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Deference, Clarity, and the Future of Arbitration in Investor-State Dispute Settlements

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NOTE

Deference, Clarity, and the Future of Arbitration in Investor-State Dispute Settlements

BG Group, PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014).

ROBERT N. MACE*

I. INTRODUCTION

Since the end of World War II, foreign investment has been a primary contributor to the increasing globalization of world economies.¹ The incursion of foreign funds has allowed developing economies to create infrastructure, expand employment opportunities, and move toward modernization.² International opportunities have allowed investors to expand their portfolios and establish a solid footing in the future of the global marketplace.³ Despite the advantages, investing across international borders is not without risk: cultural and legal differences, lack of citizen privileges, and differing priorities between investors and sovereign states become barriers for parties wishing to do business with one another. Many nations have established a legal framework in the form of bilateral investment treaties (BITs) to overcome the disadvantages.⁴

In *BG Group v. Republic of Argentina*, the U.S. Supreme Court was presented with a case of first impression dealing with a dispute resolution provision contained in a BIT. BG Group, a British investor in Argentinian natural gas distribution, argued that an arbitration panel should be given deference in its decision to waive a pre-arbitration requirement contained in a BIT.⁵ Lacking precedential authority concerning arbitration agreements contained in treaties, lower courts disagreed whether the pre-arbitration issue was primarily for judicial or arbitral determination.⁶ Ultimately, the Court chose to apply the interpretive framework

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1. Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 68 (2005).

2. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1524 (2005).

3. *Id.* at 1524-25.

4. See U.N. Conference on Trade and Dev., *World Investment Report 2013: Global Value Chains: Investment And Trade For Development*, at 101, U.N. Doc. UNCTAD/WIR/2013 (2013) [hereinafter *World Investment Report 2013*].

5. *BG Grp., PLC v. Republic of Arg.*, 134 S. Ct. 1198, 1205 (2014).

6. *Id.*

utilized in the review of domestic commercial arbitration agreements, and established that arbitration agreements in investment treaties are to be evaluated and enforced under traditional contract theories.⁷

II. FACTS & HOLDING

During the late 1980s and early 1990s, the Republic of Argentina initiated a series of economic reforms aimed at stimulating the economy by reducing inflation and public debt and increasing foreign investment.⁸ To encourage foreign investment, Argentina entered into BITs with numerous countries.⁹ One BIT, which forms the controversy at issue in *BG Group, PLC* was The Agreement for the Promotion and Protection of Investments (Treaty)¹⁰ with the United Kingdom.¹¹ Under the treaty, Argentina agreed to take steps to encourage U.K. investors to invest within its borders, and the United Kingdom agreed to do the same with respect to Argentine investors. The Treaty was signed by Argentina and the United Kingdom in 1990 and became effective in 1993.¹² Importantly, the Treaty assured foreign investors they would be given “fair and equitable treatment” and prevented the host country from “expropriating the assets of . . . [foreign investors] without just compensation.”¹³ The two nations agreed to include a dispute-resolution provision¹⁴ that would authorize arbitration of disputes between investors and the country of investment under two circumstances: (1) after the dispute had been submitted to a local court or (2) upon agreement of both parties.¹⁵

Around the same time, BG Group, a United Kingdom company, acquired a majority interest in MetroGAS, an Argentine gas distributor.¹⁶ MetroGAS was a product of an Argentine economic reform that privatized the state-owned gas utility and divided it into new private companies open to foreign investment.¹⁷ Argentina granted MetroGAS a thirty-five-year exclusive license to distribute natural

7. *Id.* at 1217-18.

8. Republic of Arg. v. BG Grp. PLC, 715 F. Supp. 2d 108, 113 (D.D.C. 2010) *rev'd*, 665 F.3d 1363 (D.C. Cir. 2012) *rev'd*, 134 S. Ct. 1198, 1188 (2014) *and vacated*, 555 F. App'x 2 (D.C. Cir. 2014) *and aff'd*, 555 F. App'x 2 (D.C. Cir. 2014).

9. *Id.*

10. See Agreement for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S. 33 [hereinafter Arg.-U.K. Agreement for Investments].

11. Republic of Arg., 715 F. Supp. 2d at 113.

12. Republic of Arg. v. BG Grp., PLC, 665 F.3d 1363, 1366 (D.C. Cir. 2012) *cert. granted*, 133 S. Ct. 2795 (U.S. 2013) *and rev'd*, BG Grp., PLC v. Republic of Arg., 134 S. Ct. 1198 (2014) *and vacated*, 555 F. App'x 2 (D.C. Cir. 2014).

13. Republic of Arg., 715 F. Supp. 2d at 113 (quoting Cross-Motion for Recognition and Enforcement of Arbitral Award at 1).

14. Article 8(2) of the Treaty provides for arbitration under two circumstances:

(a) if one of the Parties so requests . . . :

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to [a] competent tribunal of the Contracting party in whose territory the investment was made, the said tribunal has not given its final decision;

(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

Arg.-U.K. Agreement for Investments, art. 8(2), *supra* note 10, at 38.

15. BG Grp., PLC v. Republic of Arg., 134 S. Ct. 1198, 1203 (2014).

16. Republic of Arg., 715 F. Supp. 2d at 113.

17. BG Grp., PLC, 134 S. Ct. at 1204.

gas in Buenos Aires and portions of the Buenos Aires metropolitan area.¹⁸ The license stated that tariffs would be calculated in U.S. dollars and would be eligible for review to ensure a reasonable return to investors.¹⁹

An economic collapse in 2001 and 2002 prompted Argentina to enact emergency laws and regulations that directly affected MetroGAS.²⁰ These replaced the U.S. dollar standard for tariff calculations with the lesser-valued peso²¹ and stayed any lawsuits regarding the new laws for 180 days.²² To mitigate the negative impact of the measures, Argentina established a renegotiation process for public service contracts, but excluded companies that elected to dispute the laws in court or arbitration.²³ MetroGAS began sustaining losses, prompting BG Group to file a Notice of Arbitration²⁴ against Argentina pursuant to the Treaty.²⁵ The parties agreed to hold arbitration hearings in Washington, D.C. under the United Nations Commission on International Trade Law rules with the International Chamber of Commerce as the appointing authority.²⁶

In arbitration, BG Group argued Argentina's enactment of laws affecting MetroGAS violated the Treaty by expropriating its investment without just compensation and by denying it fair and equitable treatment.²⁷ Argentina denied it had violated the Treaty and asserted the arbitration was without jurisdiction under the Treaty.²⁸ Argentina reasoned because BG Group was not an "investor," its interest in MetroGAS was not an "investment" and BG Group did not first submit the dispute to an Argentine court as required by the Treaty.²⁹

In December 2007, the arbitration panel unanimously found Argentina had not expropriated BG Group's investment but had denied BG Group "fair and equitable treatment."³⁰ The panel rejected Argentina's argument that it lacked jurisdiction to arbitrate, concluding BG Group was an "investor" and MetroGAS was an "investment" under the Treaty, and that by limiting court access to companies, Argentina excused BG Group's failure to first submit the dispute to a local court.³¹ The panel awarded BG Group \$185 million in damages.³²

18. Republic of Arg. v. BG Grp., PLC, 665 F.3d 1363, 1366 (D.C. Cir. 2012).

19. *Id.*

20. *BG Group, PLC*, 134 S. Ct. at 1204.

21. *Id.* (the exchange rate was roughly 3 pesos for 1 U.S. dollar, reducing profits immediately by one-third and increasing volatility because of the peso's inconsistent exchange rate).

22. *Republic of Arg.*, 665 F.3d at 1367.

23. *BG Grp., PLC*, 134 S. Ct. at 1205.

24. The proceedings were initiated on April 25, 2003. *Republic of Arg. v. BG Group, PLC*, 715 F. Supp. 2d 108, 113 (D.D.C. 2010).

25. Over 25 foreign investors initiated arbitration against Argentina regarding the new laws. See Mem. of Points and Authorities of BG Grp., PLC in Opp'n to Mot. to Vacate and in Supp. of Cross Mot. for Recognition and Enforcement and for a Pre-Judgment Bond at 2; *Republic of Arg. v. BG Group, PLC*, 715 F. Supp. 2d 108, 113 (D.D.C. 2010).

26. *Republic of Arg.*, 665 F.3d at 1367.

27. *BG Grp., PLC*, 134 S. Ct. at 1204.

28. *Id.*

29. *Id.*

30. *Id.*; see also *Republic of Arg. v. BG Grp. PLC*, 715 F. Supp. 2d 108, 114 (D.D.C. 2010).

31. *BG Grp., PLC*, 134 S. Ct. at 1204-05 (citing App. To Pet. For Cert. at 99a, 145a, 161a, 171a (No. 12-138), 2012 WL 3091067). The panel determined the 180-day stay of court decisions arising from the new measures and the exclusion of some firms from the renegotiation process "hindered" BG Group from recourse "to the domestic judiciary." As a result, the Treaty implicitly excused compliance with the local litigation requirement. *Id.* at 1205, 1212 (citing App. To Pet. For Cert. at 165 (No. 12-138), 2012 WL 3091067).

32. *Id.* at 1205.

In 2008, both parties filed for review in the District Court for the District of Columbia.³³ BG Group sought to affirm the award under the Federal Arbitration Act (FAA).³⁴ Argentina sought to vacate the award under the FAA, arguing the arbitration panel lacked jurisdiction because BG Group failed to adhere to the local litigation requirements of the Treaty.³⁵ The District Court affirmed the award, holding courts must give great deference to the determinations of the arbitration panel and the panel had not exceeded its authority in its interpretation of the local litigation requirement.³⁶ The Court of Appeals for the District of Columbia Circuit reversed; determining the interpretation and application of the local litigation requirement was an independent question of law for the courts to decide *de novo*.³⁷ The Court of Appeals held the arbitration panel erred by determining BG Group was excused from compliance with the local litigation requirement and vacated the award.³⁸

The United States Supreme Court granted certiorari and held that when a court reviews an arbitration made under a treaty, it should apply the interpretive framework developed for traditional contracts in American law.³⁹ Under this framework,⁴⁰ the Court found the local litigation requirement was a procedural precondition to arbitration and, as such, was presumptively for an arbitrator to decide.⁴¹ The Court found nothing in the Treaty that overcame that presumption, thus the judgment of the arbitrators should have been given deference by the reviewing courts.⁴² Upon deferential review, the Court determined the conclusions of the arbitration panel were lawful and within its interpretive authority.⁴³ The Court ultimately held that without explicit limitations on consent, a local litigation requirement is primarily for arbitrators to interpret and apply.⁴⁴

III. LEGAL BACKGROUND

Because a party can only be required to submit a dispute to arbitration if it has previously agreed to do so, consent is a pivotal question in arbitration cases.⁴⁵ Inherent in the question of consent is the antecedent question of whether the judge or the arbitrator should determine whether there was initial consent.⁴⁶ The distinction is significant: arbitral awards are subject to judicial review with great deference given to arbitral decisions, but questions reserved for the courts are reviewed

33. *Id.*

34. *Id.*; see also 9 U.S.C. §§ 204, 207 (2015) (providing a party can confirm an award in Federal court).

35. *BG Grp., PLC*, 134 S. Ct. at 1205; see also 9 U.S.C. § 10(a)(4) (2015) (allows the vacating of an award in Federal court when arbitrators "exceeded their powers").

36. *Republic of Arg. v. BG Grp., PLC*, 715 F. Supp. 2d 108, 121-22 (D.D.C. 2010).

37. *Republic of Arg. v. BG Grp., PLC*, 665 F.3d 1363, 1370 (D.C. Cir. 2012).

38. *Id.* at 1373.

39. *BG Grp., PLC*, 134 S. Ct. at 1201; see also *infra* notes 87-90 and accompanying text.

40. *BG Grp., PLC*, 134 S. Ct. at 1201 (courts usually look first to the plain text in order to determine whether a dispute arises out of the arbitration, or whether it is a dispute about the agreement to arbitrate).

41. *Id.* at 1204.

42. *Id.* at 1208.

43. *Id.* at 1212.

44. *Id.* at 1204.

45. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986).

46. *Republic of Arg. v. BG Grp. PLC*, 665 F.3d 1363, 1369 (D.C. Cir. 2012).

de novo.⁴⁷ Ultimately, it is the prerogative of the contracting parties to determine which issues are for arbitrators and which are to be left for courts.⁴⁸ When an agreement is silent on the matter of who primarily is to decide preliminary questions about arbitration, courts determine the parties' intent with the help of presumptions.⁴⁹

A. *The Issue of Arbitrability*

To avoid rendering arbitration a mere prelude to the cumbersome and time-consuming judicial review process, the U.S. Supreme Court has long endorsed a liberal policy favoring arbitration with limited judicial review.⁵⁰ But as a product of contract, arbitration requires party consent to establish jurisdiction.⁵¹ The Supreme Court has made clear the policy favoring arbitration does not presumptively apply to questions of "arbitrability" — whether the parties agreed to arbitrate a dispute.⁵² Thus, a court must distinguish between questions arising within the arbitration agreement — which are presumptively for arbitrators — and questions concerning the arbitrability of a dispute, which are presumptively for judges.⁵³

Whether or not the issue is about arbitrability is not always clear.⁵⁴ In *Howsam v. Dean Witter Reynolds, Inc.*, the Supreme Court clarified that not every potentially dispositive gateway question concerns arbitrability.⁵⁵ Questions of arbitrability have a limited scope containing only the kind of gateway questions that parties might expect a court to decide: "procedural" questions arising from the dispute do not concern arbitrability and should be left to the arbitrator.⁵⁶

The Court first differentiated procedural questions in *John Wiley & Sons, Inc. v. Livingston*,⁵⁷ a case in which a union and a publishing company could not agree on the status of a collective bargaining agreement concerning the rights of covered employees after a company merger.⁵⁸ The company refused to recognize the bargaining agreement and the union filed suit to compel arbitration under the collective bargaining agreement pursuant to federal law.⁵⁹ The publishing company argued the collective bargaining agreement had not survived the merger, and even if it had, the union had not complied with the necessary procedural steps to reach arbitration.⁶⁰ Thus, two questions emerged: (1) whether the court or an arbitrator

47. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 947-48 (1995).

48. *Id.* at 943.

49. *BG Grp., PLC*, 134 S. Ct. at 1206.

50. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983)).

51. *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 592 (1960).

52. *Howsam*, 537 U.S. at 83.

53. *Id.*

54. *Id.* at 83-84.

55. *Id.* at 84.

56. *Id.* at 83-84, (citing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964)). Additionally, issues concerning "allegation[s] of waiver, delay, or a like defense to arbitrability," should be left to arbitrators. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983).

57. *John Wiley & Sons*, 376 U.S. 543 (1964).

58. *Id.* at 544-46.

59. *Id.* at 545-46. The union sought to compel arbitration pursuant to § 301 of the Labor Management Relations Act. *See id.* at 544; 29 U.S.C. § 185 (2015).

60. *John Wiley & Sons, Inc.*, 376 U.S. at 546.

should decide whether the arbitration provisions survived the merger;⁶¹ and (2) whether a court or an arbitrator should determine if the procedural conditions to arbitration had been met.⁶²

In *John Wiley*, precedent dictated the duty to arbitrate was contractual; therefore, the determination of whether the duty does in fact exist is a question of arbitrability for judicial determination.⁶³ Looking next at the procedural conditions, the Court found although the conditions presented gateway questions to arbitration, the questions could not be answered without considering the merits of the dispute.⁶⁴ To avoid unnecessary and illogical forum-splitting, once it is determined parties are obligated to submit a dispute to arbitration, “‘procedural’ questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.”⁶⁵ Regarding procedural disagreements as part of the dispute and not as separate disputes served the “best accords with the usual purposes” of arbitration and federal policy.⁶⁶

Because it is not always intuitive, the Court has attempted to provide guidance on the distinction between questions that should be judicially determined and those that should be determined by arbitrators. In *First Options of Chicago v. Kaplan*, the Court determined that it is courts that decide whether arbitration clauses should be enforced upon a party who had not personally signed the document.⁶⁷ Similarly, in *AT&T Technologies, Inc. v. Communications Workers*, the Court found courts are to decide whether a particular labor-management layoff dispute falls within the arbitration clause of a collective-bargaining contract.⁶⁸ Additionally, in *Atkinson v. Sinclair Refining Co.*, the Court held that courts decide whether clauses providing for arbitration of various “grievances” covers claims for damages for breach of a no-strike agreement.⁶⁹

Conversely, in *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.*, the Court held “allegation[s] of waiver, delay, or a like defense to arbitrability” are presumptively for the arbitrator to decide,⁷⁰ as are questions regarding satisfaction of prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate.⁷¹ Additionally, the Revised Uniform Arbitration Act of 2000 states “procedural” questions include conditions precedent to arbitration such as time limits, notice, laches, and estoppel.⁷²

In sum, the case law surrounding who decides — courts or arbitrators — demonstrates a consistent aim to effectuate the use of arbitration in accordance with the consent of parties who enter the agreements.⁷³ The rationale behind the designation of questions of arbitrability to judges and procedural questions to arbitrators maintains the presumption that parties intend to align decision makers

61. *Id.* at 544.

62. *Id.*

63. *Id.* at 547.

64. *Id.* at 557.

65. *Id.*

66. *John Wiley & Sons, Inc.* 376 U.S. at 559.

67. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943-47 (1995).

68. *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 651 (1986).

69. *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 241-43 (1962).

70. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983).

71. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (quoting REVISED UNIF. ARBITRATION ACT § 6(c) cmt. 2, 7 U.L.A. 12-13 (Supp. 2002)).

72. REVISED UNIF. ARBITRATION ACT § 6(c) cmt. 2, 7 U.L.A. 12-13 (Supp. 2002).

73. *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

with their fields of relevant expertise, so as to best secure fair and expeditious resolutions of arbitration disagreements.⁷⁴

B. Bilateral Investment Treaties

BITs are negotiated agreements between two nations that protect investments by citizens of one nation who are in the territory of the other by creating rules governing the host nation's treatment of the investment and establishing dispute resolution mechanisms for alleged violations of those rules.⁷⁵ Unlike commercial treaties,⁷⁶ the primary purpose of BITs is not to facilitate trade, but rather to attract foreign investment by ensuring fair and equitable treatment.⁷⁷ BITs have emerged as an important tool for the protection and promotion of the increasingly important international economic activity of foreign investment and have increased substantially in number since the 1950s.⁷⁸

Though BITs carry the same force of any international treaty, they typically allow greater flexibility for termination, revision, or replacement. Most BITs can be terminated unilaterally or by mutual consent. The Vienna Convention allows parties to terminate their agreement by mutual consent at any time,⁷⁹ however, the rules for unilateral treaty termination are typically described in the BIT itself.⁸⁰ Most BITs have an initial term of 10 or 15 years, after which about 80% of all BITs then allow the agreement to be terminated any point.⁸¹ Additionally, BITs can be revised through amendments that modify or remove existing provisions in a treaty or add new ones.⁸²

C. Review of Arbitral Decisions

The review of arbitration awards under BITs typically must be sought pursuant to the law of the nation in which the arbitration takes place.⁸³ The New York Convention is an international convention created in 1958 that governs international arbitration.⁸⁴ For parties to the convention, it is an important tool in the

74. *Id.*

75. Kenneth J. Vandeveld, *The Economics of Bilateral Investment Treaties*, 41 HARV. INT'L L.J. 469, 469-70 (2000).

76. Friendship, Commerce, and Navigation treaties, have been around since the founding of the American Republic, and typically, these agreements provide for most-favored-nation treatment with respect to trade, mutual guarantees against discrimination, exchange of consuls, and duties of parties with respect to neutral trade in time of war. Vandeveld, *supra* note 75, at 203-04.

77. Salacuse & Sullivan, *supra* note 1, at 83.

78. *Id.* at 67 (citing U.N. Conference on Trade & Dev., *World Investment Report 2003 FDI Policies For Development: National And International Perspectives*, 89, U.N. Doc. UNCTAD/WIR/2003 (Sept. 4, 2003) (from 1959 to 2002 nearly 2200 BITs were created)).

79. Vienna Convention on the Law of Treaties art. 54(b), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

80. *World Investment Report 2013*, *supra* note 4, at 108. If not, the rules of the Vienna Convention on the Law of Treaties apply. *Id.* at 118 n.55.

81. *World Investment Report 2013*, *supra* note 4, at 109.

82. *Id.* at 108.

83. KENNETH J. VANDELDELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* 446 (2010).

84. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter *New York Convention*] (arbitrations initiated under ICSID

recognition and enforcement of foreign arbitration awards. The New York Convention applies to the “recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.”⁸⁵

In the United States, the Federal Arbitration Act⁸⁶ is an act of Congress that governs the resolution of disputes through foreign and domestic arbitration and incorporates the New York Convention.⁸⁷ The FAA and the New York Convention provide a party to arbitration may move to affirm or vacate an award in the federal court of the place of arbitration.⁸⁸ When reviewing an award made in the United States under the FAA, the federal court generally applies U.S. law.⁸⁹

Under the FAA, there are limited grounds upon which a court may vacate or overturn the decisions of an arbitration panel seated in the United States.⁹⁰ Section 9 of the FAA states a court must grant confirmation of an award unless “vacated, modified, or corrected” pursuant to sections 10 or 11.⁹¹ Section 10 provides grounds upon which a court may vacate an award, such as fraud or an arbitration panel that has exceeded its power.⁹² Section 11 provides grounds for correction, such as a material mistake.⁹³ The Supreme Court has reiterated these grounds are intended to be narrow.⁹⁴

The United Nations Commission on International Trade Law (UNCITRAL) is an important body in commercial arbitration.⁹⁵ UNCITRAL developed The Model Law on International Commercial Arbitration (Model Law) in 1985 in an effort to make the treatment of commercial arbitration consistent from one country to the next.⁹⁶ Article 8 of the Model Law provides for the enforcement of valid arbitration agreements through national courts, regardless of the location of the arbitration.⁹⁷ Article 16 grants arbitrators authority to consider their own jurisdiction, and Article 5 prescribes judicial non-intervention in proceedings.⁹⁸ The Model Law also affirms party autonomy with regard to arbitral procedures, absent an agreement between the parties.⁹⁹

An important governing regime or arbitration specific to investment treaties is the International Centre for Settlement of Investment Disputes (ICSID).¹⁰⁰ The

are generally not subject to the New York Convention or national arbitration legislation); *see also* GARY BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 40 (2012).

85. *New York Convention*, *supra* note 84, at art. I(1) (1958).

86. 9 U.S.C. §§ 1-307 (2014).

87. *Id.* at §§ 201-208.

88. *Id.* at §§ 9, 10.

89. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 7, 1959, Art. V(1)(e), 1970 WL 104417.

90. 9 U.S.C. §§ 9-11.

91. *Id.* at § 9.

92. *Id.* § 10.

93. *Id.* § 11.

94. *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008).

95. GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 115 (2009) [hereinafter BORN, INT’L COMMERCIAL ARBITRATION].

96. GARY BORN, INTERNATIONAL ARBITRATION: LAW & PRACTICE 23 (2012) [hereinafter BORN, LAW & PRACTICE].

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 40.

ICSID Convention is a specialized international treaty¹⁰¹ that facilitates settlement investment disputes between consenting parties.¹⁰² If parties agree to submit a dispute to ICSID arbitration, the ICSID Convention provides a stand-alone legal framework generally not subject to the New York Convention or other arbitration governing legislation.¹⁰³ If parties agree to submit a dispute to ICSID arbitration, it will be administered wholly by ICSID and almost entirely detached from national law and national courts.¹⁰⁴

D. Interpreting Treaties

Like arbitration under traditional contracts, arbitration between a State and a foreign investor under an investment treaty is based on consent.¹⁰⁵ Arbitration under a treaty is unique because consent does not come directly from the parties in arbitration (state and foreign investors), but instead comes from the multiple states that were signatories to the original treaty.¹⁰⁶ Consequently, review of arbitration awards under investment treaties includes interpretation of treaties.

In *Air France v. Saks*, the U.S. Supreme Court determined treaties should be interpreted more liberally than private agreements given their nature and purpose.¹⁰⁷ This purpose includes determining a treaty's meaning by looking beyond the written words: to the history of the treaty, the negotiations involved, and the practical interpretation adopted by the parties.¹⁰⁸ Despite this liberal interpretive approach, a reviewing court should also begin its analysis by reviewing the plain text and context of the treaty.¹⁰⁹ A court must ultimately give the words of the treaty "a meaning consistent with the shared expectations of the contracting parties."¹¹⁰ The Vienna Convention on the Law of Treaties provides similar guidance, directing courts to begin with the plain language of a treaty when interpreting its meaning.¹¹¹ Although courts may find such guidance helpful, the extent to

101. There were 151 contracting parties as of April 18, 2015. *Id.* at 412 (citing *List of Contracting States and Other Signatories of the Convention*, ICSID (April 18, 2015), <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf>).

102. BORN, LAW & PRACTICE, *supra* note 96, at 412.

103. *Id.* at 40.

104. *Id.* at 412 (citing International Centre for Settlement of Investment Disputes Convention, Oct. 14, 1966, Arts. 41, 52, 53, available at https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf; C. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 516–24 (2d ed. 2009)).

105. Brief for the United States as Amicus Curiae in Support of Vacatur and Remand, BG Grp., PLC v. Republic of Arg., 134 S. Ct. 1198 (2014) (No. 12-138), 2013 WL 4737184, *15 (citing CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 219 (2008); Christoph Schreuer, *Consent to Arbitration*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 830, 831 (Peter Muchlinski et al. eds., 2008); VANDELDE, *supra* note 83, at 433; JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 385 (2010)).

106. *Id.*

107. *Air Fr. v. Saks*, 470 U.S. 392, 396 (1985) (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943)).

108. *Id.*

109. *Id.* at 397.

110. *Id.* at 399 (citing *Reed v. Wisner*, 555 F.2d 1079 (2d Cir. 1977)).

111. *Jogi v. Voges*, 480 F.3d 822, 833 (7th Cir. 2007) (citing Vienna Convention, *supra* note 79, at art. 26) (the United States is a signatory to the treaty but has not ratified the treaty; nevertheless, the treaty's instruction is useful in determining international norms).

which treaties should be evaluated differently from traditional contracts is not always clear.

IV. INSTANT DECISION

In the instant case, the U.S. Supreme Court reversed the Court of Appeals for the District of Columbia Circuit, and found that arbitrators' jurisdictional determinations are lawful.¹¹² In doing so, it established the guidelines for interpreting provisions in ordinary contracts should also be used to interpret and apply a treaty's gateway provisions concerning arbitration.¹¹³ Under this framework, the local litigation requirement was a matter for arbitrators to interpret, entitled to judicial deference.¹¹⁴

A. Procedural Precondition to Arbitration — The Majority Opinion

The Court began its analysis by reviewing the Treaty as if it were an ordinary contract.¹¹⁵ Citing *Howsam*, it determined the requirement of local litigation was a procedural question of arbitrability, as the provision determined *when* the duty to arbitrate began, not *whether* such a duty existed.¹¹⁶ Furthermore, no explicit language deposed the presumption that the provision, as a procedural precondition, should be interpreted and applied by arbitrators.¹¹⁷

Under ordinary contract law, jurisdiction belonged to the arbitrators; however, the appropriateness of making such an application to a treaty remained in question.¹¹⁸ A treaty, according to the Court, is essentially a contract between nations, and like an ordinary contract, the foundation of its interpretation should be the intent of the parties.¹¹⁹ Under the FAA, a court should apply the framework supplied by U.S. law; because the local litigation requirement was not clearly stated as a condition of consent to arbitration, the traditional contract framework was appropriate.¹²⁰ The Court reserved the D.C. Circuit's holding that the traditional contract framework would be appropriate when interpreting a provision clearly stated as a condition of consent.¹²¹ As a result, the fact the document was a treaty did not make a critical difference to the high Court's analysis.¹²²

The Court next searched for other evidence in the Treaty that would alter the presumption the parties intended threshold arbitration issues to be left to the arbi-

112. *BG Grp., PLC v. Republic of Arg.*, 134 S. Ct. 1198, 1213 (2014).

113. *Id.* at 1210.

114. *Id.*

115. *Id.* at 1206.

116. *Id.* at 1207.

117. *Id.*

118. *BG Grp., PLC* 134 S. Ct. at 1208.

119. *Id.* (citing *Air Fr. v. Saks*, 470 U.S. 392 (1985)).

120. *Id.* at 1208-09; *see also New York Convention*, *supra* note 84, at art. V(1)(e) (an award can be "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made"); VANDEVELDE, *supra* note 83, at 446 (arbitration awards under treaties are "subject to review under the arbitration law of the state where the arbitration takes place"); CHRISTOPHER DUGAN ET AL., *INVESTOR-STATE ARBITRATION* 636 (2008) ("[T]he national courts and the law of the legal status of arbitration control a losing party's attempt to set aside [an] award.").

121. *BG Grp., PLC*, 134 S. Ct. at 1209.

122. *Id.* at 1208.

trators.¹²³ No evidence indicated either of the parties had an intent contrary to the ordinary presumptions, and the text and structure of the litigation requirement made clear it was a procedural condition precedent to arbitration.¹²⁴ The Treaty did, however, authorize the use of international arbitration associations¹²⁵ whose rules granted arbitrators the authority to determine provisions like the local litigation provision.¹²⁶ Furthermore, the majority of international authorities agreed the local litigation provision was a procedural precondition to arbitration.¹²⁷ Finding the ordinary presumption was not overcome, the Court held interpretation and application of the provision should primarily be left to the arbitrator and lower courts should have reviewed the arbitrator's decision with considerable deference.¹²⁸

Having determined the arbitrator's decision should be given deference; the Court lastly reviewed the decision of the arbitrators to excuse BG Group's non-compliance with the local litigation requirement.¹²⁹ Argentina argued the arbitration panel exceeded its authority even if the standard was one of high deference.¹³⁰ The Court rejected Argentina's argument and found the arbitrators' conclusion the litigation provision was not an absolute impediment to arbitration was within the arbitral forum's interpretative discretion.¹³¹ Ultimately, this holding affirmed the arbitrators' initial conclusion that Argentina's actions precluded BG Group's obligation to adhere to the local litigation provision was not barred by the Treaty.¹³²

B. Parties May Condition Consent — The Concurring Opinion

Justice Sotomayor agreed with the majority that the provision was a procedural precondition to arbitration, but wrote separately to address the majority's dicta regarding the interpretation of treaties containing explicit conditions of con-

123. *Id.* at 1210.

124. *Id.* “[The Treaty] says that a dispute ‘shall be submitted to international arbitration’ if ‘one of the Parties so requests,’ as long as ‘a period of eighteen months has elapsed’ since the dispute was ‘submitted’ to a local tribunal and the tribunal ‘has not given its final decision.’ . . . It determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all.” *Id.* at 1207 (quoting Arg.-U.K. Agreement for Investments, *supra* note 10, at art. 8(2)).

125. Arg.-U.K. Agreement for Investments, *supra* note 10, at art. 8(3) (providing the agreement would be enforced pursuant to the International Centre for the Settlement of Investment Disputes (ICSID) as well as the United Nations Commission on International Trade Law (UNCITRAL)).

126. BG Grp., PLC v. Republic of Arg., 134 S. Ct. 1198, 1210 (2014); *accord*, U.N. Commission on Int'l Trade Law, *UNCITRAL Arbitration Rules*, art. 23(1), G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Jan. 10, 2011) (“[the] arbitral tribunal shall have the power to rule on its own jurisdiction”); Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 41(1), Mar. 18, 1965, 575 U.N.T.S. 159 (providing that the “[t]ribunal shall be the judge of its own competence”).

127. *BG Grp., PLC*, 134 S. Ct. at 1211 (“A substantial body of arbitral authority from investor-state disputes concludes that compliance with procedural mechanisms in an arbitration agreement (or bilateral investment treaty) is not ordinarily a jurisdictional prerequisite” (quoting BORN, *INT'L COMMERCIAL ARBITRATION*, *supra* note 95, at 842)).

128. *Id.* at 1210.

129. *Id.* at 1212; *see also* 9 U.S.C. § 10(a)(4) (2014) (providing that an award may be vacated “where arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made”).

130. *BG Grp., PLC*, 134 S. Ct. at 1212.

131. *Id.*

132. *Id.* at 1213.

sent.¹³³ Sotomayor argued that if a clear condition of consent¹³⁴ was placed on a seemingly procedural treaty provision it would likely raise questions of arbitrability that would need to be decided by a court.¹³⁵ In her view, consent is “especially salient in the context of bilateral investment treaties” because they involve agreements between a nation and an unknown class of investors, rather than two known parties.¹³⁶ Explicit language may demonstrate a nation reasonably wished to create conditions that had to be satisfied before submitting its sovereign decisions to a foreign arbitration panel.¹³⁷ If the provision at issue were clearly labeled a condition to the consent of the parties, it would change the analysis to a determination of whether the parties intended the requirement to be interpreted by a court or an arbitrator.¹³⁸

C. Condition of Consent to Arbitration — The Dissenting Opinion

Chief Justice Roberts, joined by Justice Kennedy, disagreed that the litigation provision was merely a procedural precondition to arbitration.¹³⁹ In dissent, they argued the investment treaty could not constitute an agreement to arbitrate because no investor was a party to the Treaty.¹⁴⁰ Instead, the treaty was merely an *offer* by the signatory nations to arbitrate, and no agreement was created until the investor submitted the dispute in accordance with the local litigation requirement.¹⁴¹

The dissent began its analysis by considering the plain language and purpose of the treaty.¹⁴² Of particular importance was the fact the “arbitration clause” in the treaty was not a stand-alone provision, but was rather a subordinate part of a broader dispute resolution provision.¹⁴³ The arbitration provision provided three routes to arbitration: two through local litigation, and one through mutual agreement.¹⁴⁴ The alternative routes to arbitration demonstrated Argentina did not intend the provision to be an existing agreement, but rather an agreement to be formed once a foreign investor satisfied the conditions.¹⁴⁵ Another arbitration tribunal¹⁴⁶ had also reached this conclusion about the local litigation require-

133. *Id.* (Sotomayor, J., concurring).

134. *Id.* at 1214. “Consider, for example, the United States–Korea Free Trade Agreement . . . includes a provision explicitly entitled ‘Conditions and Limitations on Consent of Each Party.’ That provision declares that ‘[n]o claim may be submitted to arbitration’ unless a claimant first waives its ‘right to initiate or continue before any administrative tribunal or court . . . any proceeding with respect to any measure alleged to constitute a breach’ under another provision of the treaty.” *Id.* (quoting Free Trade Agreement Between The United States of America and the Republic of Korea, U.S.–S. Kor., art. 11.18, June 30, 2007, available at https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file587_12710.pdf).

135. *Id.* at 1213 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)).

136. *BG Grp., PLC*, 132 S. Ct. at 1213.

137. *Id.* at 1214.

138. *Id.*

139. *Id.* at 1215 (Roberts, C.J., dissenting).

140. *Id.* at 1216.

141. *Id.*

142. *BG Grp., PLC*, 134 S. Ct. at 1215.

143. *Id.* at 1216–17.

144. *Id.* at 1217.

145. *Id.*

146. See *ICS Inspection & Control Servs. Ltd. v. Argentine Republic*, Case No. 2010–9, Award on Jurisdiction, ¶ 262 (Permanent Court of Arbitration 2012), <http://www.italaw.com/documents/>

ment.¹⁴⁷ The dissent rebuffed the majority's finding of a lack of explicit language dispositive in determining the litigation requirement could not be a condition to consent. Other terms in the Treaty also clearly constituted conditions¹⁴⁸ even though not explicitly labeled.¹⁴⁹

Argentina's status as a sovereign state was further persuasion the local litigation requirement was a condition on consent and not a simple procedural precondition.¹⁵⁰ It was no light matter for a state to waive sovereign immunity and allow sovereign decisions to be reviewed by foreign adjudicators.¹⁵¹ This is especially true when the reviewing body is neither domestic nor judicial.¹⁵² The dissent concluded that, within this context, the United Kingdom and Argentina intended to require special limitations on the use of arbitration by foreign investors.¹⁵³ Local litigation requirement is an important limitation because it gives the host country the opportunity to render a decision on the dispute first, to narrow the range of issues before arbitration, or to induce a settlement and eliminate the need for arbitration altogether.¹⁵⁴

Since the Treaty's local litigation requirement was a condition of consent to arbitrate, review was to be *de novo*.¹⁵⁵ The Court found that logically an arbitrator could not decide if the parties have consented if the arbitrators' authority itself depends on the decision.¹⁵⁶ Under *Howsam*, since the consent of the parties was in controversy, it is for the courts to decide whether consent existed, or else arbitrators risk forcing parties to arbitrate a dispute.¹⁵⁷

Ultimately, the dissent found the Court of Appeals was correct to determine the case should be reviewed *de novo*; but also disagreed with the D.C. Circuit's conclusion that BG Group did not submit its dispute to the local courts first, and thereby invalidated the award by the arbitration panel.¹⁵⁸ A "leading treatise" states an offeree's failure to comply with a condition will not negate an action if failure to comply is the offeror's fault.¹⁵⁹ The dissent determined the case should be remanded to the Court of Appeals to determine *de novo* whether this principle was incorporated into the Treaty.¹⁶⁰ As a result, the opinions of both the majority

ICS_v_Argentina_AwardJurisdiction_10Feb2012_En.pdf. ("Not only has the Respondent specifically conditioned its consent to arbitration on a requirement not yet fulfilled, but the Contracting Parties to the Treaty have expressly required the prior submission of a dispute to the Argentine courts for at least 18 months, before a recourse to international arbitration is initiated. The Tribunal is simply not empowered to disregard these limits on its jurisdiction.")

147. *BG Grp., PLC*, 134 S. Ct. at 1218.

148. Must be a foreign investor, must have a treaty claim, and must be suing another party to the treaty. *Id.*

149. *Id.*

150. *Id.* at 1219.

151. *Id.*

152. JESWALD SALACUSE, *THE LAW OF INVESTMENT TREATIES* 137 (2010) ("Granting a private party the right to bring an action against a sovereign state in an international tribunal regarding an investment dispute is a revolutionary innovation" whose "uniqueness and power should not be overlooked.")

153. *BG Grp., PLC*, 134 S. Ct. at 1219.

154. *Id.* at 1221.

155. *Id.* (citing *Adams v. Suozzi*, 433 F.3d 220, 226–28 (2d Cir. 2005)).

156. *Id.*

157. *Id.* (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002)).

158. *Id.* at 1223.

159. *BG Grp., PLC*, 134 S. Ct. at 1224 (citing RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 5:14 (4th ed. 2013)).

160. *Id.*

and dissent may have resulted in the same outcome for the parties; nevertheless, the impact of each decision on the law could hardly be more divergent.

V. COMMENT

The dispute between BG Group and Argentina presents a unique and confounding question of first impression before the U.S. Supreme Court. The controversy contained many elements similar to commercial arbitration disputes, but also presented unique considerations like treaty interpretation and sovereignty. Unsurprisingly, the striking characteristics of the instant decision are the Court's unambiguous attempt to bring clarity to the very muddled topic and its desire to strongly affirm policies favoring arbitration autonomy. Although the decision in *BG Group, PLC* should only apply domestically, it may ultimately have an effect on arbitration globally, given the popularity of the United States as the seat of arbitration as well as the level of influence wielded by the American Supreme Court.¹⁶¹

A. Framing the Analysis

The Supreme Court and the Court of Appeals for the D.C. Circuit relied on much the same case law, yet announced different holdings. A significant factor in the courts' incongruous outcomes was the starting analyses point. The Supreme Court began by reviewing the dispute as if it were a contract between private parties.¹⁶² It distinguished substantive and procedural questions of arbitrability and respective presumptions as it previously had in *Howsam*.¹⁶³ Applying these presumptions, the Court analyzed the parties' intent using the proper presumption.¹⁶⁴ On the other hand, the Appellate Court left the lower court's discretion undisturbed unless clear evidence of intent to the contrary existed.¹⁶⁵ The Appellate Court devoted the majority of its analysis to the determination whether the parties intended the question of arbitrability to be answered by an arbitrator.¹⁶⁶ The Appellate Court focused on how *John Wiley* and *Howsam* differed from the present dispute.

B. Aligning International and Domestic Arbitration Decisions

BG Group, PLC signals the Court's aligning of BIT interpretative framework with commercial arbitration provisions. The Supreme Court rejected the narrow application and muddled distinction of *John Wiley* and *Howsam*, choosing instead to recognize the similarities between commercial and investment arbitration prior to analyzing differences.¹⁶⁷ Because it declined to adopt the dissent's view that a new framework should be developed to allow for greater judicial review of awards granted under BITs, the Court in *BG Group, PLC* makes an important statement

161. See BORN, INT'L COMMERCIAL ARBITRATION, *supra* note 95, at 2063.

162. *BG Grp., PLC*, 134 S. Ct. at 1206.

163. *Id.* at 1207.

164. *Id.*

165. Republic of Arg. v. BG Grp., PLC, 665 F.3d 1363, 1369-70 (D.C. Cir. 2012).

166. *Id.*

167. *Id.*

regarding the importance of autonomy in international arbitration tribunals. This conclusion affirmed the longstanding recognition and enforcement of a liberal policy favoring arbitration and endorses a broad application of *Howsam* in determining the scope of judicial review of arbitration decisions.¹⁶⁸

C. Possible Negative Impacts on Sovereigns

As the dissent notes, there are legitimate reasons a State might desire an investor to first file a dispute in a local court, while still giving investors the absolute assurance that they have recourse in arbitration.¹⁶⁹ States have increasingly sought to resolve BIT disputes domestically.¹⁷⁰ A recent study on Investor-State Dispute settlements (ISDS) found “70% of recent treaties explicitly mention domestic judicial review as a dispute settlement mechanism in their ISDS clauses. Many also seek to coordinate the use of domestic judicial review with investor recourse in international arbitration.”¹⁷¹ The trend favoring international arbitration as recourse to domestic judicial procedures may demonstrate that local review provisions are important parts of states’ consent to arbitrate.¹⁷² Although the Court’s deferential approach may prove beneficial for investors and courts through increased clarity and judicial efficiency, it carried the potential to also aggravate some systemic deficiencies in the regime of investor-state dispute settlements.¹⁷³

The 2013 World Investment Report, published by the United Nations Conference on Trade and Development, identifies several “systemic deficiencies” existing in the dispute settlement regime between investors and the states that may be impacted by the Court’s holding in *BG Group, PLC*.¹⁷⁴ First, it is questionable whether arbitration panels can be entrusted with evaluating the validity of a States’ acts, especially when such questions involve issues of policy.¹⁷⁵ Sovereignty allows a nation to maintain its own economic affairs, handle financial crises, and control its own development.¹⁷⁶ In the wake of the recent world financial crisis, economic self-determination has become an especially cogent part of the argument in favor of national sovereignty.¹⁷⁷ Both the dissent and concurrence bring to light the weightiness of a sovereign’s decision to grant private adjudica-

168. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

169. *Id.*

170. David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* 65 (Org. for Econ. Co-Operation & Dev., Working Papers on Int’l Inv. No. 2012/03, 2012), available at http://www.oecd.org/investment/investment-policy/WP-2012_3.pdf.

171. *Id.* See, e.g., Arg.-U.K. Agreement for Investments, *supra* note 10, at art. 8(2) (providing claimants the ability to file in domestic court before moving to arbitration).

172. *Id.*; see also *BG Grp., PLC v. Republic of Arg.*, 134 S. Ct. 1198, 1214 (2014).

173. *World Investment Report 2013*, *supra* note 4, at 112.

174. *Id.*

175. *Id.*

176. Duncan E. Williams, *Policy Perspectives on the Use of Capital Controls in Emerging Market Nations: Lessons from the Asian Financial Crisis and a Look at the International Legal Regime*, 70 *FORDHAM L. REV.* 561, 601 (2001).

177. Robert M. Ziff, *The Sovereign Debtor’s Prison: Analysis of the Argentine Crisis Arbitrations and the Implications for Investment Treaty Law*, 10 *RICH. J. GLOBAL L. & BUS.* 345, 348 (2011).

tors “a power it typically reserves to its own courts, if it grants it at all: the power to sit in judgment on its sovereign acts.”¹⁷⁸

The claims against Argentina raise important questions about the balance that needs to be struck between (1) BITs’ guarantee of a stable climate for foreign investors and, (2) a sovereign’s ability to respond to economic crises with independence and in good faith.¹⁷⁹ As the dissent noted, the weighty public responsibilities of a sovereign will affect the expectations regarding obligations under a BIT; likewise, the tumultuous nature of world economic conditions should cause investors’ expectations to incorporate the possibility that extraordinary circumstances may necessitate state regulatory action.¹⁸⁰ In the instant decision, the Court elected not to distinguish this unique attribute of sovereign parties and instead extended the same presumptions utilized in commercial arbitration disputes.¹⁸¹ This will likely put some sovereign nations in an uneasy position, as they must more carefully weigh the economic incentives of BITs against possible restrictions on economic planning and policy implementation.

Second, sovereign nations’ ability to weigh the important consequences of BITs is undercut by inconsistent findings by arbitral tribunals.¹⁸² Divergent legal interpretations of identical or similar treaty provisions as well as differences in the assessment of the merits of cases create uncertainty that may well be compounded by the instant decision.¹⁸³ Indeed, arbitral tribunals have already rendered inconsistent decisions regarding the effect of the local litigation requirement and similar provisions as the dissent pointed out.¹⁸⁴ No decision by the Supreme Court would provide complete consistency given the many operative legal frameworks around the globe; however, a decision providing for greater judicial oversight would at least produce greater consistency to parties choosing to arbitrate in the United States.

Though inconsistency is to some degree the nature of arbitration, the concern is especially heightened when the inconsistency concerns the consent of the parties to arbitrate. By determining local litigation provisions are presumptively for arbitrators, States may now be subjected to differing interpretations of consent to arbitrate. As a result, local litigation requirements will be thrown into uncertainty as they are at times deemed necessary for consent, and other times determined waivable. Such a result is not simply undesirable, but also in conflict with traditional views that treaties should be interpreted liberally to meet the challenges of State agreements.¹⁸⁵

178. *BG Grp., PLC v. Republic of Arg.*, 134 S. Ct. 1198, 1220 (2014) (Roberts, C.J., dissenting).

179. Ziff, *supra* note 177, at 354-55.

180. *Id.* at 361.

181. *BG Grp., PLC*, 134 S. Ct. at 1208.

182. *World Investment Report 2013*, *supra* note 4, at 112.

183. *Id.*

184. *BG Grp., PLC* 134 S. Ct. at 1218; *see also* ICS Inspection & Control Servs. Ltd. v. Argentine Republic, PCA Case No. 2010-9, Award on Jurisdiction, ¶ 262 (Permanent Court of Arbitration 2012), http://www.italaw.com/documents/ICS_v_Argentina_AwardJurisdiction_10Feb2012_En.pdf (the panel concluded it had no jurisdiction until the local litigation provision was fulfilled); *Daimler Fin. Servs. AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, ¶¶ 193, 194 (ICSID Trib. 2012), <http://www.italaw.com/sites/default/files/case-documents/ita1082.pdf>; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶ 116 (ICSID Trib. 2008), <http://www.italaw.com/sites/default/files/case-documents/ita0907.pdf>.

185. *See* *Air Fr. v. Saks*, 470 U.S. 392, 396 (1985); Vienna Convention, *supra* note 79.

Third, an increasing number of challenges to arbitrators may indicate that disputing parties perceive them as biased or predisposed.¹⁸⁶ Particular concerns have arisen from perceived tendencies of each disputing party to appoint individuals sympathetic to their own case; concerns amplified by arbitrators' interest in being re-appointed in future cases and a tendency to serve as arbitrators in some cases and counsel in others.¹⁸⁷ It appears over 50% of ISDS arbitrators have acted as counsel for investors in other ISDS cases, while it has been estimated about 10% of ISDS arbitrators acted as counsel for States in other cases.¹⁸⁸ Such statistics may also imply a predisposition favoring investors: at the end of 2012, 31% of ISDS cases ended in favor of the investor and 27% were settled.¹⁸⁹ Additionally, ICSID tribunals upheld investor claims in approximately 46% of cases, with only 28% of cases seeing investor claims dismissed.¹⁹⁰

Such concerns hold a potential impact for the perceived legitimacy of international arbitration: over the past decade, three States — Bolivia, Ecuador, and Venezuela — have withdrawn from ICSID, claiming investment arbitration erodes sovereignty while favoring investors.¹⁹¹ These governments are not alone in their criticisms of the current international arbitration framework.¹⁹² Even proponents of investment arbitration like the United States and Canada have revisited their model BITs to limit the scope of investor protections.¹⁹³

D. Possible Future Effects

Despite the discontent of some sovereigns,¹⁹⁴ the instant decision is likely to maintain the United States' position as a leader in hosting international arbitration tribunals.¹⁹⁵ In a system where autonomy is fundamental, leaving responsibility in the hands of the parties and arbitral governance regimes is perhaps imperative to its survival. As UNCITRAL and other groups develop solutions to the “systemic deficiencies” in ISDS, *BG Group, PLC* may well be seen internationally as an important instance of judicial restraint.

186. *World Investment Report 2013*, *supra* note 4, at 112; *see also* Gaukroder & Gordon, *supra* note 170, at 65.

187. *World Investment Report 2013*, *supra* note 4, at 112.

188. Gaukroder & Gordon, *supra* note 170, at 65.

189. *World Investment Report 2013*, *supra* note 4, at 111.

190. *The ICSID Caseload - Statistics*, Issue 2014-2, ICSID 14 (June 30, 2014), http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2015/01/12/000442464_20150112143506/Rendered/PDF/936220NWP0Box30ats020140200English0.pdf.

191. BORN, LAW & PRACTICE, *supra* note 96, at 412; *see also* ICSID, *List of Contracting States and Other Signatories of the Convention*, (April 18, 2015), <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf>.

192. *See* An Open Letter from Lawyers to the Negotiators of the Trans-Pacific P'Ship Urging the Rejection of the Investor-State Dispute Settlement (May 8, 2012), *available at* <http://www.tpplegal.wordpress.com/open-letter>.

193. *See* 2012 U.S. MODEL BILATERAL INVESTMENT TREATY, *available at* <http://www.state.gov/documents/organization/188371.pdf>. Canada also maintains a “Model Foreign Investment and Protection treaty” *available at* <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf>.

194. *See supra* notes 191-93 and accompanying text.

195. *See* BORN, INT'L COMMERCIAL ARBITRATION, *supra* note 95.

The instant decision will likely serve to impose a clear rule that will require parties to state their intent “clearly and unmistakably.”¹⁹⁶ Unfortunately, the court’s failure to conclusively clarify what language demonstrates a clear intent to reserve consent will certainly add some uncertainty to the drafting process. Additionally, the instant decision may have some consequences for investors as States have no choice but to restrict paths to international arbitration if they want to maintain a consistently enforceable local litigation provision.¹⁹⁷ Although *BG Group, PLC* refused to find enough distinction in the fact the creation of a BIT is not manifested between contesting parties to warrant abandonment of the traditional contract framework, it does not change the fact investors are not present when BITs are formed. As a result, investors may see further-restricted paths to arbitration, but no voice in the BIT drafting process to oppose these restrictions.¹⁹⁸

VI. CONCLUSION

The result in *BG Group, PLC* demonstrates the Court’s desire to sustain arbitration as an effective and independent means of resolving disputes. The Court displayed an inclination to limit the influence of the judiciary on the process of BIT arbitration, recognizing the important position of BITs in global commerce and the prominence of the United States.¹⁹⁹ Ultimately, the Court aligned the interpretive framework of domestic and international arbitration review in an effort to simplify review for courts and better inform stakeholders to the level of involvement of the judicial system in BITs that contain arbitration provisions.²⁰⁰

Though the effect of this decision is still somewhat unclear, it will likely be met with divergent reactions. Some States may see the decision as an affront to national sovereignty and as an aggravation to some systemic deficiencies in the ISDS regime.²⁰¹ As a result, these States may regard the system as less legitimate and attempt to restrict investor’s accessibility to arbitration through BIT revision.²⁰² Such a result would be injurious to investors who have no voice in the process and could ultimately decrease mutually beneficial investment. Conversely, many parties might also see the Court’s deferential approach as beneficial to the arbitration process via increased clarity and judicial efficiency.²⁰³ In this way, the decision may be seen as an important instance of judicial restraint — upholding the foundational aspect of autonomy in arbitration — and leaving ISDS development in the hands of parties and arbitral governance regimes.

196. *BG Grp., PLC v. Republic of Arg.*, 134 S. Ct. 1198, 1222-23 (2014) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

197. See *supra* notes 182-85 and accompanying text.

198. See BORN, *LAW & PRACTICE*, *supra* note 96, at 416-17.

199. See *supra* notes 1-4, 161 and accompanying text.

200. See *supra* notes 162-68 and accompanying text.

201. See *supra* notes 174-78 and accompanying text.

202. See *supra* notes 186-9 and accompanying text.

203. See BORN, *LAW & PRACTICE*, *supra* note 96, at 419.