set to the authority of the Arbitral Tribunal to decide on the merits of the dispute, but a procedural rule that must be satisfied by the Claimant (*Ethyl Corp. v. Canada*, UNCITRAL June 24, 1998, 38 I.L.M. 708 (1999), paragraphs 74-88)… [T]he purpose of this rule is to allow the parties to engage in good-faith negotiations before initiating arbitration."

Lauder v. Czech Republic, Final Award, 3 September 2001, UNCITRAL (United States/Czech Republic BIT), 185, 187.

Inconsequential Procedural Rule or Condition to Consent?

SGS v. Pakistan:

"Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. . . . Finally, it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant's BIT claims to this Tribunal."

SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, Jurisdiction, 6 August 2003, ICSID Case No. ARB/01/13 (Swiss Confederation/Pakistan BIT), ¶184.

Inconsequential Procedural Rule or Condition to Consent?

Bayindir v. Pakistan

"Significantly, Article VII(2) does not read, if these disputes "are not settled" within six months but "cannot be settled" within six months . . "

"The Tribunal agrees with the view that the notice requirement does not constitute a prerequisite to jurisdiction. Contrary to Pakistan's position, the non-fulfilment of this requirement is not "fatal to the case of the claimant". As Bayindir pointed out, to require a formal notice would simply mean that Bayindir would have to file a new request for arbitration and restart the whole proceeding, which would be to no-one's advantage.

Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29 (Turkey/Pakistan BIT), Award, Aug. 27, 2009 (G. Kaufmann-Kohler, Pres.; F. Berman; K.H. Böckstiegel), ¶100.

Inconsequential Procedural Rule or Condition to Consent?

"The Nature of the Six-Month Period: The Republic's objection depends upon the characterisation of the six-month period in Article 8(3) of the BIT as a condition precedent to the Arbitral Tribunal's jurisdiction, or the admissibility of BGT's claims. In the Arbitral Tribunal's view, however, properly construed, this 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. Non-compliance with the six month period, therefore, does not preclude this Arbitral Tribunal from proceeding. If it did so, the provision would have curious effects, including:

- preventing the prosecution of a claim, and forcing the claimant to do nothing until six months have elapsed, even where further negotiations are obviously futile, or settlement obviously impossible for any reason;
- forcing the claimant to recommence an arbitration started too soon, even if the six-month period has elapsed by the time the Arbitral Tribunal considers the matter."

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, Award, 24 July 2008, ICSID Case No. ARB/05/22 (UK/Tanzania BIT), ¶343.

Inconsequential Procedural Rule or Condition to Consent?

"If the Argentine Republic had the opportunity to consider negotiations with the investors on the occasion of the first claims, and the claims that followed did not involve any new element, the observance of this requirement is evidently fulfilled. This is particularly so in view of the fact that the Argentine Republic did not take advantage of the possibility of defusing the dispute during that start-up period."

"***The Tribunal wishes to note in this matter, however, that the conclusion reached is not because the six-month negotiation period could be a procedural and not a jurisdictional requirement as has been argued by the Claimants and affirmed by other tribunals. Such requirement is in the view of the Tribunal very much a jurisdictional one***. A failure to comply with that requirement would result in a determination of lack of jurisdiction. In the present case, as noted, the requirement was complied with in view of the identical nature and scope of the dispute with the Argentine Provinces; the same holds true if a dispute is ruled to be ancillary or additional to an earlier claim. ."

***Enron Corporation and Ponderosa Assets, L.P v. Argentine Republic*, Decision on Jurisdiction, 14 January 2004, ICSID Case No. ARB/01/3 (US/Argentina BIT), ¶88.**

Inconsequential Procedural Rule or Condition to Consent?

"[B]y imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an opportunity to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity. That suffices to defeat jurisdiction (¶315)."

"[I]n ICSID arbitration the inadmissibility of claims has the same consequence as the failure to meet the requirements for jurisdiction under Article 25 of the ICSID Convention or the BIT, such consequence being that the Tribunal cannot exercise jurisdiction over the dispute."(¶340)

***Burlington v Ecuador*, Decision on Jurisdiction, 14 January 2004, ICSID Case No. ARB/08/5 (Ecuador/US.**

Murphy v. Ecuador

104. The Tribunal sides with Claimant in that Article VI does not impose a formal notice requirement. However, without the prior allegation of a Treaty breach, it is not possible for a dispute to arise which could then be submitted to arbitration under Article VI of the BIT. However, without the prior allegation of a Treaty breach, it is not possible for a dispute to arise which could then be submitted to arbitration under Article VI of the BIT. In this sense, the Decision on Jurisdiction in the *Burlington* case holds that "… as long as no allegation of Treaty breach is made, no dispute will have arisen giving access to arbitration under Article VI."

***Murphy Exploration and Prod. Co. Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4 (US/Ecuador BIT), Award on Jurisd., Dec. 15, 2010 (R. Oreamuno Blanco, Pres.; H. A. Naón; R. E. Vinuesa).**

Murphy v. Ecuador

103. The Tribunal finds that in order for a dispute to be submitted to ICSID arbitration, in accordance with Article VI of the BIT, a claim on an alleged breach of the BIT must previously exist. Disputes referred to in paragraph (1) of that provision arise when a Treaty breach is alleged. Therefore, the six-month waiting period shall run from the date of such allegation.

…

105. The Tribunal understands that it is necessary for the Respondent to have been aware of the alleged Treaty breach**es** in order to resort to arbitration under Article VI of the BIT. Under the Treaty, it would suffice for Claimant to inform its counterpart of the alleged Treaty breach.

…

107. [T]he six-month waiting period under Article VI(3)(a) starts running once there is evidence that a BIT claim exists. It follows that in order for the six-month term to effectively start running, **the dispute based on an alleged BIT breach** must be known to Respondent.

***Murphy Exploration and Prod. Co. Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4 (US/Ecuador BIT), Award on Jurisd., Dec. 15, 2010 (R. Oreamuno Blanco, Pres.; H. A. Naón; R. E. Vinuesa).**

Murphy v. Ecuador

154. The tribunal in *SGS v. Pakistan* held that "…it does not appear consistent with the need for orderly and cost-effective procedure to halt this arbitration at this juncture and require the Claimant first to consult with the Respondent before re-submitting the Claimant's BIT claims to this Tribunal."91 Claimant raises this same argument in its letter dated April 30, 2010, which has already been cited. **This Tribunal finds that rationale totally unacceptable: it is not about a mere formality, which allows for the submission of a request for arbitration although the six-month waiting period requirement has not been met, and if the other party objects to it, withdraws and resubmits it. It amounts to something much more serious: an essential mechanism enshrined in many bilateral investment treaties, which compels the parties to make a genuine effort to engage in good faith negotiations before resorting to arbitration.**

155. Of course, this Tribunal does not ignore the fact that if both parties cling obstinately to their positions, the possibilities for having a successful negotiation become null. However, there have been many cases in which parties with seemingly irreconcilable points of view at first, manage to reach amicable solutions. **To find out if it is possible, they must first try it.**

***Murphy Exploration and Prod. Co. Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4 (US/Ecuador BIT), Award on Jurisd., Dec. 15, 2010 (R. Oreamuno Blanco, Pres.; H. A. Naón; R. E. Vinuesa).**

Murphy v. Ecuador

149. This Tribunal finds the requirement that the parties should seek to resolve their dispute through consultation and negotiation for a six-month period does not constitute, as Claimant and some arbitral tribunals have stated, "a procedural rule" or a "directory and procedural" rule which can or cannot be satisfied by the concerned party. To the contrary, ***it constitutes a fundamental requirement that Claimant must comply with, compulsorily, before submitting a request for arbitration under the ICSID rules.***

…

151. [D]uring this "cooling-off period," the parties should attempt to resolve their disputes amicably, without resorting to arbitration or litigation, which generally makes future business relationships difficult. ***It is not an inconsequential procedural requirement*** *but rather* ***a key component of the legal framework established in the BIT*** *and in many other similar treaties, which aims for the parties to attempt to amicably settle the disputes that might arise resulting of the investment made by a person or company of the Contracting Party in the territory of the another State.*

***Murphy Exploration and Prod. Co. Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4 (US/Ecuador BIT), Award on Jurisd., Dec. 15, 2010 (R. Oreamuno Blanco, Pres.; H. A. Naón; R. E. Vinuesa).**

Murphy v. Ecuador

141. Claimant seems to assert that the requirements prescribed in certain rules (the "jurisdictional") are of a category such that its non-compliance leads to the lack of competence of the tribunal hearing the dispute. Instead, the "procedural requirements," can be breached without having any consequence whatsoever. The Tribunal does not share this view.

142. The Tribunal also does not accept the consequences Claimant seeks to derive between "procedural" and "jurisdictional" requirements. According to Murphy International, "procedural requirements" are of an inferior category than the "jurisdictional requirements" and, consequently, its non-compliance has no legal consequences. It is evident that in legal practice this does not occur, and that non-compliance with a purely procedural requirement, such as, for example, the time to appeal a judgment, can have serious consequences for the defaulting party.

***Murphy Exploration and Prod. Co. Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4 (US/Ecuador BIT), Award on Jurisd., Dec. 15, 2010 (R. Oreamuno Blanco, Pres.; H. A. Naón; R. E. Vinuesa).**