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Read Between the Lines: Considering the Party Agreement When Determining Arbitrability in Bilateral Investment Treaties

*Republic of Argentina v. BG Group PLC*¹

I. INTRODUCTION

Considering the recent growth of bilateral and multilateral investment treaties, it should be no surprise that disputes between parties to such agreements have become an almost common occurrence.² Generally, many of these treaty agreements contain a wide variety of dispute resolution mechanisms, including arbitration agreements, while others present more limited options to the parties.³ In *Republic of Argentina v. BG Group PLC*, the arbitration agreement between the parties came with a preconditional string attached which led to intense litigation.⁴ Despite a curious past, the *BG Group* decision ultimately rested on one of the pillars of arbitration itself: party autonomy. Paradoxically, the appellate court's decision in *BG Group* to overturn the district court and the arbitration tribunal arguably strengthened the institution of arbitration rather than weakening it, as many international arbitration proponents have opined.⁵ Without party autonomy, arbitration itself might cease to exist as we know it.⁶

This note will discuss the impact party autonomy and limited judicial review of arbitral awards have on the issue of arbitrability, concluding that parties should be held to their agreement despite strict judicial review limitations. It will also discuss the implications of *BG Group* for the manifest disregard of law doctrine. Furthermore, this note will also attempt to examine the future ramifications this decision may have on other courts and arbitration panels facing a similar issue. It will primarily focus on the role of party autonomy in arbitration and how such party interest analysis *should* and *does* supersede other legal issues in arbitration.

1. 665 F.3d 1363 (D.C. Cir. 2012).

2. See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1523 (2005).

3. *Id.* at 1540-41.

4. *Id.*; see generally *Republic of Argentina v. BG Group PLC*, 764 F. Supp. 2d 21, 24 (D.D.C. 2011), rev'd, 665 F.3d 1363 (D.C. Cir. 2012); *Republic of Argentina v. BG Group PLC*, 715 F. Supp. 2d 108, 113 (D.D.C. 2010), rev'd, 665 F.3d 1363 (D.C. Cir. 2012).

5. Brief for BG Group PLC as Amici Curiae Supporting Petitioner, *Republic of Argentina v. BG Group PLC*, 665 F.3d 1363 (D.C. Cir. 2012) (No. 12-138), 2012 WL 3805768 (U.S.).

6. See, e.g., J.S. McClendon and R.E. Goodman, *INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 3* (Brill Acad. Publishers 1986). The authors state that, "[t]he most obvious advantage [of arbitration] is party autonomy resulting from the fact that arbitration is the creature of a contract between the parties." *Id.*

II. FACTS AND HOLDING

On December 11, 1990, the Republic of Argentina (Argentina) and the United Kingdom signed the Bilateral Investment Treaty (“the Treaty”).⁷ The Treaty became effective February 19, 1993 after Argentina implemented economic reforms aimed at reducing their public debt and inflation.⁸ In Article 8(2) of the Treaty, the two parties agreed to an international arbitration provision to govern investment disputes.⁹ The arbitration agreement could only be invoked once a preconditioned eighteen-month waiting period had elapsed.¹⁰ Article 8(3) included more specific arbitration provisions, such as utilizing UNCITRAL rules.¹¹

In early 1992,¹² Argentina privatized its state-owned gas transportation and distribution company, Gas del Estrado, and ultimately split the company into two transportation companies and eight distribution companies.¹³ One of the new distribution companies, MetroGAS, was granted a thirty-five year exclusive license to distribute gas in the city of Buenos Aires as well as the surrounding metropolitan area.¹⁴ BG Group PLC (BG Group), a British corporation, invested directly in MetroGAS, and by 1998 owned a 45.11% share in the Argentine gas distribution company.¹⁵

During late 2001 and early 2002, a dispute arose between Argentina and BG Group amidst a serious downturn in Argentina’s economy.¹⁶ In response to this economic collapse, Argentina enacted several measures to mitigate the financial

7. Republic of Argentina v. BG Group PLC, 65 F.3d 1363, 1366 (D.C. Cir. 2012).

8. *Id.*

9. *Id.* Article 8(2) of the Treaty sets requirements by which an investment dispute arising out of Article 8(1) may go to international arbitration including: “(a) if one of the Parties so requests, in any of the following circumstances: (i) where, *after a period of eighteen months has elapsed* from the moment when the dispute was submitted to the 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; [or](b) where the Contracting Party and the investor of the other Contracting Party have so agreed.” *Id.* (quoting language from Art. 8(2) of the Treaty (emphasis added)).

10. *Id.*

11. *Id.* Article 8(3) provides “that if, after three months from written notification of the claim, the parties to the dispute are unable to agree on one of the described arbitration procedures, then ‘the Parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law [“UNCITRAL Rules”],’ although they can modify these rules.” *Id.* (quoting language from Art. 8(3)).

12. Andres Gomez-Lobo & Vivien Foster, *The 1996-97 Gas Price Review in Argentina*. WORLD BANK (1999), <https://openknowledge.worldbank.org/handle/10986/11493>.

13. *BG Group*, 665 F.3d at 1366. Argentina also instituted a 1:1 fixed parity between the Argentine peso and the U.S. dollar that would later be subject to the enactments Argentina passed during economic distress. *Id.* at 1366-67.

14. *Id.* at 1366. The license “provided that tariffs would be calculated in U.S. dollars and expressed in pesos...[a] provision of [the] license provided that adjustments to tariffs would be made every six months for inflation, in accordance with the... (“PPI”). MetroGAS was entitled to review of its tariffs every five years to ensure reasonable returns.” *Id.*

15. *Id.* at 1366-67. BG Group owned a 54.67% share in Gas Argentino, S.A. (GASA), which owned 70% of MetroGAS. *Id.* at 1366.

16. *Id.* at 1367. The economic downturn in Argentina involved a “collapse of Brazilian currency, a run on Argentine banks, and the withholding of a billion dollar loan installment by the International Monetary Fund.” *Id.*

damage.¹⁷ Most notably, Argentina adopted Decree 214/02, Article 12, also known as the Emergency Law, on March 2, 2002.¹⁸ This measure provided for a 180-day stay, regarding compliance with injunctions and execution of final judgments in lawsuits brought involving the Emergency Law's impact on the financial system.¹⁹ Eight months after the prescribed stay had expired, BG Group filed a notice of arbitration pursuant to Article 8(3) of the Treaty.²⁰ Subsequently, because BG Group was unable to agree with Argentina on an alternative forum or procedure, it submitted to arbitration governed by UNCITRAL Rules.²¹ BG Group argued that compliance with the eighteen month waiting period prior to commencing arbitration as prescribed in Article 8(1)²² and Article 8(2)²³ of the Treaty would require an estimated six years to resolve in Argentina state courts, and therefore argued that it was "senseless" to uphold the provisions.²⁴ BG Group also argued that customary international law did not require the exhaustion of local remedies and further reasoned that Article 3 of the Treaty, known as the "Most Favored Nation Clause," eliminated the need to first go to Argentine courts because Argentina's treaty with the United States did not have this requirement.²⁵

An International Chamber of Commerce-appointed arbitral panel in Washington D.C. ruled it had jurisdiction over BG Group and Argentina's proceedings and issued a final award on December 24, 2007.²⁶ While the panel rejected BG Group's argument that the dispute was arbitrable because of the delay in the Argentine courts, it concluded that the Article 8(2) provision could not, according to Treaty interpretation, be regarded as "an absolute impediment to arbitration."²⁷ The panel cited Article 32 of the Vienna Convention, reasoning that because Ar-

17. *Id.* Argentina enacted Emergency Law 25,561 on January 6, 2002 with the intent to forbid inflation adjustments based on foreign price indices as well as to change dollar-based tariffs into peso-based tariffs on a scale of one to one. Argentina also adopted Resolution 308/02 and Decree 1090/02, which involved renegotiation of public service contracts but excluded any licensee who desired any redress by arbitration or in court. *Id.*

18. *Id.*

19. *Id.*

20. *BG Group*, 665 F.3d at 1367.

21. *Id.*

22. Article 8(1) of the Treaty provides that "disputes between an investor under the Treaty and the host State that 'have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.'" *Id.* at 1366.

23. *Id.* at 1366.

24. *Id.* at 1367 (citing Final Award ¶ 142).

25. *Id.*; compare Marian Nash (Leich), *Bilateral Investment Treaties United States--Argentina*, 87 AM. J. INT'L L. 433, 433 (1993) (explaining that the U.S.-Argentina BIT, "which contains an absolute right to international arbitration of investment disputes, removes U.S. investors from the restrictions of the Calvo Doctrine and... [b]y providing important protections to investors and creating a more stable and predictable legal framework for investment, the BIT helps to encourage U.S. investment" (citation omitted)) with the UK-Argentina BIT (where the panel noted the BIT did not have a "national security" exception similar to that of Article XI of the U.S.-Argentina BIT). Steven Smith, et al., *International Commercial Dispute Resolution*, 43 INT'L LAW. 443, 466 (2009) (citing n.7).

26. *BG Group*, 665 F.3d at 1367. In this case, the parties had designated the ICC COURT as the "appointing authority". Award ¶ 9. The tribunal claimed jurisdiction under UNCITRAL Article 21(1) which states, "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction." *BG Group*, 665 F.3d at 1371 (citing UNCITRAL Arbitration Rules, G.A. Res. 31/98, art. 21, ¶ 1, U.N. Doc. A/RES/31/98 (Dec. 15, 1976)). See also *Republic of Argentina v. BG Group PLC*, 715 F. Supp. 2d 108, 114 (D.D.C. 2010), rev'd, 665 F.3d 1363 (D.C. Cir. 2012).

27. *Id.* (citing Final Award ¶ 147).

gentina had constrained court access by emergency enactments and excluded any licensees from the renegotiation process,²⁸ a literal interpretation of the Treaty would create an “absurd and unreasonable result.”²⁹ Thus, the panel concluded that it was not necessary to determine whether Articles 8(1) and (2) were inoperative.³⁰

Argentina argued a “state-of-necessity defense,” a common defense in international law,³¹ asserting that its economic collapse created exceptional circumstances that could not have been avoided.³² The panel rejected this argument, finding that Argentina had violated Article 2 of the Treaty.³³ According to the panel, Argentina’s actions in the early 1990s induced BG Group’s investment, and by disabling the regulations that initially encouraged BG Group to invest, Argentina had failed to provide “fair and equitable treatment” which was required in Article 2(2).³⁴ Furthermore, the panel found that Argentina’s violation was exacerbated by the fact that licensees seeking renegotiation were excluded from arbitration or similar forums.³⁵ In the end, the panel awarded damages to BG Group of approximately 185 million U.S. dollars.³⁶

Following the panel’s decision, Argentina filed a petition under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 10(a) and 11,³⁷ to vacate or modify the final award on the grounds that the panel acted beyond its authority by ignoring the

28. See *supra* text accompanying notes 14 & 17. Argentina’s establishment of Resolution 308/03 and Decree 1090/02 created a renegotiation process for public service contracts but excluded any licensee who desired any redress by arbitration or in court, like BG Group.

29. *BG Group*, 665 F.3d at 1367-68 (citing Final Award ¶ 147).

30. *Id.* at 1368.

31. Eric David Kasenetz, *Desperate Times Call for Desperate Measures: The Aftermath of Argentina’s State of Necessity and the Current Fight in the Icsid*, 41 GEO. WASH. INT’L L. REV. 709, 719-20 (2010). Author states that the doctrine is “generally accepted in the international community as a customary defense to state responsibilities regarding treaties.” *Id.*

32. *BG Group*, 665 F.3d at 1368 (citing Final Award ¶ 410).

33. *Id.*

34. *Id.* at 1368. Article 2(2) of the Treaty provides that “[i]nvestments of investors of each Contracting Party shall at all times be accorded *fair and equitable treatment*.... [n]either Contracting Party shall in any way impair by unreasonable ... measures the management, maintenance, use, enjoyment or disposal of investments in its territory.... [e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.” *Id.* at n.3 (emphasis added).

35. *Id.* See *supra* text accompanying notes 14 & 28.

36. *Id.* The panel calculated this figure by comparing BG Group’s share value in 1998, three and half years before enactment, and 2002, shortly after enactment. *Id.* Thus, the panel calculated the total investment and figured the loss incurred by way of Argentina’s Emergency Law. *Id.*

37. *Id.* Section 10(a) of the FAA provides that an arbitration award may be vacated, “(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” 9 U.S.C. § 10(a) (2006). Section 11 provides that an arbitration award may be vacated or corrected by a court order, “[w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award; [w]here the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted; [w]here the award is imperfect in matter of form not affecting the merits of the controversy.” 9 U.S.C. § 11 (2006).

terms of the parties' agreement, primarily Articles 8(1) and (2).³⁸ BG Group filed a cross-motion and sought recognition and enforcement of the final award rendered by the panel.³⁹ The U.S. District Court for the District of Columbia denied Argentina's petition and granted enforcement of the panel award.⁴⁰

On appeal, the U.S. Court of Appeals, District of Columbia Circuit, reversed the district court's enforcement of the panel's final award.⁴¹ The appellate court held that because the Treaty explicitly provided that a precondition to arbitration of BG Group's investment claim was that the claim initially needed to be submitted in Argentine state court,⁴² and because the Treaty failed to address who decided the issue of arbitrability when that precondition was not complied with, the question of arbitrability was an independent question of law for the Argentine court to decide.⁴³ The court also held that the district court improperly determined that Argentina had conceded the arbitrability issue and therefore reversed the district court's ruling while also vacating the award.⁴⁴

III. LEGAL BACKGROUND

Bilateral investment treaties ("BITs"), like the one at issue in *BG Group*, are negotiated agreements between two countries ("sovereigns") with the primary purpose of attracting foreign investment by granting investors extensive investment rights.⁴⁵ The resulting foreign investment these agreements provide have proved to be a valuable tool for economic development and global prosperity for participants by allowing developing nations to use foreign investor funds for the development of local industries and infrastructure.⁴⁶ In return, investors generally receive positive financial returns and also gain a foothold in these emerging markets.⁴⁷

BITs often present flexible dispute resolution options, such as arbitration or the sovereigns' own national courts.⁴⁸ When disagreements stem from these treaties and resolution is needed, investors tend to prefer arbitration to litigation due to their fear of potential bias that may exist in a sovereign's national court system.⁴⁹ This fear is evidenced by the fact that the number of arbitrations of BIT disputes exploded in the early 2000s.⁵⁰

38. *Id.* at 1365.

39. *Id.* at 1368-69.

40. *Id.* at 1369.

41. *Id.* at 1373.

42. *See supra* text accompanying notes 9 & 11.

43. *BG Group*, 665 F.3d at 1371.

44. *Id.* at 1370.

45. Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521, 1522-23 (2005).

46. *Id.* at 1524.

47. *Id.*

48. *Id.* at 1541.

49. *Id.* at 1542. *See generally* Mark Friedman & Gaetan Verhoosel, *Arbitrating over BIT Claims*, *NAT'L L.J.*, Sept. 15, 2003, at 15 n.78 (describing BIT claims and suggesting that investors often view BIT arbitration as more fair than foreign courts).

50. Franck, *supra* note 45 at 1521.

For parties looking for a neutral site to arbitrate, the United States has become a popular seat for this brand of international arbitration over the last thirty years.⁵¹ The U.S. Supreme Court has extended its strong federal policy favoring arbitration to international commercial disputes.⁵² Arbitrating international commercial disputes allows parties to remove themselves from a potentially unfavorable forum in national courts, just as BG Group attempted to do.⁵³

A. An Overview of Arbitral Governance

The New York Convention is an international treaty that governs international arbitration and fosters recognition and enforcement of non-domestic arbitral awards.⁵⁴ In the United States, the FAA governs arbitrational agreements—both domestic and international.⁵⁵ The FAA was signed into law in 1925 and was amended in 1970 to incorporate the New York Convention.⁵⁶ In *BG Group*, the panel's award fell within the non-domestic provision of the New York Convention, which granted the district court jurisdiction to hear Argentina's claim to set aside the panel's award.⁵⁷

Under the FAA, only a few limited grounds exist upon which a court may vacate or overturn an arbitration panel's award.⁵⁸ Section 9 of the FAA provides that a court is required to confirm an award unless it is vacated, modified, or corrected as prescribed in sections 10 and 11.⁵⁹ Section 10 discusses the grounds for vacating an award while section 11 establishes the grounds where an award may be corrected or modified.⁶⁰

As for governance of arbitration in other countries, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration ("UNCITRAL Model Law") is a very important tool in the field of international commercial arbitration.⁶¹ Many countries have adopted UNCITRAL guidelines when faced with the task of crafting legislation applicable

51. See GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 132 (2009). The United States was the seat to the present arbitration tribunal and had jurisdiction for judicial review, so U.S. arbitration law (FAA) will be the focus of this Legal Background.

52. Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 GEO. WASH. INT'L L. REV. 17 (2002). The Supreme Court has said that the United States has an "emphatic federal policy in favor of arbitral dispute resolution" as well as a "strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes..." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 631 (1985).

53. *Id.*

54. 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.

55. See generally 9 U.S.C. §§ 1-307 (2006); see also *Born, supra* note 51, at 132.

56. See 9 U.S.C. §§ 201-208 (2006) (incorporating the New York Convention).

57. See *Republic of Argentina v. BG Group PLC*, 665 F.3d 1363 (D.C. Cir. 2012). The court found that "...the Award plainly falls within the "non-domestic" provision of Article I(1) of the New York Convention and, consequently, this Court has subject-matter jurisdiction to entertain this matter under 9 U.S.C. § 203." *Id.*

58. See 9 U.S.C. §§ 9-11 (2006).

59. *Id.*

60. See 9 U.S.C. §§ 10-11 (2006); see also *supra* text accompanying note 37.

61. BORN, *supra* note 51, at 115.

to international trade.⁶² The UNCITRAL Model Law has been revised as recently as 2006 to account for recent trends in international arbitration.⁶³

Aside from national legislation, there are also rules that govern the procedural framework of international arbitrations and there are two distinct styles of international arbitration that dictate what rules will be used, “institutional” and “*ad hoc*.”⁶⁴ There are numerous arbitration institutional organizations⁶⁵ that govern arbitration tribunals in a style known as institutional arbitration.⁶⁶ *Ad hoc* arbitration is not conducted under the supervision of an institutional organization; rather, the parties simply agree to arbitrate without such formal procedures.⁶⁷ Institutional and *ad hoc* arbitration both have their advantages and disadvantages.⁶⁸ Institutional arbitration is administered by a staff of employees under a set procedural framework, which provides for a reliable and prompt process, but it is more expensive.⁶⁹ *Ad hoc* arbitration is more flexible and less expensive, but it is less structured and can be less predictable.⁷⁰

The UNCITRAL Arbitration Rules were designed for, and are a prominent set of rules commonly used in, an *ad hoc* styled arbitration.⁷¹ In certain cases, as illustrated by *BG Group*, the parties will request an organizational institution to select the arbitrators for the proceeding even if the parties are utilizing an *ad hoc* style.⁷² Thus, the UNCITRAL Arbitration Rules can be used in conjunction with an institutional organization such as the ICC in *BG Group*.⁷³ The ICC is an institutional organization with its own rules for governing arbitrations, but the ICC rules are broadly similar to the UNCITRAL Rules as they too provide a procedural framework for arbitral proceedings.⁷⁴ One of the ICC’s primary functions is to appoint arbitrators and resolve challenges to the appointment of arbitrators.⁷⁵ The ICC is the institution of preference for many commercial users despite receiving criticism by some that claim the ICC rules are expensive and cumbersome.⁷⁶

62. *Id.* at 119-20. The author notes that some 50 jurisdictions have adopted legislation based off of the Model Law as of 2008. *Id.* at 119.

63. *Id.* at 118-19. It is important to note that Article 21(1) of the UNCITRAL Arbitration Rules, G.A. Res. 31/98, art. 21, para. 1, U.N. Doc. A/RES/31/98 (Dec. 15, 1976), provides that “[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction” to hear the arbitration. *BG Group*, 665 F.3d at 1368 n.3.

64. *Id.* at 148.

65. *Id.* at 148-49. The author notes that popular arbitration institutions include the ICC, the American Arbitration Association (“AAA”) and its International Centre for Dispute Resolution (“ICDR”), and the London Court of International Arbitration (“LCIA”). *Id.* at 148.

66. BORN, *supra* note 51, at 148.

67. *Id.* at 149.

68. *Id.* at 150.

69. *Id.*

70. *Id.* at 150-51.

71. *Id.* at 151-52.

72. BORN, *supra* note 51, at 150.

73. *See generally* *BG Group*, 665 F.3d at 1363.

74. BORN, *supra* note 51, at 156.

75. *Id.*

76. *Id.* at 157.

*B. Judicial Review, Manifest Disregard of the Law,
and Party Agreement*

Because the panel was seated in the United States and the FAA governed the decisions of the district and appellate courts, U.S. jurisprudence is an important aspect when discussing *BG Group*. Two recent Supreme Court decisions have markedly shaped the way courts treat arbitration in the United States. These cases involved two distinct issues that came to a head in *BG Group*: the limitations on courts in reviewing arbitration awards and the need to respect the parties' right to contract.⁷⁷

In *Hall Street Associates, LLC. v. Mattel, Inc.*, the Supreme Court was faced with the issue of expanded judicial review of an arbitration award based on the parties' agreement.⁷⁸ In holding that sections 10 and 11 in the FAA are the *exclusive* grounds for vacating, modifying or correcting an arbitration award, *Hall Street* made a very important distinction by limiting judicial review to the FAA's enumerated grounds.⁷⁹ Thus, the parties were not allowed to expand judicial review through contract.⁸⁰ The Court explained that instead of fighting the statute's text, it was simply logical to read and interpret the FAA on its face, which restricted judicial review to specific grounds.⁸¹ According to the Court, such limited review is required to maintain arbitration's goal of speedy dispute resolution.⁸² *Hall Street* greatly constrained a court's role in reviewing arbitration awards by setting clear precedent that the enumerated grounds in the FAA are the sole means to challenge the outcome of an arbitration proceeding.⁸³

Since *Hall Street*, lower courts have struggled to distinguish what grounds have survived the Supreme Court's test of what constitutes a justifiable reason to overturn or vacate an arbitration award.⁸⁴ *Hall Street* is significant because, under the FAA, an arbitrator's failure to follow the law is not one of the specifically enumerated grounds for vacating an award.⁸⁵ However, most jurisdictions have long recognized a non-statutory doctrine, "manifest disregard of the law," as sufficient grounds for vacating an arbitrator's award.⁸⁶ The doctrine is used as cause for vacatur when, upon review, a judge determines that the arbitrator knew the law

77. See *Hall St. Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

78. *Hall Street*, 552 U.S. at 576-77.

79. *Id.* at 577. The Court recognized that the "question here is whether statutory grounds for prompt vacatur and modification may be supplemented by contract. We hold that the statutory grounds are *exclusive*." *Id.* at 578 (emphasis added). See also *supra* text accompanying note 37.

80. *Hall Street*, 552 U.S. at 577-78.

81. *Id.* at 577. The Court reasoned that, "[i]nstead of fighting the text, it makes more sense to see §§ 9-11 as the substance of a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.*

82. *Id.*

83. See generally *Hall St. Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

84. Annie Chen, *The Doctrine of Manifest Disregard of the Law After Hall Street: Implications for Judicial Review of International Arbitrations in U.S. Courts*, 32 *FORDHAM INT'L L.J.* 1872, 1875 (2009).

85. Timothy M. O'Shea, *Arbitration's Appeal: The Grounds Have Narrowed*, 66 *BENCH & B. MINN.*, 31, 31 (July 2009).

86. *Id.*

but disregarded it.⁸⁷ The holding in *Hall Street* complicated the doctrine's viability to vacate an arbitration award and lower courts are reaching different conclusions on the doctrine's status.⁸⁸

The manifest disregard of law doctrine again reached the Supreme Court two years after *Hall Street* was decided in *Stolt-Nielsen v. AnimalFeeds International Corp.*⁸⁹ The *Stolt-Nielsen* Court had to determine whether a claim was arbitrable when the parties' agreement was silent on the matter.⁹⁰ The arbitral tribunal had concluded that class arbitration was appropriate.⁹¹ The district court reversed the tribunal's award due to the manifest disregard of the law doctrine, but the Second Circuit reversed in favor of the tribunal.⁹²

The Supreme Court granted certiorari but failed to make a determination on whether the "manifest disregard of the law" issue survived *Hall Street*'s strict limitation on judicial review as the district court had determined.⁹³ Instead, the Court reversed the Second Circuit, holding that requiring parties to submit to class arbitration when it was not discussed in their agreement would be contrary to the FAA.⁹⁴ The Court primarily focused on party consent and how courts and arbitrators must give deference to the parties' contract.⁹⁵ *Stolt-Nielsen* is significant for its emphasis on the intent of the parties in making the determination of arbitrability and the Court's conclusion that a party cannot be forced to arbitrate when it had not agreed to do so.⁹⁶

C. The Arbitrability Issue in the United States

Generally, the issue of arbitrability involves determining whether parties have agreed to submit a dispute to arbitration.⁹⁷ However, the question of arbitrability can be seen as two-fold: first, "who should decide arbitrability" and second, "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement."⁹⁸ Determining arbitrability can be a complex task, and some courts have likened it to a "box within a box . . . [arbitrability is] the authority as to the authority to make a decision."⁹⁹ Because it is considered

87. Michael H. LeRoy, *Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard*, 52 B.C. L. REV. 137, 165 (2011).

88. O'Shea, *supra* note 85, at 31; *see also* Chen, *supra* note 84, at 1876, 1891.

89. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1766 (2010).

90. *Id.* at 1764.

91. *Id.* at 1761.

92. *Id.* at 1761-62.

93. *Stolt-Nielsen*, 130 S. Ct. at 1768, n.3.

94. *Id.* at 1762.

95. *Id.* (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). The Court stated that arbitration is a "matter of consent, not coercion" and in construing an arbitration agreement, courts and arbitrators must "give effect to the [parties'] contractual rights and expectations." *Id.*; *see also infra* note 117.

96. *Stolt-Nielsen*, 130 S. Ct. at 1776.

97. *See Howsam v. Dean Witter Reynolds, Inc.*, 573 U.S. 79, 83 (2002) (citing *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)).

98. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995).

99. *Ex parte Perry v. Hyundai Motor America, Inc.*, 744 So. 2d 859, 866 n.5 (Ala. 1999).

a threshold issue, arbitrability must be decided before a court or tribunal can reach the merits.¹⁰⁰

The U.S. Supreme Court has addressed several cases involving arbitrability over the years.¹⁰¹ In *First Options of Chicago, Inc. v. Kaplan*, the Court held that the contracting parties' intent controlled whether the question of arbitrability would be posed to a court or an arbitrator.¹⁰² In *First Options*, because the parties did not clearly agree to submit the question of arbitrability to arbitration, the Supreme Court affirmed the lower court's finding that the arbitrability of the dispute was subject to independent review by the courts.¹⁰³ *First Options* is significant because the Court rejected the idea of requiring a party to raise the arbitrability issue in litigation prior to arbitration.¹⁰⁴ In so holding, the Court essentially allowed a party to challenge an arbitral award by raising the arbitrability issue after the fact and to argue that the parties never submitted to arbitration in the first place.¹⁰⁵

The Supreme Court reached a different conclusion in *John Wiley & Sons, Inc. v. Livingston*.¹⁰⁶ In *John Wiley*, the Court distinguished between substantive and procedural questions of arbitrability and said that courts should determine substantive questions and arbitrators should determine procedural questions of arbitrability.¹⁰⁷ Therefore, the Court concluded that the dispute was to be decided by an arbitrator because the question was procedural in nature.¹⁰⁸ Ultimately, the Court upheld the arbitration clause, focusing its reasoning on the need for speedy resolution and a strong policy preference for arbitration in the context of labor disputes.¹⁰⁹

In *AT&T Technologies, Inc. v. Communications Workers of Am.*, the Supreme Court manifested the presumption that courts would decide the question of arbitrability unless "the parties clearly and unmistakably provide otherwise."¹¹⁰ More recently, in *Howsam v. Dean Witter Reynolds, Inc.*, the Court reinforced its decision from *AT&T* and held that courts determine arbitrability when the parties are not clear in their agreement on whether arbitrators or a court should decide the issue.¹¹¹ In *Howsam*, the Court attempted to further refine the "who" question of arbitrability by outlining limited circumstances in which parties should expect a

100. See *Howsam*, 537 U.S. at 83-84. The Court acknowledged that an arbitrability determination must occur before the merits in saying, "...its answer will determine whether the underlying controversy will proceed to arbitration [or litigation] on the merits." *Id.*

101. See, e.g., *Id.*; *AT&T*, 475 U.S. at 649; *First Options*, 514 U.S. at 938; *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 543 (1964).

102. See generally *First Options*, 514 U.S. 938.

103. *Id.* at 947.

104. *Id.* at 946.

105. See generally, Claudia D. Hartleben, *Argentina v. BG Group and the Question of Arbitrability*, 2012 A.B.A. SEC. INT. LIT. SEC. 1-2.

106. *John Wiley & Sons*, 376 U.S. at 559 (1964).

107. *Id.* at 557-58.

108. *Id.* (reasoning that, "procedural questions...should be left for the arbitrator.")

109. *Id.* at 558. The court recognized that, "such delay may entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties... and contrary to the aims of national labor policy." *Id.*

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

111. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

court to decide this “gateway matter.”¹¹² These circumstances include whether the parties are bound to a particular arbitration agreement.¹¹³

IV. INSTANT DECISION

In *Republic of Argentina v. BG Group PLC*, the United States Court of Appeals for the District of Columbia Circuit reversed and vacated the district court’s decision to enforce an ICC-appointed panel’s award that favored BG Group.¹¹⁴ The court acknowledged that judicial review in such arbitral circumstances is narrow, but it disagreed with the panel’s award because of the district court’s reliance on outside legal sources and its failure to consider the agreement of the contracting parties.¹¹⁵ The court noted the parties’ contract expressly established a preconditional waiting period¹¹⁶ that needed to be satisfied before proceeding to arbitration.¹¹⁷ The court also acknowledged the panel’s finding that BG Group had standing on the merits due to its status as an investor and an investment that lost value as a direct result of Argentina’s Emergency Law.¹¹⁸

According to the *BG Group* court, the gateway issue on appeal was the question of arbitrability,¹¹⁹ specifically whether a court or an arbitrator should determine what the parties intended.¹²⁰ An additional issue was whether BG Group rightfully sought arbitration instead of first seeking recourse in Argentine state court pursuant to Article 8(1) of the Treaty.¹²¹

The court referenced the Supreme Court’s propensity for holding that the parties’ intent controls the issue of whether a court or an arbitrator is to decide questions of arbitrability.¹²² The court reasoned that this logic agrees with the basic notion that arbitration is not simply meant to resolve disputes in the quickest way possible, but primarily it is meant to honor the parties’ agreement.¹²³ In turn, the court noted that whoever interprets the arbitration clause—be it a court or an arbitrator—must give effect to the parties’ interests and expectations.¹²⁴ The court also cited Supreme Court precedent concerning how courts will decide arbitrabil-

112. *Id.* at 83-84. The Court said that the presumption of courts deciding arbitrability protects the parties and “...avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate...[t]hus, a gateway dispute about whether the parties are bound by a given arbitration clause raises a ‘question of arbitrability’ for a court to decide.” *Id.*

113. *Id.*

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

115. *Id.* at 1365-66.

116. *Id.* at 1366; *see also supra* text accompanying note 9.

117. *Id.*

118. *Id.* at 1368; *see also supra* text accompanying notes 26-36 for further discussion on the panel’s reasoning and decision.

119. *Id.* at 1369.

120. *Id.*

121. *Id.* at 1371-72.

122. *Id.* at 1369. *See, e.g.*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). The court emphasized that “[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ‘clea[r] and unmistakabl[e]’ evidence that they did so.” *Id.* (quoting *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)) (alterations in original).

123. *BG Group*, 665 F.3d at 1369 (citing *First Options* 514 U.S. at 947).

124. *Id.* (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773-74 (2010)).

ity¹²⁵ and stated that when parties do not expressly agree to send the arbitrability question to an arbitrator, the question should go to a court.¹²⁶ Furthermore, the court found that the arbitrability question should be sent to arbitrators only if the parties explicitly manifest that it is their intent to do so.¹²⁷

The appellate court disagreed with the district court's conclusion that Argentina had conceded the issue of arbitrability when Argentina's counsel acknowledged the panel's jurisdiction in its motions.¹²⁸ It reasoned that Argentina's concession was directed solely to the context in which the Treaty's arbitration provision was properly triggered, such as after the waiting period had elapsed, and only *then* would the arbitrator decide any question of arbitrability.¹²⁹ Therefore, the court found that Argentina only conceded that arbitrability would be determined by an arbitrator after Articles 8(1) and (2) of the Treaty were satisfied.¹³⁰ Thus, the court held that the district court erred in finding that Argentina had acceded jurisdictional power to the arbitrators, because such a finding would be contrary to the parties' agreement.¹³¹ The court reemphasized this holding by stating that Article 8(3)¹³² of the Treaty could only be operative after the injured party had sought recourse in Argentine courts as prescribed by Articles 8(1) and (2).¹³³

The court acknowledged that the Treaty did not speak directly to what would occur when a party did not meet the precondition.¹³⁴ The court compared the parties' investment dispute to a hypothetical one between the countries themselves, in which case the Treaty's language in Article 9 demanded arbitration.¹³⁵ The court suggested that the absence of such direct language in Article 8, like that of the kind used in Article 9, was intentional and demonstrated that Argentina and

125. *Id.* (citing *Howsam v. Dean Witter*, which stated that courts will decide the question of arbitrability, "in the kind of narrow circumstances where the contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002)).

126. *Id.* at 1369-70 (citing *First Options*, 514 U.S. at 943, explaining that where "the parties did *not* agree to submit the arbitrability question itself to arbitration, then the district court should decide that question ... independently." *Id.*

127. *Id.* at 1370.

128. *Id.*

129. *Id.* The court referenced the objection Argentina's counsel's made in its brief, "[t]he context... indicate[s] that Argentina was conceding an altogether different point: once the Treaty's arbitration provision was properly triggered, after eighteen months' recourse to an Argentine court, any question of arbitrability *then* would be decided by the arbitrator. *See Tr.*, Sept. 28, 2010, at 5. Indeed, in the sentence immediately following the one cited by the district court, Argentina's counsel stated: 'However, we also understand that this Court has the right to and the duty to under the New York Convention to assess whether ... Argentina's consent to arbitration [was] respected.' *Id.* at 4. The transcript indicates this statement qualifies the previous sentence about arbitrability, rather than presents a new argument, because counsel next stated that the consent was 'also' relevant to 'whether the award is contrary or not to U.S. [public] policy,' *Id.*, a separate argument under the New York Convention." *Id.*

130. *BG Group*, 665 F.3d at 1370.

131. *Id.* at 1370-72.

132. *See supra* text accompanying note 11.

133. *BG Group*, 665 F.3d at 1371.

134. *Id.*

135. *Id.* "By comparison, the Treaty states in Article 9(2) that should a dispute arise between the contracting parties themselves, the United Kingdom and Argentina, and it is not resolved through diplomatic channels, the dispute will go directly to arbitration. Article 9(5) provides that '[t]he [arbitral] tribunal shall determine its own procedure.'" *Id.*

BG Group were aware of the means to give an arbitrator authority to determine arbitrability.¹³⁶

The court hypothesized that the parties likely never thought to specify that “a court” determine whether Articles 8(1) and (2) be respected because the language itself instructed bringing action in “court” first.¹³⁷ It also reasoned there was no “clear and unmistakable” evidence demonstrating that the parties intended for the arbitrators to determine the question of arbitrability.¹³⁸ The court held that the arbitrability question was an independent question of law for the Argentine state court to decide.¹³⁹ The court explained that the district court had erred when it determined as a matter of law that the parties intended for an arbitrator to decide arbitrability where BG Group had failed to satisfy the waiting period as prescribed in the Treaty.¹⁴⁰

The court distinguished this case from previous Supreme Court cases reaching the opposite result.¹⁴¹ In *John Wiley & Sons, Inc. v. Livingston*, the Supreme Court was concerned with delay due to judicial proceedings before arbitration; however, the *BG Group* court reasoned that while public policy strongly favored the arbitration of labor disputes to achieve a speedy resolution, the justification was absent in the context of international investment disputes.¹⁴² The court went on to explain that the two cases were different in that the instant dispute involved two sovereigns and also because the Treaty itself explicitly mandated court proceedings before commencing arbitration.¹⁴³ Furthermore, the court noted that the issue of arbitrability itself could be distinguished from the situation in *John Wiley* because the parties in *BG Group* agreed to resolution in court prior to moving to arbitration.¹⁴⁴ Additionally, the court reasoned that strong public policy favoring federal arbitration was misplaced in this context because the explicit language in the agreement represented the parties’ interest, which overrode such public policy concerns.¹⁴⁵

The court concluded by again noting that BG Group was required to initiate a lawsuit in Argentina, despite the current economic conditions, and had to satisfy the waiting period before commencing an arbitration action pursuant to Article 8(1) of the Treaty.¹⁴⁶ Ultimately, the court in *BG Group* reversed the district court and vacated the panel’s final award because they asserted that there was “only one

136. *Id.*

137. *Id.*

138. *Id.* See generally *AT&T Techs.*, 475 U.S. at 649; *First Options*, 514 U.S. at 944 (where the Supreme Court creates and reinforces the presumption that if parties do not “clear[ly] and unmistakabl[y]” demonstrate that an arbitrator will determine arbitrability in the agreement, then a court will determine arbitrability). See also *supra* text accompanying notes 101-105; 110-113.

139. *BG Group*, 665 F.3d at 1371.

140. *Id.* at 1371-72.

141. *Id.* at 1372; *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

142. *BG Group*, 665 F.3d at 1372. The court discussed the collective bargaining process in the *John Wiley* context and stressed the importance of speedy resolution “to avoid industrial strife that had historically led to labor strikes.” *Id.*

143. *Id.*; see *supra* text accompanying note 9.

144. *BG Group*, 665 F.3d at 1373.

145. *Id.* The court reasoned that “a court cannot lose sight of the principle that led to a policy in favor of arbitral resolution of international trade disputes: enforcing the intent of the parties.” *Id.*

146. *Id.*

possible outcome” on the arbitrability question before them:¹⁴⁷ that it was an independent question of law for the court to decide.¹⁴⁸

V. COMMENT

The tension evident in *BG Group* between limited judicial review and party autonomy is illustrated by the question of arbitrability.¹⁴⁹ This underlying friction coupled with complex international arbitration regimes, national statutes, and arbitration institutions and rules, makes for a ripe and important decision.

A foundational principle of international commercial arbitration and the FAA is party consent,¹⁵⁰ as demonstrated by the fact that parties are considered to be “the architects of their own arbitration process.”¹⁵¹ The policy established by the FAA is intended to ensure that private agreements to arbitrate are enforced according to their terms.¹⁵² It is also significant to note that the FAA does not compel arbitration against the will of the parties but only confers the right to obtain an order directing arbitration to proceed in the *manner* provided for in the parties’ agreement.¹⁵³ The court in *BG Group* was required to apply the FAA in determining whether to vacate the panel’s award.¹⁵⁴ Thus, the court was correct to adhere to the parties’ agreement and recognize that arbitration should not have commenced.

Party autonomy clearly prevailed in *BG Group*, as it should have, for it is one of arbitration’s defining characteristics.¹⁵⁵ Without the privilege of party autonomy, *BG Group* would not even have had the opportunity to arbitrate. In adhering to the parties’ agreement and the principles established by the FAA, *BG Group* strengthened the institution of arbitration by reinforcing the will of the parties.

A. The *BG Group* Decision

In *BG Group*, the agreement at issue was a Bilateral Investment Treaty (“BIT”) written and agreed upon by two sovereigns, Argentina and the United Kingdom.¹⁵⁶ In that agreement, there existed an explicit provision that mandated a waiting period before commencing arbitration.¹⁵⁷ In the very next Article of the BIT, a provision authorized direct recourse to arbitration upon a dispute between the two sovereigns, as opposed to a dispute arising out of an investor relationship

147. *Id.* (citing Stolt-Nielsen, 130 S. Ct. 1758, 1770 (2010)).

148. *BG Group*, 665 F.3d at 1371.

149. See generally *BG Group*, 665 F.3d 1363 (D.C. Cir. 2012).

150. BORN, *supra* note 51, at 90. Author states that international commercial arbitration is “fundamentally consensual” and there can be no arbitration unless the parties agreed to it. *Id.*

151. *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 151 (1968).

152. Cindy G. Buys, *The Arbitrators’ Duty to Respect the Parties’ Choice of Law in Commercial Arbitration*, 79 ST. JOHN’S L. REV. 59, 70 (2005); see also 9 U.S.C. §§ 1–307 (2006).

153. See 9 U.S.C. § 4 (2006) (emphasis added).

154. See generally *BG Group*, 665 F.3d 1363 (D.C. Cir. 2012).

155. Buys, *supra* note 152, at 59.

156. See generally *BG Group*, 665 F.3d 1363 (D.C. Cir. 2012).

157. See *supra* text accompanying notes 9–11.

like *BG Group*.¹⁵⁸ Thus, the appellate court was correct in finding that the parties were well aware of how to grant an arbitrator jurisdiction directly if they so desired.¹⁵⁹ This fact also illustrates a key assumption made by the *BG Group* court: that the two parties had *intentionally* left out any provision signaling direct arbitration in the event of an investment dispute.¹⁶⁰

No ambiguity was present in these provisions or in the BIT in general. Presumably, *BG Group* was fully aware of what they were agreeing to prior to their investment. Therefore, a fair question to ask in this situation is why did *BG Group* agree to invest if it did not appreciate the terms of the agreement? Like most foreign investors, *BG Group* made its investment in an effort to make a financial return.¹⁶¹ However, *BG Group* differs from other cases in the sense that the Argentina-United Kingdom BIT protected the sovereign from a capricious tribunal award whereas generally BITs are intended to protect a foreign investor from hostile state courts.¹⁶² Even so, a different decision could not be justified simply because the positions of the parties have reversed away from the norm.

B. How *BG Group* Settles with *Hall Street*

BG Group skirted the strict judicial review limitations set forth in *Hall Street*¹⁶³ by acknowledging arbitrability as a gateway issue.¹⁶⁴ Judging from the *BG Group* court's vacatur of the panel's award, the strict judicial review limitations set forth in *Hall Street* do not insulate arbitration panels from erroneously granting themselves jurisdiction. *BG Group* utilized *Stolt-Niesen's* textualist approach and simply interpreted the agreement on its face. Thus, the *BG Group* court had no trouble with vacating the panel's award within the narrow limitations set forth in *Hall Street*.¹⁶⁵

However, discerning exactly what grounds *BG Group* based its vacatur on may prove more difficult. The *BG Group* decision could lend itself to criticism due to the fact that the *BG Group* court never directly specified on what basis it was vacating the award, but simply concluded in saying, "we vacate the Final Award."¹⁶⁶ Whether this determination was made pursuant to Section 10(a)(4) or Section 11 of the FAA as Argentina argued, or the dubious manifest disregard of law doctrine, remains unclear.

Yet one can infer that the *BG Group* court intended to use the manifest disregard of law doctrine based on its earlier statement that, "the arbitral panel ren-

158. *BG Group*, 665 F.3d at 1371 (citing Argentina-UK Treaty). Art. 9 section 2 of the BIT clearly states that a disagreement between Argentina and the United Kingdom "shall...be submitted to an arbitral tribunal" and further evidenced in section 5 with, "[t]he tribunal shall determine its own procedure." *Id.* This can be easily distinguished from Art. 8, which was intended for a dispute involving foreign investments. *Id.*

159. *Id.*

160. *Id.*

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

162. *Id.* at 1529-30.

163. *BG Group*, 665 F.3d at 1365.

164. *Id.* at 1369.

165. *Id.* at 1365. Conceding that the scope of judicial review is very narrow, the court said the panel ignored the terms of the BIT and thus vacated the award. *Id.* at 1365-66.

166. *Id.* at 1373.

dered a decision wholly based on outside legal sources . . . without regard to the . . . parties' agreement . . . [a]ccordingly . . . we vacate the Final Award."¹⁶⁷ If this inference holds true, the *BG Group* may very well have resurrected the manifest disregard of law doctrine in the D.C. Circuit and validated its use as a means to vacate arbitral awards.

Other circuits have struggled in determining whether manifest disregard of law is a viable option for vacating arbitration awards, and the circuits remain divided.¹⁶⁸ With such confusion, it would have been preferable if the United States Supreme Court in *Stolt-Nielsen* had made a determination as to the doctrine, but it sadly failed to do so and left the door open.¹⁶⁹ The only certainty concerning the doctrine is that it remains unsettled. In that regard, *BG Group* only adds to this confusion by potentially opening the door for the doctrine's use in the D.C. Circuit.

C. *BG Group's Place into Arbitrability Jurisprudence*

The result in *BG Group* is ultimately consistent with similar situations involving this type of complex jurisprudence regarding the issue of arbitrability by preserving the intent of the parties.¹⁷⁰ The decision falls in line with *AT&T*¹⁷¹ and other Supreme Court cases that focused on the parties' agreement.¹⁷² In doing so, the *BG Group* court utilized the foundational principles most recently seen in *Stolt-Nielsen* and *Howsam* that also adhered to the idea of honoring the parties' agreement.¹⁷³

As the *BG Group* court pointed out, a decision in accordance with *John Wiley's* speedy resolution rationale was not sensible here.¹⁷⁴ It is obvious that *John Wiley* cannot control in *BG Group* because of the major differences between the two contexts. *John Wiley* called for arbitration due to a policy rationale that fostered a speedy resolution needed in labor disputes, which may not necessarily be present in the international arbitration context.¹⁷⁵ Thus, the court in *BG Group* was correct in following the likes of *AT&T* and *Howsam*, rather than that of *John Wiley*, due to the differing needs of parties in the labor context versus that of the international investment context.

D. Possible Future Ramifications of *BG Group*

Going forward, *BG Group* will likely prove to be significant in a particular set of cases in United States jurisprudence concerning the issues of arbitrability

167. *Id.* at 1366.

168. LeRoy, *supra* note 87, at 137. The author states that, "...the Court's muddled analysis in *Hall Street* as to "manifest disregard" has split federal circuits." *Id.*

169. *Stolt-Nielsen*, 130 S. Ct. at n.3. The Court explained that they did not make a determination on whether manifest disregard of the law remained a viable basis of vacatur in saying, "[w]e do not decide whether " 'manifest disregard' " survives our decision in *Hall Street*..." *Id.*

170. *See supra* note 101.

171. *See supra* text accompanying note 110.

172. *See supra* notes 101-105.

173. *BG Group*, 665 F.3d at 1369.

174. *Id.* at 1373.

175. *Id.* at 1372-73.

and enforcement of arbitral awards.¹⁷⁶ The decision in *BG Group* may provide instruction to investors and sovereigns alike to read and appreciate the terms of a BIT—or any agreement for that matter—before signing on the dotted line.¹⁷⁷ *BG Group* demonstrates that courts will respect the importance of party autonomy in arbitration by enforcing the agreement the parties bargained for. The decision also potentially leaves the door open in the D.C. Circuit for the use of the “manifest disregard of the law” as grounds to vacate arbitration awards. However, the court could be subject to criticism because the decision was unclear as to what grounds were used to vacate the award.

As a nation, Argentina suffered a tremendous economic collapse which resulted in countless lawsuits being filed against the country over the past decade.¹⁷⁸ Judging from previous decisions and awards against Argentina,¹⁷⁹ it may very well lose on the merits; however, Argentina deserves what they bargained for, namely an eighteen-month waiting period prior to arbitration commencement. *BG Group* failed to comply with the straightforward provisions of the Treaty and in the end; the court in *BG Group* rightly vacated the panel’s award.

VI. CONCLUSION

The result in *BG Group* should not be a surprising one. *BG Group* reaffirms the longstanding principle of party autonomy championed by the FAA as well as the strong presumption that courts determine the question of arbitrability unless the parties’ agreement explicitly says otherwise. The agreement in dispute had an express precondition prior to commencing arbitration. The *BG Group* court recognized this and rightly adhered to the will of the parties by holding that arbitration should not have commenced at all. However, the court in *BG Group* missed an opportunity and failed to make a determination on the doctrine of manifest disregard. The doctrine will likely remain muddled until the Supreme Court makes a clear distinction. Whether other post-*BG Group* courts will review tribunal awards as *BG Group* did with the parties’ intent in mind should be more certain. In the future, parties will not have to worry about arbitrary tribunal awards or strict limitations on court review as long as they remember that they hold the

176. Hartleben, *supra* note 105, at 5-6.

177. See e.g., ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* (1981). As one scholar noted, the moral is that parties should be very careful in drafting the arbitral clause. *Id.*

178. James L. Loftis & Adrienne L. Goins, *International Law*, 69 TEX. B.J. 45, 46 (2006). The authors noted that in 2004, there were 35 cases pending against Argentina at the World Bank’s International Centre for the Settlement of Investment Disputes (ICSID), a majority were based on the measures the Argentine government introduced to address the same economic crisis seen in *BG Group*. *Id.*

179. See generally, Eric Kazenat, *Desperate Times Call For Desperate Measures: The Aftermath of Argentina’s State of Necessity And The Current Fight In The ICSID*, 41 GEO. WASH. INT’L L. REV. 709. As of 2010, Argentina has been liable to damages of \$665 million (or approximately 1.4 percent of Argentina’s reserve assets...resulting from the crisis). See CMS Award, *supra* note 8, at 468 (\$133.2 million); Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/09, Award, at 320 (Sept. 5, 2008) (\$2.8 million); Enron Award, *supra* note 8, at 450 (\$106.2 million); LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Award, at 115 (July 25, 2007) (\$57.4 million); Semptra Award, at 482 (\$128.3 million); Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/08, Award (February 6, 2007) (\$237.82 million) (quoting n.8).

key to their own destiny when they are bargaining at the onset, just as the FAA intended.

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