

# Procedural Challenges for Investors and for States in Investment Arbitration

Special Course #5  
Arbitration Academy  
Summer 2013

Andrea K. Bjorklund  
L. Yves Fortier Chair in International Arbitration and International Commercial Law  
McGill University Faculty of Law

As investment arbitration develops both investors and host states have been confronted with several challenges relating to the procedural aspects of dispute settlement and their subsequent effects on substantive issues. Difficult questions face the investment arbitration community; some are relatively new, while others might be termed chronic. Over the course of five sessions we will explore four major areas of contention in the area of investment arbitral procedure (we will spend approximately 1 to 1.25 hours on each topic).

## 1. Conditions Precedent to Arbitration

Most investment treaties contain conditions precedent to the submission of a claim to arbitration. These procedural hurdles can encompass “cooling off” periods, the submission of notices of intent to arbitrate, conciliation measures, the filing of waivers to seek relief in other fora, and the like. What effect does the failure to satisfy these pre-conditions have on an investor’s claim? Why do investors not satisfy them as a matter of course? When and why does it matter if a condition is a question of admissibility or a question of jurisdiction?

### Readings:

Jan Paulsson, [\*Jurisdiction and Admissibility\*](#), in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER, ICC Publishing, Publication 693 (November 2005) (excerpts)

[\*BG Group Plc. v. Argentina\*](#), UNCITRAL, [Final Award, 24 December 2007](#), paras. 140-157

[\*Argentina v. BG Group\*](#), 665 F.3d 1363 (D.C. Cir. 2012)

[Canadian Model FIPA](#) (2003), Article 26

## 2. Mass claims and consolidation

The question of mass claims really came to the fore when a group of some 60,000 Italian bondholders submitted claims against the Government of Argentina in the aftermath of the Argentine financial crisis. A divided ICSID tribunal upheld its jurisdiction to consider the claims. Was this the right decision? Does the mass nature of the claim vitiate Argentina's consent to arbitration? Asserting jurisdiction in turn gives rise to significant procedural challenges. How can or should the process be managed? Is ICSID (or any arbitral body) capable of handling such a large number of claims? Should there be a de facto "class action" where designated claimants serve as bellwether or test cases?

Even prior to *Abaclat*, at least some treaties had anticipated multiple claimants in a single action. NAFTA Article 1126, for example, provides for consolidation of claims, and provides for the establishment of a special tribunal to determine the desirability of consolidation. What are the benefits and drawbacks to consolidating related claims?

Readings:

[\*Abaclat et al v. Argentine Republic\*](#), ICSID Case No. ARB/07/5, [Decision on Jurisdiction and Admissibility \(4 August 2011\)](#), paras. 50-71; 86-91; 233-234; 480-492; 504-551

[\*Abaclat et al v. Argentine Republic\*](#), ICSID Case No. ARB/07/5, [Dissenting Opinion, Georges Abi-Saab \(28 October 2011\)](#), paras. 154-75

[NAFTA Article 1126](#)

Gonzalo Flores, [Introductory Note, Consolidation Proceedings Under NAFTA Article 1126, Corn Products International, Inc. v. United Mexican States](#), ICSID Case No. ARB(AF)/04/1; [Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States](#), ICSID Case No. ARB(AF)/04/5, 21 ICSID REVIEW – FOREIGN INVESTMENT L. J. 361 (2006)

## 3. State influence over treaty interpretation and tribunal decision-making

The availability of investor-state arbitration as a neutral process suggests that a state, as one of the disputing parties, should not be able to interfere with the process in which its actions are being measured against international law. Yet states are the primary lawmakers and are the ones responsible for establishing the dispute settlement mechanism. It is not surprising that they want to retain some control over the process. States can assert some authority over their treaties by virtue of Vienna Convention Article 31(3)(a) and (b) provide that a subsequent agreement by treaty parties or subsequent practice leading to agreement can influence the interpretation or application of the treaties. More concretely, certain treaties give states the right to submit memorials on matters of interpretation of the agreement; some permit (or require) the referral of a question of interpretation to a designated body; and some provide that a designated body can

issue binding statements as to how an agreement should be interpreted. A significant question is how much they can do that without undermining the integrity of the dispute settlement process to such an extent that it could no longer qualify as neutral or fair. Other questions include the extent to which such interpretive authority interferes with domestic treaty-making requirements.

Readings:

[Vienna Convention on the Law of Treaties](#), Article 31

[NAFTA Articles 1128, 1129, 1131, 1132](#)

[NAFTA Notes of Interpretation](#) (31 July 2001)

[Pope & Talbot Inc. v. Government of Canada](#), UNCITRAL, [Award in Respect of Damages \(31 May 2002\)](#), paras. 20-23; 43-66

[Merrill & Ring v. Canada](#), UNCITRAL, [Award \(31 March 2010\)](#), paras. 182-213

Anthea Roberts, [Power and Persuasion in Investment Treaty Interpretation](#), 104 AM. J. INT'L L. 179, 215-225 (2010)

#### 4. Transparency

The term “transparency” is used to describe a number of issues ranging from varying levels of access to information about investor-state proceedings to the ability to participate in those cases as “*amici curiae*”. The NAFTA Parties were in the forefront of institutionalizing norms for amicus curiae participation, as well as for the publication of virtually all materials produced in NAFTA Chapter 11 arbitrations. Tribunals convened under other sets of rules tended to follow suit, and in 2006 ICSID amended its rules to provide for greater transparency. Most recently UNCITRAL’s Working Group II took up the question as to whether and how the UNCITRAL Arbitration Rules might be modified to accommodate transparency concerns arising with respect to investor-state arbitration; the group produced a recommendation in February 2013. In theory transparency is often viewed as attractive, but in practice it raises some difficult questions, including the potential for greater politicization of investment disputes and possible deleterious effects on settlement. The question of money also arises; transparency is not cost-free, and someone has to pay the bill for access to documents and for the costs incurred by amicus participation.

Readings:

[NAFTA Statement of the Free Trade Commission on non-disputing party participation](#) (7 October 2003)

[Glamis Gold v United States](#), UNCITRAL, [Non-Party Supplemental Submission \(Submission of the Quechan Indian Nation\)](#) (16 October 2006), pages 1-9

Andrea K. Bjorklund, [The Promise and Peril of Arbitral Precedent: The Case of Amici Curiae](#), ASA BULLETIN Special Series No. 34, at 165 (Anne K. Hoffmann ed., May 2010), pp. 180-87

UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eight session, [A/CN.9/765](#) (13 February 2013), pp. 5-22