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Stayin' Alive?: *BG Group, PLC v. Republic of Argentina* and the Vitality of Host-Country Litigation Requirements in Investment Treaty Arbitration

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Stayin' Alive?: *BG Group,*
PLC v. Republic of Argentina
and the Vitality of Host-Country
Litigation Requirements in
Investment Treaty Arbitration

Stephen R. Halpin III*

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I. Introduction

Over the last few decades, international arbitration has emerged as the preferred mechanism for resolving international investment disputes.¹ There are currently in effect over 2,800

1. See U.N. Conference on Trade and Dev., *Recent Developments in*

bilateral investment treaties (BITs),² agreements “drafted to address a specific circumstance: that of an investor of one state (the home state) locating assets in the territory of another state (the host).”³ Many BITs require or allow foreign investors to arbitrate directly against host countries, abrogating sovereign immunity.⁴ Investors in such disputes regularly seek damages totaling hundreds of millions of dollars.⁵ In short, international investment treaty arbitration (ITA) involves high monetary stakes, implicates issues of international comity, and is here to stay.

Last Term, the Supreme Court of the United States decided *BG Group, PLC v. Republic of Argentina*,⁶ the first case the Court had ever heard concerning an international arbitration award rendered pursuant to an investment treaty dispute.⁷ The case raised factual and legal issues that are likely to recur given the growing popularity of international arbitration. The BIT in question is between two foreign countries—the United Kingdom and Argentina—and provides for final, binding resolution of

Investor–State Dispute Settlement (ISDS) 2 (2013) [hereinafter UNCTAD Recent Dev.] (tracking the dramatic increase in the filing of known investor–state investment arbitrations between 1987 and 2012).

2. See U.N. Conference on Trade and Dev., *World Investment Report 2013* 101 (2013), http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf [hereinafter UNCTAD Inv. Rpt.] (noting that there were 2,857 BITs in effect at the end of 2012).

3. KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* 1 (2010).

4. See GARY B. BORN, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* 42 (2012) (“BITs . . . frequently contain dispute resolution provisions which permit foreign investors to require international arbitration . . . of specified categories of investment disputes with the host state . . .” (citation omitted)).

5. See Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 57 (2007) (reporting amounts claimed in publicly available international investment treaty arbitration awards).

6. 134 S. Ct. 1198, 1203 (2014).

7. See Diane Marie Amann, *Argument Preview: Jurisdictional Say-So in Investor–State Arbitrations*, SCOTUSBLOG (Nov. 20, 2013, 2:14 PM), <http://www.scotusblog.com/2013/11/argument-preview-jurisdictional-say-so-in-investor-state-arbitrations/> (last visited Sept. 24, 2014) (“This case represents the Court’s first consideration of an investor–state dispute arising out of one of the thousands of bilateral investment treaties (BITs) that countries have entered in recent decades.”) (on file with the Washington and Lee Law Review).

disputes by international arbitration.⁸ The BIT is silent on where arbitration should be held, but contains a clause requiring litigation of disputes in the host-country's courts *prior to* international arbitration.⁹

In 2003, BG Group PLC (BG), a U.K. entity that had invested in Argentina's energy sector, requested arbitration under the BIT against the host country, claiming the Argentine government had expropriated BG's investments in response to a currency crisis.¹⁰ Neither BG nor Argentina litigated the dispute in the Argentine courts prior to BG's request for arbitration.¹¹ The parties selected the United States as the seat of arbitration, and in 2007, an international arbitral tribunal rendered an award in favor of BG, observing that failure to comply with the litigation requirement in the BIT did not prevent the tribunal from reaching the merits of the dispute.¹²

Argentina then petitioned the U.S. District Court for the District of Columbia to vacate the award on the ground that BG had not accepted Argentina's standing offer to arbitrate contained in the BIT, and thus had not fulfilled the host-country litigation requirement.¹³ According to Argentina, the litigation requirement was a condition on its consent to arbitration with an investor.¹⁴ Failing to satisfy the requirement meant the parties had not formed an arbitration agreement and in turn that the arbitral

8. See Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, Arg.-U.K., art. 8(4), Dec. 11, 1990, http://unctad.org/sections/dite/ia/docs/bits/uk_argentina.pdf [hereinafter Arg.-U.K. BIT] ("The arbitration decision shall be final and binding on both Parties.").

9. See *infra* notes 111–12 and accompanying text (discussing article 8(2) of the BIT).

10. See *infra* notes 99–113 and accompanying text (describing the underlying facts leading to arbitration between BG and Argentina).

11. *Infra* note 114 and accompanying text.

12. *Infra* notes 116–17 and accompanying text. Despite agreeing on an arbitral seat, Argentina maintained its position that the parties had not actually formed an agreement to arbitrate. See *infra* note 114 (noting Argentina's objection).

13. See *infra* Part III.B (summarizing the district court's opinions).

14. *E.g.*, *infra* note 173 and accompanying text.

tribunal lacked jurisdiction to hear the case.¹⁵ The district court upheld the award, but the U.S. Court of Appeals for the D.C. Circuit reversed and vacated it on appeal.¹⁶ The Supreme Court granted BG's petition for certiorari on the question: "In disputes involving a multi-staged dispute resolution process, does a court or instead the arbitrator determine whether a precondition to arbitration has been satisfied?"¹⁷

Throughout briefing and oral argument, the parties disagreed about which legal principles the Court should apply to determine whether to vacate the award as well as what result should follow under those principles. BG and Argentina argued that the Federal Arbitration Act (FAA),¹⁸ interpreted through domestic arbitration case law, provided the proper framework, but differed on who should prevail under those authorities.¹⁹ The United States Department of Justice (DOJ), participating as *amicus curiae*, contended that the Court should engraft an international appendage onto its domestic approach in light of the distinct nature of the case and remand for further proceedings.²⁰

On March 5, 2014, the Court reversed the D.C. Circuit, holding for BG and sending a clear message to the international arbitration community that the jurisprudence the U.S. Supreme Court has developed regarding domestic arbitration extends to its international counterpart.²¹ Specifically, if a BIT states that disputes will be resolved by final, binding arbitration and the parties choose the United States as the seat of arbitration or seek to enforce an award pursuant to the BIT in the United States, it is proper for U.S. courts to conclude that the treaty partners

15. See *infra* note 121 and accompanying text (arguing that the district court should vacate the award).

16. See *infra* Part III.C (examining the D.C. Circuit's opinion).

17. Petition for Writ of Certiorari at *i*, BG Grp., PLC v. Argentina, No. 12-138 (July 27, 2012).

18. 9 U.S.C. §§ 1-307 (2012).

19. See *infra* Part IV.A (drawing out the parties' main arguments before the Supreme Court).

20. See *infra* Part IV.A (describing oral argument of DOJ).

21. See *infra* Part IV.B (describing potential implications of the Court's decision for international arbitration in the United States).

expected U.S. domestic law on vacatur and enforcement to control. Under U.S. law, courts afford arbitrators significant deference.²² Accordingly, Part IV.B of this Note contends that countries and investors using ITA, as well as private parties engaging in international commercial arbitration (ICA), will have a better idea of what to expect when they arbitrate or seek to enforce awards in the United States, allowing them to avoid some of the sticky issues that plagued the proceedings between BG and Argentina.²³

But what about Argentina and the text of the treaty, which plainly insists upon host-country litigation prior to arbitration?²⁴ What about the broader criticism that the current ITA regime shortchanges host-country sovereignty in order to please foreign investors?²⁵ Or that host-country courts are better positioned than international arbitral tribunals to decide questions of host-country law, even if the arbitrators have the final say?²⁶ These concerns deserve a response if ITA is to maintain its prominence, notwithstanding the Court's arbitration-friendly decision in *BG Group*. Part V proposes a novel solution in the form of an improved host-country litigation requirement that stabilizes host-country law at the time of investment.²⁷ Part VI concludes that countries should learn from *BG Group* and

22. See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671–72 (2010) (“It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice that his decision may be unenforceable.” (internal quotation marks and citations omitted)).

23. *Infra* Part IV.B.1–2.

24. See *infra* notes 111–13 and accompanying text (reproducing and discussing parts of the U.K.–Argentina BIT’s dispute-resolution section).

25. See BORN, *supra* note 4, at 419 (noting that “investment arbitration has generated substantial criticism” and that three countries have recently given notice of withdrawal from a major multilateral treaty, “claiming that investment arbitration erodes national sovereignty and favors foreign investors” (citation omitted)).

26. See Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT’L L. 809, 876 (2005) (“In most instances, the presumption must be that a national court is best suited to interpret national laws.” (citing JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 73 (2005))).

27. *Infra* Part V.

implement or improve host-country litigation requirements in their BITs.²⁸

Before addressing the implications of *BG Group* for international arbitration in the United States and proposing an improved host-country litigation requirement, some context is necessary. Part II provides background on international arbitration and briefly introduces a few of the various sources of applicable law at play, including the role of host-country law and the law of the seat of arbitration.²⁹ Part III fills an existing gap in the literature by summarizing in depth the *BG Group* decisions in the lower federal courts, including the important U.S. arbitration precedents relied upon by the parties and courts.³⁰ Part IV.A builds on the analysis in Part III and draws from the oral argument before the Supreme Court in December 2013 to illuminate the March 2014 decision.³¹

II. Background and Sources of Applicable Law in International Arbitration

Subpart A defines “international arbitration” and distinguishes the two prominent types while highlighting shared issues regarding applicable law.³² The remaining subparts overview some, but not all, sources of applicable law: the BIT itself, host-country law, rules governing proceedings before the arbitral tribunal, the law of the situs (or seat of arbitration), and the law governing enforcement of awards.³³

A. International Arbitration Defined

International arbitration is a dispute-resolution mechanism. In its simplest form, “arbitration” involves the submission of a dispute,

28. *Infra* Part VI.

29. *Infra* Part II.

30. *Infra* Part III.

31. *Infra* Part IV.A.

32. *Infra* Part II.A.

33. *Infra* Part II.B–F.

at the request of adverse parties, to a private, independent third party for adjudication.³⁴ The disputing parties agree they will be bound by the third-party's decision,³⁵ and to that end, often seek decision makers who are well-respected and possess subject-matter expertise.³⁶ It bears emphasis that arbitration is a creature of contract. Party consent is a necessary condition.³⁷

Broadly speaking, "international" encompasses matters that "in some way transcend national boundaries."³⁸ Different countries' arbitration laws define "international" in different ways.³⁹ For the purposes of this Note, it is sufficient to point out that the FAA controls which arbitrations conducted in the United States are considered domestic and which are international.⁴⁰ Section 202 of the FAA frames which arbitrations are international⁴¹ and carves out which disputes are domestic.⁴²

34. See NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 1–2 (5th ed. 2009) (tracing the origins of arbitration); BORN, *supra* note 4, at 4 ("[V]irtually all authorities accept that arbitration is . . . a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision . . .").

35. See BLACKABY & PARTASIDES, *supra* note 34, at 2 (explaining that parties to a dispute are bound by an arbitrator's decision because they agree to be, not "because of the coercive power of any State"); BORN, *supra* note 4, at 5 ("[A]rbitration . . . produces a binding award that decides the parties' dispute in a final manner and is subject only to limited grounds for challenge in national courts.").

36. See BLACKABY & PARTASIDES, *supra* note 34, at 1 (observing that parties may pick an arbitrator "whose expertise or judgment they trust").

37. See BORN, *supra* note 4, at 4 (noting that "[i]t is elementary that 'arbitration' is a consensual process that requires the agreement of the parties").

38. BLACKABY & PARTASIDES, *supra* note 34, at 8.

39. *Cf. infra* Part II.D–F (noting that different countries have different rules for conducting arbitrations and reviewing arbitration awards).

40. See 9 U.S.C. § 202 (2012) (laying out which arbitration agreements or awards are international and covered by the New York Convention and which are wholly domestic).

41. See *id.* ("An arbitration agreement or arbitral award arising out of a legal relationship . . . falls under the [New York] Convention.").

42. See *id.* ("An [arbitration] . . . which is entirely between citizens of the United States shall be deemed not to fall under the [New York] Convention unless [the dispute] . . . involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.").

There are two major types of international arbitration: international commercial arbitration (ICA) and international investment treaty arbitration (ITA).⁴³ Stated simply, ICA “involve[s] commercial disputes between private parties,” and ITA typically involves arbitration by an investor against a sovereign country,⁴⁴ oftentimes under a BIT.⁴⁵ Although ICA and ITA are separate subjects, they overlap considerably.⁴⁶ A practical issue that arises in both contexts is which law applies to a particular aspect of a given dispute.

In ICA, arbitrators generally have significant flexibility in determining applicable law, and oftentimes awards rendered in such proceedings will not contain “substantial legal developments beyond the application of general principles of law.”⁴⁷ Resolution of commercial disputes turns predominantly on “the provisions contained in the agreement of the parties, taking into consideration the facts of the case as they appear from the documents submitted by counsel and the witness hearing.”⁴⁸ By contrast, ITA requires an arbitral tribunal “to perform very substantial, multi-step, legal work before reaching its final decision.”⁴⁹ The tribunal must inquire into its jurisdiction to hear the claim and whether the claimant has standing to bring the

43. See BORN, *supra* note 4, at 41 (observing that “[m]ost international arbitrations are international *commercial* arbitrations,” but “[a]nother significant . . . category of international arbitration involves ‘investor-state’ or ‘investment’ arbitrations”).

44. See *id.* at 411 (introducing the basics of investor–state arbitration).

45. See BLACKABY & PARTASIDES, *supra* note 34, at 468–69 (explaining that “[i]n light of the dramatic increase in the number of BITs and the emergence of clearer legal principles through case law, the number of investor-State arbitrations has mushroomed” (citation omitted)).

46. See, e.g., Campbell McLachlan, *Investment Treaty Arbitration: The Legal Framework*, in 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE 95, 98 (Albert Jan van den Berg ed., 2009) (noting that “despite the treaty context, investment treaty dispute settlement uses the forms and procedures of commercial arbitration”).

47. Bernard Hanotiau, *Investment Treaty Arbitration and Commercial Arbitration: Are They Different Ball Games? The Legal Regime/Framework*, in 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE, *supra* note 46, at 146, 146–47.

48. *Id.* at 147.

49. *Id.* at 148.

claim.⁵⁰ Divining the applicable law is a more complicated task than in the strictly commercial context. A BIT is often thought of as a “self-contained legal system,”⁵¹ and choice-of-law provisions in BITs frequently direct a tribunal to consider, among others, “the BIT itself, the law of the Contracting State, [and] the rules and principles of international law.”⁵²

B. The Bilateral Investment Treaty Itself

Historically, investments made by foreign entities in other countries carried substantial risk.⁵³ Under bilateral treaties of friendship, commerce, and navigation—precursors to modern BITs—“[t]he primary form of dispute resolution was in local courts” with possible international arbitration between the two countries.⁵⁴ That is, investors lacked the ability to arbitrate directly against a host country and instead were frequently required to exhaust local remedies in the host-country’s courts, after which they could seek diplomatic aid from their own country if their efforts had not proven fruitful.⁵⁵ This policy “conserve[d] the resources of the home-state government by deflecting claims that could be resolved by the investor in local courts” and “preserve[d] the dignity of the host state by providing it with an opportunity to rectify a violation of law and to accord justice to the investor under its own law.”⁵⁶ Investors were not particularly fond of this slow brand of justice and wanted more protection for

50. *See id.* (“In investment arbitration, the issue of jurisdiction is nearly invariably raised by the respondent. It leads the arbitral tribunal to determine whether claimant has standing . . . , but also whether it qualifies for protection under the applicable BIT . . .”).

51. Richard H. Kreindler, *The Law Applicable to International Investment Disputes*, in *ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS* 401, 404 (Norbert Horn & Stefan Michael Kröll eds., 2004).

52. *Id.*

53. *See* VANDEVELDE, *supra* note 3, at 38 (observing that, in the aftermath of World War I, many governments engaged in “large scale expropriations of foreign investment . . . as an instrument of economic policy”).

54. *Id.* at 24.

55. *See id.* at 428 (explaining the policy of “espousal”).

56. *Id.*

their investments.⁵⁷ At about the same time, many countries desired to attract more foreign capital, leading to increased usage of BITs that included international arbitration.⁵⁸

C. Host-Country Law

Host-country law retains significance in international investment disputes, notwithstanding the BIT movement and its focus on international law.⁵⁹ For example, “the typical definition of an investment found in a BIT requires that the status of the asset claimed to be an investment must be considered under the host State’s domestic property law.”⁶⁰ Unfortunately, BITs do not always provide clear textual guidance on the applicable law,⁶¹ and those that do often fail to address head-on the appropriate balance between international and host-country law.⁶²

Most can agree that wedding investors to a body of law that is subject to change by the host country at any time is unpalatable,⁶³ but BITs such as the one between the United

57. *See id.* at 3 (“Capital exporting states created the BITs to protect their investment abroad . . .”).

58. *See id.* at 63–64 (discussing how developing countries’ increased desire to attract foreign investment beginning in the late-1980s after the Cold War Era and the concurrent “revolution in information technology” contributed to the relatively recent surge in BITs).

59. *See* CAMPBELL MCLACHLAN QC, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 69–70 (2007) (“The investments of non-State actors are creatures of private law and tribunals cannot avoid addressing issues arising under the law pursuant to which investments owe their existence in adjudicating treaty questions.”).

60. *Id.* at 182.

61. *See* BLACKABY & PARTASIDES, *supra* note 34, at 483 (observing that “BITs do not always contain specific provisions on the law to be applied by the arbitral tribunals appointed to resolve disputes” (footnote omitted)).

62. *See id.* at 483–84 (explaining that “BITs that do contain applicable law provisions usually list the provisions of the BIT, international law, and domestic law, without indicating which is pre-eminent or how they are to be combined”). By way of example, Blackaby and Partasides lay out the choice-of-law provision from the Argentina–United Kingdom BIT. *Id.* at 484.

63. *See* Guido Santiago Tawil, 2.6 *Applicable Law*, in UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT: DISPUTE SETTLEMENT: ICSID 1, 15 (Rubens Ricupero ed., 2003), available at <http://r0.unctad.org/disputesettlement/course.htm> (noting that “[s]ubsequent changes in the applicable [host-country]

Kingdom and Argentina lack a strong textual defense against this possibility.⁶⁴ As a result, an investor may include a stabilization clause in a subsequent agreement with the host country concerning the investment.⁶⁵ A stabilization clause provides a means for investors to insulate their investments from disadvantageous changes in host-country law.⁶⁶ BITs themselves do not typically contain stabilization clauses, perhaps because countries party to the treaty do not want to relinquish the power to alter their laws freely.⁶⁷

D. Rules Governing Arbitral Proceedings

Parties may specify in their agreements or treaties that when a dispute arises arbitration will be conducted on an ad hoc basis or that the parties will seek varying levels of assistance from specialized arbitration institutions.⁶⁸ The United Nations Commission on International Trade Law (UNCITRAL), created by the United Nations General Assembly in 1966, puts forth texts on various subjects of international trade law, including dispute

law may have a severe impact on the investment” and “may go as far as the termination of the contract and the expropriation of the investor’s property”).

64. See Arg.-U.K. BIT, *supra* note 8, at art. 8 (noting with regard to applicable host-country law that “[t]he arbitral tribunal shall decide the dispute in accordance with . . . the laws of the Contracting Party [host country] involved in the dispute, including its rules on conflict of laws”).

65. See JEFF WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 990 (2012) (observing that “[i]t is particularly prevalent in investment agreements to incorporate *stabilisation* clauses that seek to limit the impact on the parties to the laws in existence at the time the agreement was entered into”).

66. See *id.* (“One way to prevent the effect of subsequent changes is to introduce a *stabilisation* clause into the investment agreement. Such a clause protects the investor from subsequent changes of the local law.”).

67. See GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 166 (4th ed. 2013) (noting that stabilization clauses “are generally used only in agreements between foreign investors and states or state-owned entities, where the possibilities for legislative interference are most substantial”).

68. See BLACKABY & PARTASIDES, *supra* note 34, at 52–57 (discussing the comparative strengths and weaknesses of ad hoc arbitration and institutional arbitration).

resolution.⁶⁹ One such text contains the UNCITRAL Arbitration Rules (UNCITRAL Rules), which are based in part on the notion “that the establishment of rules for ad hoc arbitration that are acceptable in countries with different legal, social and economic systems . . . significantly contribute[s] to the development of harmonious international economic relations.”⁷⁰ The UNCITRAL Rules provide a procedural framework that parties may invoke wholesale or strategically alter at their agreement.⁷¹

Prominent institutions offering international arbitration services include the International Chamber of Commerce (ICC), the International Centre for Settlement of Investment Disputes (ICSID), and the London Court of International Arbitration (LCIA).⁷² These institutions do not adjudicate disputes but instead administer disputes initiated under the institution’s rules.⁷³ Many BIT disputes are resolved through either institutional arbitration under ICSID or ad hoc arbitration under the UNCITRAL Arbitration Rules.⁷⁴

69. See UNCITRAL, A GUIDE TO UNCITRAL: BASIC FACTS ABOUT THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 1 (2013) (describing its “mandate [as] to further the progressive harmonization and modernization of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas” (footnote omitted)). “Those [key] areas include dispute resolution . . .” *Id.*

70. See G.A. Res. 31/98, U.N. GAOR, 31st Sess., Supp. No. 17 (Dec. 15, 1976) (requesting broad distribution of the UNCITRAL Arbitration Rules). The Rules were subsequently revised in 2010. G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Dec. 6, 2010).

71. See UNCITRAL, UNCITRAL ARBITRATION RULES art. 1(1) (2010) (“Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.”).

72. See BLACKABY & PARTASIDES, *supra* note 34, at 54 (listing examples of the “better known” arbitration institutions).

73. See, e.g., *Functions of the ICC International Court of Arbitration*, INT’L CHAMBER OF COM., <http://www.iccwbo.org/About-ICC/Organization/Dispute-Resolution-Services/ICC-International-Court-of-Arbitration/Functions-of-the-ICC-International-Court-of-Arbitration/> (last visited Sept. 24, 2014) (outlining administrative and procedural responsibilities) (on file with the Washington and Lee Law Review).

74. See BORN, *supra* note 4, at 412 (explaining that “many BIT arbitrations are conducted under general institutional rules, such as the UNCITRAL Rules,”

E. The Seat of Arbitration

Once parties have agreed where to arbitrate, the law of the seat of arbitration (law of the situs or *lex arbitri*) provides procedural rules that parties must follow during arbitration.⁷⁵ The *lex arbitri* also sets forth the grounds on which parties may vacate an arbitral award.⁷⁶ In the United States, the FAA grants the U.S. federal district court embracing the location where an award is made the power to vacate the award on certain procedural grounds.⁷⁷ Although the Supreme Court has not expressly held that the FAA provides the sole grounds for vacating awards rendered in the United States, recent decisions reflect this understanding.⁷⁸

or under “specialized and *sui generis* dispute resolution mechanisms,” such as ICSID).

75. See WAINCYMER, *supra* note 65, at 147 (explaining that “[t]he law of the Seat or place of arbitration generally plays a central role in arbitral proceedings” and “will, in most cases, form the *lex arbitri*”). Under such an arrangement, national courts may be tasked with resolving “timing issue[s]” and other “supervisory functions in relation to jurisdictional determinations.” *Id.* at 149.

76. See WAINCYMER, *supra* note 65, at 147 (“An award that does not comply with [the] norms [of the *lex arbitri*] can be annulled or enforcement can be refused on that basis.”).

77. See 9 U.S.C. § 10 (2012) (“In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . .”).

78. See *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–12 (2013) (declining to allow “[r]espondents [to] invoke a judge-made exception to the FAA” to invalidate an arbitration agreement); *AT&T Mobility, L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1746–53 (2011) (holding that the respondents could not rely on California’s doctrine of unconscionability to invalidate a consumer contract in which they had waived class-action arbitration because the FAA preempts state law regarding enforceability of arbitration clauses); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008) (holding that the FAA’s statutory grounds for “expedited judicial review to confirm, vacate, or modify arbitration awards” are “exclusive” and may not be “supplemented by contract”). For an analysis of the clouded history attending whether “manifest disregard” exists as another ground on which an award may be vacated under U.S. law, see Patrick Sweeney, Note, *Exceeding Their Powers: A Critique of Stolt-Nielsen and Manifest Disregard, and a Proposal for Substantive Arbitral Award Review*, 71 WASH. & LEE L. REV. 1571, 1585–1608 (2014).

Typically, only national courts at the seat of arbitration have the power to vacate or annul awards rendered within a country's borders.⁷⁹ Even if an award has not been vacated at the seat, the prevailing party will have to enforce the award if the losing party does not comply voluntarily.⁸⁰

F. Enforcement of International Arbitral Awards

Arbitral tribunals, lacking the coercive power that national courts enjoy, cannot compel compliance with their awards.⁸¹ Fortunately, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)⁸² and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention)⁸³ are two major treaties that facilitate transnational enforcement of international arbitral awards.⁸⁴ There are currently 152 countries party to the New York Convention⁸⁵ and 159 countries signatory

79. See BORN, *supra* note 4, at 307 (“[B]oth the New York Convention and national arbitration statutes . . . prohibit[] actions to annul awards outside the state where the award was made . . .”).

80. *Infra* Part II.F.

81. See CHRISTOPHER F. DUGAN ET AL., *INVESTOR–STATE ARBITRATION* 676 (paperback ed. 2011) (explaining that arbitrators “lack[] any direct compulsory power” and that “[a]rbitrator-sanctioned seizure of assets . . . would in most countries amount to vigilante justice, as governments jealously retain their general police powers”).

82. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38 (entered into force June 7, 1959).

83. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).

84. See Gary B. Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 837–38 (2012) (discussing how under both the New York Convention and the ICSID Convention, “effective enforcement [of arbitral awards] is available in national courts”).

85. *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, UNITED NATIONS COMMISSION ON INT’L TRADE L., http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Sept. 24, 2014) (on file with the Washington and Lee Law Review).

to the ICSID Convention.⁸⁶ For present purposes, it is important to note that the FAA implements the New York Convention's grounds for enforcement of arbitral awards.⁸⁷

Unlike vacatur (or annulment) of an award, enforcement may occur in many places. If the country embracing the situs of the arbitration is a party to the New York Convention, the award can be enforced in any other country party to the Convention, subject to limitations imposed by domestic law.⁸⁸ An award rendered in an ICSID proceeding imposes a similar obligation and shields awards from national court review.⁸⁹ Given the efficacy of these international treaties on enforcement, losing parties often comply without a formal challenge.⁹⁰

86. *Member States*, INT'L CTR. FOR THE SETTLEMENT OF INVESTMENT DISP., https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home (last visited Sept. 24, 2014) (on file with the Washington and Lee Law Review).

87. *See* 9 U.S.C. § 201 (2012) ("The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter."); *id.* § 202 ("An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention.").

88. *See* BORN, *supra* note 4, at 377–78 (noting that the New York Convention "imposes a general obligation on Contracting States to recognize awards made in other countries").

89. *See id.* at 428

[N]othing in the ICSID Convention permits courts in a Contracting State to review the tribunal's jurisdiction, procedural decisions or other actions, or to consider objections based on local public policy Rather, Contracting States are required . . . to treat awards as binding and to recognize them without any judicial review

90. *See* BLACKABY & PARTASIDES, *supra* note 34, at 623 (stating that "the vast majority of [international commercial arbitration] awards are performed voluntarily"). *But see* UNCTAD Recent Dev., *supra* note 1, at 24 ("Enforcing [investment treaty arbitration] awards against sovereign States remains a difficult issue . . .").

III. The Issue Presented by BG Group: Litigation Before Arbitration

With some basic principles in mind, this Part III turns to *BG Group*. A comprehensive discussion of the lower-court decisions and the precedents relied upon sharpens understanding of this complex dispute. Accordingly, after reviewing the underlying facts and arbitral proceedings that led to an award in BG's favor,⁹¹ this Part examines the fight over vacatur and enforcement in the lower federal courts. The U.S. District Court for the District of Columbia decided not to vacate the award and instead confirmed it.⁹² The U.S. Court of Appeals for the D.C. Circuit reversed.⁹³ The Supreme Court of the United States granted certiorari and heard oral argument in the case on December 2, 2013.⁹⁴ The Court issued its opinion on March 5, 2014.⁹⁵

A. Factual Background

Historically, those seeking to invest in a foreign country faced significant hurdles to ensure protection of their investments.⁹⁶ The United Kingdom and Argentina signed a bilateral investment treaty on December 11, 1990 to promote cross-border investment and generate economic growth in each country.⁹⁷ Article 2 of the BIT protects foreign investments by promising that the investments “shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security.”⁹⁸

91. *Infra* Part III.A.

92. *Infra* Part III.B.

93. *Infra* Part III.C.

94. *Infra* Part IV.

95. *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1198 (2014).

96. *See supra* Part II.B (discussing the emergence of BITs).

97. *See Arg.-U.K. BIT*, *supra* note 8, at 1 (stating reasons for the countries' agreement to the BIT).

98. *Id.* at Art. 2(2). Article 2 provides, in full:

(1) Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to invest

With the BIT and its key provisions in effect, BG Group PLC, a United Kingdom corporation,⁹⁹ invested in Argentina.¹⁰⁰ When Argentina privatized its gas industry, BG secured a significant ownership interest in MetroGAS, one of the previously state-run gas utilities.¹⁰¹ By 1998, BG controlled approximately 45% of MetroGAS.¹⁰² In late 2000, after struggles in Mexico and Brazil, there were rumblings that Argentina might be the next Latin American country to fall victim to a currency crisis.¹⁰³ Faced with continuing economic stagnation, Argentina took steps in June 2001 towards delinking the Argentine peso from its strict one-to-one peg to the American dollar.¹⁰⁴ In doing so, the

capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.

(2) Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

99. See *BG Group Plc. v. Republic of Argentina*, Final Award, at 5 (Dec. 24, 2007), <http://italaw.com/sites/default/files/case-documents/ita0081.pdf> [hereinafter Final Award] (noting that BG Group is “a British corporation located . . . in the United Kingdom”).

100. See *id.* at 47 (concluding that “BG’s ownership interest . . . is an ‘Investment’ for the purposes of Article 1(a)(ii) of the Argentina–U.K. BIT”).

101. See *id.* at 10–12 (explaining Argentina’s restructuring of its gas industry for the purposes of privatization, including the creation of several distribution companies, and the successful bid by a group of investors that included BG for ownership of MetroGAS, one of the distribution companies).

102. See *id.* at 12 (“Between 1994 and 1998, BG increased its investment in MetroGAS from 28.7% . . . to 45.11% . . .”).

103. See Larry Rohter, *Argentina’s Economy Casts a Shadow*, N.Y. TIMES (Dec. 18, 2000), <http://www.nytimes.com/2000/12/18/business/international-business-argentina-s-economy-casts-a-shadow.html> (last visited Sept. 24, 2014) (describing how Argentina had difficulty “maintain[ing] the [Argentine] peso’s one-to-one link with the American dollar, becoming the region’s biggest borrower in the process”) (on file with the Washington and Lee Law Review).

104. See Clifford Krauss, *Argentina Moves to Overhaul Peso’s Peg to the Dollar*, N.Y. TIMES (June 19, 2001), <http://www.nytimes.com/2001/06/19/business/argentina-moves-to-overhaul-peso-s-peg-to-the-dollar.html> (last visited

government sought to make Argentine exports relatively cheaper and thus more attractive in the global marketplace.¹⁰⁵ On January 6, 2002, Argentina “formally abandoned” its peg of the peso to the dollar and devalued its currency.¹⁰⁶

Up until this point, recently privatized gas utilities could collect tariffs¹⁰⁷ and seek adjustments of the tariffs to keep pace with inflation.¹⁰⁸ But in light of Argentina’s persistent currency problems, including the move away from its strict peg to the U.S. dollar, the methodology for calculating tariffs became a source of intractable conflict for MetroGAS and its regulators.¹⁰⁹ In fact, BG’s main contention in pursuing arbitration was that MetroGAS’s inability to increase tariffs and collect the additional revenue put the business in a financially untenable position.¹¹⁰

Article 8 of the United Kingdom–Argentina BIT lays out the process for settling disputes between an investor and a host country.¹¹¹ Article 8(2) states:

[D]isputes shall be submitted to international arbitration in the following cases:

(a) if one of the Parties so requests, in any of the following circumstances:

Sept. 24, 2014) (reporting that “Argentina has announced a complex set of new economic policies,” including implementation of a “floating exchange rate”) (on file with the Washington and Lee Law Review).

105. *See id.* (noting that the steps “should help Argentina’s competitiveness in Brazil, Chile and Europe, the markets for two-thirds of its exports”).

106. Larry Rohter, *Argentina Unlinks Peso from Dollar, Bracing for Devaluation and Even Harder Times*, N.Y. TIMES (Jan. 7, 2002), <http://www.nytimes.com/2002/01/07/world/argentina-unlinks-peso-from-dollar-bracing-for-devaluation-and-even-harder-times.html> (last visited Sept. 24, 2014) (on file with the Washington and Lee Law Review).

107. *See* Final Award, *supra* note 99, at 13–20 (discussing the relevant Argentine “Gas Law,” “Gas Decree,” and “The MetroGAS License,” which formed the regulatory environment for MetroGAS’s operations).

108. *See id.* at 18 (laying out the tariff adjustment provisions of the MetroGAS license).

109. *See id.* at 22–29 (describing the various steps taken by the Argentine government that prevented MetroGAS from adjusting its tariffs).

110. *See id.* at 29 (summarizing BG’s prayer for relief).

111. *See* Arg.-U.K. BIT, *supra* note 8, at art. 8 (“Settlement of Disputes Between an Investor and the Host State”).

(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;

(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.¹¹²

On its face, Article 8 contemplates that an investor or State can initiate arbitration only after a period of litigation in the host-country's national court system unless the parties to a dispute agree otherwise.¹¹³ Nevertheless, having declined to first litigate in Argentina or otherwise secure Argentina's permission to bypass litigation, investor BG filed its "Notice of Arbitration" in 2003.¹¹⁴ On December 24, 2007, the arbitral tribunal, having conducted the proceedings in the United States¹¹⁵ according to the UNCITRAL Rules,¹¹⁶ held that Argentina had breached the BIT and directed Argentina to pay BG approximately \$185 million in damages.¹¹⁷ The tribunal explained that, "[a]s a matter of treaty interpretation . . . [the litigation requirement in] Article 8(2)(a)(i) cannot be construed as an absolute impediment to arbitration."¹¹⁸ Unhappy with the result from proceedings it had

112. *Id.*

113. *See id.* (establishing that arbitration is only available if either: one party has first litigated for eighteen months in the host-country's courts; or the investor and host country agree to proceed directly to arbitration).

114. *See* Final Award, *supra* note 99, at 5, 48 (noting the date of BG's request for arbitration and Argentina's objection that "failure by BG to bring its grievance to Argentine courts for 18 months renders its claim . . . inadmissible").

115. Final Award, *supra* note 99, at 1 (noting that Washington, D.C., was the "[f]ormal seat of the arbitration").

116. *See id.* at 7 ("Because the Parties failed to agree on submission of the dispute to [ICSID], BG submitted to arbitration under [the UNCITRAL Rules]. . . . The Parties designated arbitrators in accordance with Article 7(1) of the UNCITRAL Rules.").

117. *See id.* at 138 ("The Republic of Argentina breached Article 2.2 of the Argentina-U.K. BIT[] [and] . . . shall pay BG Group Plc. the sum of US\$185,285,485.85.").

118. *Id.* at 50.

not wholeheartedly embraced, Argentina petitioned to vacate the award in the U.S. District Court for the District of Columbia.¹¹⁹

B. Denial of Vacatur and Enforcement of the Award in the U.S. District Court for the District of Columbia

In *Republic of Argentina v. BG Group PLC*,¹²⁰ Argentina asserted that the arbitral tribunal lacked jurisdiction to hear the claims because BG had not litigated in the Argentine courts prior to requesting arbitration.¹²¹ In conducting its analysis, the district court used the FAA to assess the bases for vacating an arbitration award rendered in the United States.¹²² The court stressed the narrowness of its inquiry, noting that “careful scrutiny of an arbitrator’s decision would frustrate the FAA’s ‘emphatic federal policy in favor of arbitral dispute resolution,’”¹²³ and that “under a more searching, appellate-style review, the arguments presented by Argentina . . . could very well carry the day.”¹²⁴ Finding no grounds in the FAA on which to vacate or modify the award,¹²⁵ the court upheld the award, reasoning that “Argentina ha[d] not met its burden of showing that the arbitral panel exceeded its authority by entertaining BG Group’s claims,” and the tribunal had “correctly turned to the text of Article 8(2)(a)(i) of the Investment Treaty and relevant international law sources in attempting to discern its jurisdiction.”¹²⁶

119. See *Republic of Argentina v. BG Grp. PLC*, 715 F. Supp. 2d 108, 112 (D.D.C. 2010) (noting that Argentina seeks to “vacate or modify [the] arbitral award”).

120. 715 F. Supp. 2d 108 (D.D.C. 2010).

121. See *id.* at 121 (noting that Argentina asserted *inter alia* that “the Court must vacate the Award under Section 10(a)(4) [of the FAA] because the arbitral panel improperly permitt[ed] BG to arbitrate its claims before seeking recourse in the Argentina courts” (quotation omitted)).

122. See *id.* at 115 (“The Court’s authority to vacate an arbitral award is governed by 9 U.S.C. § 10(a) . . .”).

123. *Id.* at 116 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)).

124. *Id.* at 126.

125. See *id.* at 121–25 (examining and rejecting Argentina’s various arguments for vacatur or modification of the award).

126. *Id.* at 121–22.

Argentina later filed a separate claim on whether the district court should refuse to deny enforcement of the award pursuant to the “public policy” exception in the New York Convention.¹²⁷ The court confirmed the award,¹²⁸ explaining that Argentina “failed to identify any fundamental public policy that implicates this country’s most basic notions of morality and justice.”¹²⁹ The court concluded it was bound by the tribunal’s interpretation of Article 8(2) of the BIT in determining whether Argentina had consented to arbitration.¹³⁰

C. Reversal and Vacatur of the Award in the U.S. Court of Appeals for the D.C. Circuit

The D.C. Circuit reversed the district court. It determined that Argentina’s agreement to arbitrate was conditioned on investors first litigating in Argentina.¹³¹ The circuit court framed two central issues: (1) whether the United Kingdom and Argentina had intended under the BIT that an investor could seek arbitration without first litigating for eighteen months; and (2) whether the countries intended for a court or arbitrator to resolve such a question.¹³² As explained below, the second issue

127. *Republic of Argentina v. BG Grp. PLC*, 764 F. Supp. 2d 21, 26–27 (D.D.C. 2011).

128. *See id.* at 39 (“[T]he Court concludes that the Award must be confirmed, and that BG Group is entitled to damages . . .”).

129. *Id.* at 27 (internal quotation marks and citation omitted).

130. *See id.* at 32–34 (explaining that “the Court is without authority to deviate from the arbitral panel’s interpretation of the Investment Treaty in determining whether enforcement of the Award would contravene the public policy of the United States”).

131. *See Republic of Argentina v. BG Grp. PLC*, 665 F.3d 1363, 1370 (D.C. Cir. 2012) (explaining that the UNCITRAL Rules governing arbitration under the BIT were not triggered because BG never satisfied the litigation precondition).

132. *See id.* at 1369

The “gateway” question in this appeal is arbitrability: when the United Kingdom and Argentina executed the Treaty, did they, as contracting parties, intend that an investor under the Treaty could seek arbitration without first fulfilling Article 8(1)’s requirement that recourse initially be sought in a court of the contracting party where the investment was made? That question raises the antecedent

turns on whether the provision at issue goes to the substance of the dispute or is instead procedural in nature.

1. *Following* First Options

Because the D.C. Circuit rested its opinion largely on the test from *First Options of Chicago, Inc. v. Kaplan*,¹³³ the case deserves close discussion. The parties involved were First Options of Chicago, Inc. (First Options), Manuel Kaplan, Kaplan's wife Carol, and Kaplan's company—MK Investments, Inc. (MKI).¹³⁴ First Options was a brokerage firm that “clear[ed] stock trades on the Philadelphia Stock Exchange.”¹³⁵ MKI had a trading account with First Options, and as a result of the 1987 financial crash, MKI and the Kaplans accrued significant debt with First Options, an issue the parties attempted to resolve in a series of “workout” agreements.¹³⁶ One of the agreements, signed by MKI but not the Kaplans personally, contained an arbitration clause.¹³⁷ First Options subsequently sought arbitration against MKI and the Kaplans pursuant to that clause.¹³⁸

The arbitral panel determined that it had jurisdiction over the parties and claims and rendered an award in favor of First Options.¹³⁹ Although a federal district court refused to vacate the award at the Kaplans' request, the Third Circuit Court of Appeals “agreed with the Kaplans that their dispute was not arbitrable.”¹⁴⁰ Thus, the central issues before the Supreme Court were: “(1) how a district court should review an arbitrator's decision that the parties agreed to arbitrate a dispute, and

question of whether the contracting parties intended the answer to be provided by a court or an arbitrator.

133. 514 U.S. 939 (1995).

134. *Id.* at 939.

135. *Id.*

136. *Id.*

137. *Id.* at 941.

138. *Id.*

139. *Id.*

140. *Id.*

(2) how a court of appeals should review a district court's decision confirming, or refusing to vacate, an arbitration award."¹⁴¹

Regarding the first issue, the Court explained 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.”¹⁴² Here, the Kaplans had not personally signed a contract to arbitrate disputes with First Options,¹⁴³ and the fact that they appeared at the arbitration proceedings to protest the arbitrators’ jurisdiction did not preclude them from later asserting that they had not agreed to arbitrate arbitrability.¹⁴⁴ Accordingly, the Court found that “First Options cannot show that the Kaplans clearly agreed to have the arbitrators decide . . . the question of arbitrability.”¹⁴⁵

In resolving the second issue, the Court declined to fashion a modified standard of review for courts of appeals reviewing district court decisions on whether to vacate an arbitration award under the FAA.¹⁴⁶ Instead, courts of appeals in such instances are instructed to review district court decisions under “ordinary, not special standards,” meaning that they “accept[] findings of fact that are not clearly erroneous but decid[e] questions of law *de novo*.”¹⁴⁷

No facts in *First Options* implicated international concerns. The dispute was wholly domestic.¹⁴⁸ Nonetheless, the D.C. Circuit followed this precedent in *BG Group*, explaining that “the intent of the contracting parties controls whether the answer to the question of arbitrability is to be provided by a court or an

141. *Id.* at 940.

142. *Id.* at 944 (quoting *AT&T Tech. v. Commc’n Workers of Am.*, 475 U.S. 643, 649 (1986)).

143. *Id.* at 941.

144. *See id.* at 946 (explaining that it made sense for the Kaplans to be present at the proceedings given that MKI was arbitrating disputes with First Options and noting that “Third Circuit law . . . suggested that the Kaplans might argue arbitrability to the arbitrators without losing their right to independent court review” (citation omitted)).

145. *Id.* at 945.

146. *Id.* at 948.

147. *Id.*

148. *Supra* notes 134–38 and accompanying text.

arbitrator,”¹⁴⁹ and intent must indicate there is “clear and unmistakable evidence” that the parties sought to “arbitrate arbitrability.”¹⁵⁰ As evidence of intent, the D.C. Circuit noted that the text of the BIT did not expressly address the particular facts of the case: when an investor who has not litigated in the host-country’s courts as directed by the BIT immediately pursues international arbitration.¹⁵¹ Accordingly, the court concluded that there was not clear and unmistakable evidence of intent to arbitrate disputes unless an investor had satisfied the litigation requirement of Article 8.¹⁵² In other words, compliance with the litigation requirement was necessary to signal that both BG and Argentina intended to arbitrate any outstanding disputes.

2. Distinguishing Two Other Domestic Arbitration Precedents

The D.C. Circuit also distinguished its decision from two other precedents.¹⁵³ In *John Wiley & Sons, Inc. v. Livingston*,¹⁵⁴ the Supreme Court concluded that a court should answer the threshold question of arbitrability when there is a dispute over whether a successor firm after a merger is bound under an

149. *Republic of Argentina v. BG Grp. PLC*, 665 F.3d 1363, 1369 (D.C. Cir. 2012) (citing *First Options*, 514 U.S. at 943). The court labeled the arbitrability inquiry a “gateway” question,” *id.*, explaining that “[a] court will decide the question ‘in the kind of narrow circumstances where the contracting parties would likely have expected a court to have decided the gateway matter’” *Id.* (quoting *Howsam v. Dean Witter*, 537 U.S. 79, 123 (2002)).

150. *Id.* (alterations and internal quotation marks omitted) (citing *First Options*, 514 U.S. at 943).

151. *See id.* at 1371 (“The Treaty does not directly answer whether the contracting parties intended a court or the arbitrator to determine the questions of arbitrability where the precondition of resort to a contracting party’s court pursuant to Article 8(1) and (2) is disregarded by an investor.”).

152. *See id.* at 1370–71 (noting that the UNCITRAL Rules, under which the arbitration was subsequently conducted, would provide clear and unmistakable evidence of intent to arbitrate, but those Rules could be “triggered[] . . . only after an Argentine court first has an opportunity to resolve the dispute”).

153. *See id.* at 1372 (discussing why the court of appeals’s decision is not at odds with *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964)); *id.* at 1372 n.6 (asserting that *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), “is also distinguishable”).

154. 376 U.S. 543 (1964).

arbitration clause of a collective bargaining agreement negotiated by a predecessor firm and a labor union.¹⁵⁵ But the *John Wiley* Court then decided that the successor firm *was* required to arbitrate in part because of “[t]he preference of national labor policy for arbitration.”¹⁵⁶ On this point, the D.C. Circuit, faced with a bilateral investment treaty between two foreign countries rather than a domestic labor dispute, departed from the result reached in *John Wiley*.¹⁵⁷

In *Howsam v. Dean Witter Reynolds, Inc.*,¹⁵⁸ the Supreme Court instructed that certain procedural issues do not really constitute independent “questions of arbitrability” and are presumptively for an arbitrator to resolve, not a court.¹⁵⁹ In

155. *See id.* at 547 (“Here, the question is whether Wiley, which did not itself sign the collective bargaining agreement on which the Union’s claim to arbitration depends, is bound at all by the agreement’s arbitration provision.”).

In *John Wiley*, a labor union represented about half the employees of a publishing firm. *Id.* at 545. The union had negotiated a collective bargaining agreement with the publishing firm granting the employees certain rights “such as seniority status, severance pay, etc.” *Id.* at 544–45. “The agreement did not contain an express provision making it binding on successors of [the firm.]” *Id.* at 544. The firm subsequently merged with another publishing firm, John Wiley & Sons, Inc., and a dispute arose over whether the collective bargaining agreement survived the merger. *See id.* at 545 (“The Union’s position was that despite the merger . . . Wiley was obligated to recognize certain rights of [the] employees . . . Wiley . . . asserted that the merger terminated the bargaining agreement for all purposes.”). In light of this dispute, the union sought arbitration. *Id.* at 546.

The Court addressed “who shall decide whether the arbitration provisions of the collective bargaining agreement survived the . . . merger.” *Id.* at 546. The Court concluded that courts should decide this issue because a party cannot be compelled to arbitrate if the instrument that purports to require arbitration is not binding on the party. *Id.* at 547. That a court should decide this question did not, however, mean that Wiley was not bound to arbitrate. *See id.* at 547–48 (holding that a merger does not necessarily extinguish the rights under a prior collective bargaining agreement and that “in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union”).

156. *Id.* at 550–51.

157. *See Republic of Argentina v. BG Grp. PLC*, 665 F.3d 1363, 1372 (D.C. Cir. 2012) (emphasizing that the present dispute “arises in an entirely different context: an international investment treaty” and thus reliance upon domestic labor policy would be misplaced).

158. 537 U.S. 79 (2002).

159. *See id.* at 85 (concluding that the applicability of a time limit rule on seeking arbitration “falls within the class of gateway procedural disputes” that

concluding that the particular claims-processing issue in that case was for the arbitrator, the Court attempted to clarify that the *First Options* framework requiring a court to answer whether there is clear and unmistakable evidence of intent to arbitrate arbitrability is only triggered in certain circumstances, such as when there is “a gateway dispute about whether the parties are bound by a given arbitration clause” or when there is “disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.”¹⁶⁰ Outside of such circumstances, certain “procedural’ questions which grow out of the dispute and bear on its final disposition,” such as whether a precondition to arbitration has been satisfied, presumptively lie within the power of the arbitrator.¹⁶¹

In *BG Group*, the D.C. Circuit reasoned that the issues were *substantive* questions of arbitrability that a court and not an arbitrator should decide.¹⁶² Having determined that *First Options* supplied the appropriate test of party intent and that the facts in *BG Group* were sufficiently different from those in *John Wiley and Howsam*, the D.C. Circuit reversed the district court and vacated the award.¹⁶³

are presumptively for an arbitrator to decide).

The dispute in *Howsam* concerned a business relationship between Dean Witter and Karen Howsam. *Id.* at 81. Howsam felt that Dean Witter made misrepresentations in providing investment advice and sought arbitration before the National Association of Securities Dealers (NASD) per Dean Witter’s “standard Client Service Agreement’s arbitration clause.” *Id.* Among the NASD’s arbitration rules was a limitation that no dispute older than six years could be submitted to arbitration. *Id.* at 82. Dean Witter argued that Howsam’s claim was too old and sought the assistance of the courts to prevent arbitration. *Id.* Accordingly, the issue before the Supreme Court was “whether a court or an NASD arbitrator should apply the [time limit] rule to the underlying controversy.” *Id.* at 81.

160. *Id.* at 83–84.

161. *Id.* at 84–85 (citation and internal quotation marks omitted).

162. *See BG Grp.*, 665 F.3d at 1371 (“The Treaty [between the United Kingdom and Argentina] provides a prime example of a situation where the ‘parties would likely have expected a court’ to decide arbitrability.” (quoting *Howsam*, 537 U.S. at 83)).

163. *See id.* at 1373 (“[W]e conclude that there can be only one possible outcome on the [arbitrability question] before us, namely, that BG Group was required to commence a lawsuit in Argentina’s courts and wait eighteen months

IV. *The Supreme Court's Decision and Its Implications*

This Part examines the Supreme Court's March 2014 decision as well as its implications for international arbitration in the United States. Part IV.A briefly overviews how the parties framed the issues before the Court at oral argument; it then distills the main points from the majority and concurring opinions filed in the case.¹⁶⁴ Part IV.B closes with a few observations on the practical impact of the Court's decision on international investment treaty and international commercial arbitration in the United States.¹⁶⁵

A. *Setting the Stage*

From the beginning of oral argument, BG parroted language it had used in presenting the question for certiorari: petitioner "ask[s] [the Court] to resolve this case narrowly by reaffirming that an arbitrator rather than a court presumptively resolves a dispute over a precondition to arbitration."¹⁶⁶ BG maintained that if the case fell under the ambit of the *Howsam-First Options* divide and the Court assigned the international component of the case little weight, BG should win because the litigation requirement in Article 8 of the BIT really resembles a "procedural precondition" to arbitration.¹⁶⁷ BG then explained that if the

before filing for arbitration pursuant to Article 8(3) if the dispute remained." (internal quotation marks and citation omitted); *id.* ("[W]e vacate the Final Award.").

164. *Infra* Part IV.A.1–2. Chief Justice Roberts's dissent garnered the vote of one other: Justice Kennedy. BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1203 (2014).

165. *Infra* Part IV.B.

166. Transcript of Oral Argument at 1, BG Grp., PLC v. Republic of Argentina, 134 S.Ct. 1198 (2014) (No. 12-138) (U.S. Dec. 2, 2013) at 3 [hereinafter Or. Arg. Tr.] (beginning oral argument). Compare *id.* (framing of the issue by BG at oral argument), with Petition for Writ of Certiorari at *i*, BG Grp. PLC v. Argentina (No. 12-138) (July 27, 2012) ("In disputes involving a multi-staged dispute resolution process, does a court or instead the arbitrator determine whether a precondition to arbitration has been satisfied?").

167. See Or. Arg. Tr., *supra* note 166, at 5 (explaining that if the Court takes up the issue of consent, it could do so through three separate strains of analysis). See *supra* note 159 (explaining that the *Howsam* Court held that

Court were to focus on the international component,¹⁶⁸ the FAA would still compel a ruling in BG's favor because the parties were aware when they agreed to international arbitration in the United States that they were choosing U.S. arbitration law, including case law such as *First Options* and *Howsam*.¹⁶⁹

Following BG, DOJ argued as amicus curiae representing the interests of the United States. DOJ asked the Court to vacate the D.C. Circuit's judgment and remand with instructions to apply a modified standard of review.¹⁷⁰ DOJ emphasized the international component of the case, contending that "applying the domestic presumptions that are set forth in *Howsam* [and *First Options*] to this type of investor-state arbitration . . . would not be appropriate."¹⁷¹ DOJ framed the issue as "a question of treaty interpretation, not a question of the likely expectations of parties to a domestic commercial contract."¹⁷²

Speaking third, Argentina staked out its position that "[t]his is a contract formation case," in keeping with its contention that its consent to arbitration was conditioned upon BG satisfying the litigation requirement.¹⁷³ Argentina noted additionally that after

certain procedural questions of arbitrability are presumptively within the power of the arbitrator to decide).

168. Cf. *supra* note 157 and accompanying text (noting that the D.C. Circuit in *BG Group* distinguished *John Wiley* on the basis that the latter concerned domestic labor policy).

169. See Or. Arg. Tr., *supra* note 166, at 6–7 (acknowledging the United Kingdom and Argentina did not know when signing the Treaty whether a dispute of this nature would be resolved by a court or an arbitrator, "but they d[id] know that the applicable law [would] be the [situs] of the arbitration"); *id.* at 7 ("[W]e are unaware of any precedent from any country ever that says we are going to not apply our domestic system set of rules, here the *Howsam* [and] [*F*]irst [*O*]ptions lines, because this is an international case." (emphasis added)).

170. See Brief for United States as Amicus Curiae in Support of Vacatur and Remand at 11–12, *BG Grp. PLC v. Republic of Argentina* (No. 12-138) (U.S. Sept. 3, 2013) ("In the distinct context of investor-state arbitral proceedings conducted pursuant to investment treaties, courts should not apply [the private commercial arbitration agreement] interpretive framework wholesale, but instead should review de novo arbitral rulings on consent-based objections to arbitration, and review deferentially rulings on other objections.").

171. *Id.* at 27.

172. *Id.*

173. See *id.* at 37 (arguing that because the case is about Argentina's consent to arbitrate, the D.C. Circuit's result was correct under U.S. arbitration

an arbitral panel has issued a decision, national courts possess “judicial review” over certain jurisdictional questions, including whether an arbitration agreement was ever formed.¹⁷⁴ Argentina tied the arbitrability question—whether BG had accepted Argentina’s offer—back into U.S. case law, arguing that under *John Wiley*¹⁷⁵ a court decides this type of issue.¹⁷⁶

As noted above, the adverse parties both relied heavily on U.S. domestic arbitration precedents before the Supreme Court.¹⁷⁷ DOJ stressed the international aspect of the case¹⁷⁸ but failed to offer a principled means of distinguishing between treaty provisions that went to “consent” and those that were merely procedural.¹⁷⁹ Viewed against this backdrop, neither the majority’s analysis nor its result is surprising.

1. The Majority Opinion

On March 5, 2014, Justice Breyer delivered the opinion of the Court in *BG Group, PLC v. Republic of Argentina*.¹⁸⁰ The identity

precedents and “treaty principles”).

174. See *id.* at 38 (arguing that “whether a contract was ever formed, [or] whether there ever was an agreement to arbitrate [are] ultimately . . . issue[s] for a court to independently de novo decide”).

175. For a summary of the pertinent part of the case, see *supra* note 155.

176. See Or. Arg. Tr., *supra* note 166, at 42 (noting that *John Wiley* held there is “independent judicial review” when the question concerns “whether there is an agreement to arbitrate at all between the parties”).

177. *Supra* notes 167–69, 175–76 and accompanying text.

178. *Supra* notes 170–72 and accompanying text.

179. See *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1209 (2014) (“[W]hile we respect the Government’s views about the proper interpretation of treaties, we have been unable to find any other authority or precedent suggesting that the use of the ‘consent’ label in a treaty should make a critical difference . . .” (citation omitted)); Or. Arg. Tr., *supra* note 166, at 32 (“Is this litigation preliminary . . . a condition on the consent to arbitrate a dispute? . . . [A]fter looking at the sources that the United States is telling the Court it should look to, what is the answer of the United States to that question?”); *id.* at 33 (observing that DOJ’s position seems to discard “all the techniques that [the Court] use[s] in the *Howsam–First Options* line of cases” and fails to “replac[e] [them] with anything else” (emphasis added)).

180. 134 S. Ct. 1198, 1203 (2014). The majority opinion was joined in full by five other Justices: Scalia, Thomas, Ginsburg, Alito, and Kagan. *Id.* at 1203. Sotomayor joined all but one part and wrote a separate concurrence. *Id.*

of the author was telling—Justice Breyer penned the decisions in both *First Options*¹⁸¹ and *Howsam*.¹⁸² His authorship of *BG Group* signaled from the outset that the Court likely would not depart substantially, if at all, from its domestic precedents. The Justice cast the issue before the Court as follows:

[W]hether a court of the United States, in reviewing an arbitration award made under the [United Kingdom–Argentina bilateral investment] [t]reaty, should interpret and apply the local litigation requirement [in the BIT] *de novo*, or with the deference that courts ordinarily owe arbitration decisions. That is to say, who—court or arbitrator—bears primary responsibility for interpreting and applying the local litigation requirement to an underlying controversy?¹⁸³

After setting out the factual and procedural background,¹⁸⁴ Justice Breyer explained how the majority, in no more than ten pages in the U.S. Reports, would dispose of a case that had wreaked havoc in every previous forum:

In answering the question, we shall initially treat the document before us as if it were an ordinary contract between private parties. Were that so, we conclude, the matter would be for the arbitrators. We then ask whether the fact that the document in question is a treaty makes a critical difference. We conclude that it does not.¹⁸⁵

Employing the legal fiction that a State-to-State Treaty is “an ordinary contract between private parties” allowed the majority to invoke and apply domestic precedents such as *Howsam* and *First Options* without pause.¹⁸⁶ In turn, the majority instructed that under these authorities questions that go to substantive arbitrability, such as “whether the parties are bound by a given arbitration clause,” are presumptively for a court to decide.¹⁸⁷ By

181. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 940 (1995).

182. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 81 (2002).

183. *BG Grp.*, 134 S. Ct. at 1203–04.

184. *See id.* at 1204–06 (summarizing events in Argentina, award of the arbitral tribunal, and the subsequent decisions of the lower U.S. federal courts). *See supra* Part III for a fuller account.

185. *Id.* at 1206.

186. *See id.* at 1206–07 (citing domestic arbitration cases).

187. *Id.* at 1206 (quoting *Howsam*, 537 U.S. at 84).

contrast, “disputes about the meaning and application of particular *procedural* preconditions for the use of arbitration” are presumptively for the arbitrator.¹⁸⁸

Having laid out the familiar *Howsam–First Options* formulation, the majority faced little difficulty reaching the conclusion that the host-country litigation requirement in the BIT was of the “procedural[] variety.”¹⁸⁹ Relying on the structure of the dispute-resolution section of the BIT, as well as the BIT’s mandatory language in connection with resort to international arbitration, the Court reasoned that the litigation requirement “determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all.”¹⁹⁰ Further, nothing in the BIT “give[s] substantive weight to the local court’s determinations on the matters at issue between the parties.”¹⁹¹ As such, “the litigation provision is . . . a purely procedural requirement—a claims-processing rule that governs when the arbitration may begin, but not whether it may occur or what its substantive outcome will be on the issues in dispute.”¹⁹² According to the majority, this requirement is “highly analogous” to other provisions the Court has deemed procedural in its domestic arbitration precedents.¹⁹³

The Court next “relaxed [its] ordinary contract assumption and ask[ed] whether the fact that the document before [it] is a treaty makes a critical difference to [its] analysis.”¹⁹⁴ But the majority could find no authority that displaced the ordinary contract assumption.¹⁹⁵ It declined DOJ’s invitation to grant the term “consent” in an international treaty talismanic significance,

188. *Id.* at 1207 (emphasis added).

189. *See id.* (observing that the “text and structure of the provision make clear that it operates as a procedural condition precedent to arbitration”).

190. *Id.*

191. *Id.*

192. *Id.*

193. *See id.* at 1207–08 (listing examples of various claims-processing rules found to be “procedural provisions”).

194. *Id.* at 1208.

195. *See id.* at 1209 (noting that the Court was “unable to find any other authority or precedent suggesting that the use of the ‘consent’ label in a treaty should make a critical difference in discerning the parties’ intent”).

noting that in the present case “we do not now see why the presence of the term ‘consent’ in a treaty warrants abandoning, or increasing the complexity of, our ordinary intent-determining framework.”¹⁹⁶ Although the BIT did contain evidence of contrary intent, that is, a desire to have questions of arbitrability resolved by a court, the evidence was not sufficient to displace the ordinary contract presumption.¹⁹⁷

In sum, the Court articulated that, in matters involving vacatur or enforcement of investment treaty arbitration awards in the United States, arbitrators receive “considerable deference” when interpreting and applying procedural provisions, absent evidence of contrary intent that would displace this presumption.¹⁹⁸ The Court closed: “Consequently, we conclude that the arbitrators’ jurisdictional determinations are lawful. The judgment of the Court of Appeals to the contrary is reversed.”¹⁹⁹

2. Justice Sotomayor’s Concurrence

One of the chief challenges facing those trying to understand and apply the majority’s decision will be determining its breadth.²⁰⁰ Justice Sotomayor’s concurrence provides critical

196. *Id.*

197. *Id.* at 1210 (explaining that a “treaty may contain evidence that show the parties had an intent contrary to our ordinary presumptions about who should decide threshold issues related to arbitration”). But the Court reasoned that “the text and structure of the litigation requirement . . . make clear that it is a procedural condition precedent to arbitration—a sequential step that a party must follow before giving notice of arbitration.” *Id.* “The Treaty nowhere says that the provision is to operate as a substantive condition on the formation of the arbitration contract, or that it is a matter of such elevated importance that it is to be decided by courts.” *Id.*

198. *See id.* (“A treaty may contain evidence that shows the parties had an intent contrary to our ordinary presumptions about who should decide threshold issues related to arbitration. But the treaty before us does not show any such contrary intention.”).

199. *Id.* at 1213.

200. *See id.* at 1209 (“We leave for another day the question of interpreting treaties that refer to ‘conditions of consent’ explicitly.”); Diane Marie Amann, *Opinion Analysis: Clear Statement Ruling in Investor–State Arbitration Case Leaves Open Question on U.S. Bilateral Treaties*, SCOTUSBLOG (Mar. 6, 2014, 4:06 PM), <http://www.scotusblog.com/2014/03/opinion-analysis-clear-statement->

insight on this point because it emphasizes the narrowness of the majority's precise holding.²⁰¹

Justice Sotomayor “agree[d] with the Court that the local litigation requirement at issue in this case is a procedural precondition to arbitration . . . , not a condition on Argentina's consent to arbitrate”²⁰² But the Justice felt it was important to acknowledge that if parties explicitly made such a requirement a condition on consent to arbitration, then the result might be different. She thought it was unnecessary and potentially troublesome for the Court to state in dicta that “a decision by treaty parties to describe a condition as one on their consent to arbitrate is unlikely to be conclusive in deciding whether the parties intended for the condition to be resolved by a court.”²⁰³

B. Potential Implications for International Arbitration in the United States

1. International Investment Treaty Arbitration

As noted above, the Court's decision in *BG Group* is its first-ever pronouncement on ITA.²⁰⁴ If it had affirmed the D.C. Circuit, the Court would have signaled to investors and foreign countries that U.S. national courts are keen to intervene when arbitrability issues arise during or following an international arbitration.²⁰⁵

ruling-in-investor-state-arbitration-case-leaves-open-question-on-u-s-bilateral-treaties/ (last visited Sept. 24, 2014) (“Whether in some future case the Supreme Court will enforce such express provisions [as those conditions on consent in U.S. treaties] remains an open question.”) (on file with the Washington and Lee Law Review).

201. See *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1213 (2014) (Sotomayor, J., concurring) (explaining that “I write separately because, in the absence of this express reservation [regarding what the majority has decided], the opinion might be construed otherwise”).

202. *Id.*

203. *Id.* (internal quotation marks and citation omitted).

204. *Supra* note 7.

205. See *Republic of Argentina v. BG Grp. PLC*, 665 F.3d 1363, 1371 (D.C. Cir. 2012) (reasoning that Argentina and the United Kingdom “likely never conceived of the need to specify that a *court* should decide whether Article 8(1) and (2)'s requirement that disputes first be brought to a *court* should be

Such a ruling might have proven a boon for critics who believe international arbitrators wield too much authority in the current ITA regime,²⁰⁶ but a bane to others who hold sacrosanct the autonomy of the international arbitral tribunal. To reach this result, the Court would have needed to conclude that the litigation requirement constituted a substantive question of arbitrability—a condition on Argentina's consent to arbitrate—the fulfillment of which a court should review independently.²⁰⁷

Instead, the Court reversed the D.C. Circuit and ruled that under existing precedents the district court was correct to confirm the award, indicating that international arbitral awards receive significant deference from U.S. courts on questions of arbitrability.²⁰⁸ Extending existing domestic precedents might not have been the most elegant solution, but doing so established that questions of arbitrability, whether in domestic or international arbitration, will be reviewed under the same *Howsam–First Options* formulation.²⁰⁹ Specifically, it likely means that when a BIT states only an arbitral tribunal has the power to issue final and binding decisions, there is clear and unmistakable evidence under U.S. law that the treaty parties envisioned arbitrators, not a court, would decide whether procedural preconditions to arbitration have been satisfied.²¹⁰ As

respected”). “The [BIT] provides a prime example of a situation where the ‘parties would likely have expected a court’ to decide arbitrability.” *Id.* (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

206. See, e.g., Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT’L L.J. 391, 394 (2012) (contending that ITA insiders, including arbitrators, possess too much power and that “states . . . should sit at the top of the decisional hierarchy”).

207. See *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1216 (2014) (Roberts, C.J., dissenting) (“Submitting the dispute to the courts is . . . a condition to the formation of an agreement, not simply a matter of performing an existing agreement.”). Whether an investor has fulfilled the litigation requirement is “for a court, not an arbitrator, to decide.” *Id.*

208. *Supra* Part V.A.1.

209. See *supra* notes 194–98 and accompanying text (concluding no alternative mode of analysis was required by the Court even though *BG Group* concerned a BIT rather than an ordinary domestic contract).

210. *BG Grp.*, 134 S. Ct. at 1210 (reasoning that “the text and structure of the litigation requirement set forth in [the BIT] make clear that it is a procedural condition” and that “[i]nternational arbitrators are likely more familiar than are judges with the expectations of foreign investors and recipient

such, investors and countries party to future disputes, as well as U.S. lower courts, which have not yet decided an ITA case post-*BG Group*, now have a clearer idea of the applicable U.S. law on ITA.²¹¹

2. International Commercial Arbitration

The decision will also apply to international arbitration in the United States more broadly. As noted above, ITA and ICA draw on many of the same principles.²¹² Thus, parties to future international *commercial* arbitrations in the United States or those trying to enforce ICA awards in the United States will rely on *BG Group* for guidance.²¹³ Private parties enjoy the speed and confidentiality that ICA provides.²¹⁴ Confidentiality helps parties maintain a working relationship while they resolve disputes without attracting public scrutiny.²¹⁵ But if the relationship has soured during a dispute such that one party petitions to vacate an award under the FAA, public court proceedings ensue and both parties lose the benefit of privacy.²¹⁶ Accordingly, to the extent

nations regarding the operation of the provision” (citation omitted)).

211. See *supra* Part II.E (describing the role of situs law).

212. See *supra* notes 43–46 and accompanying text (describing similarities). The *BG Group* decision will also influence resolution of arbitrability questions in wholly domestic cases. See, e.g., *Joe v. Sec. Fin. Corp. of S. Carolina*, CA 0:14-159-CMC-SVH, 2014 WL 2094978, at *1–2 (D.S.C. May 20, 2014) (noting that employer moved to compel arbitration of race-discrimination claim and explaining that “[a]rbitrability questions, such as whether an arbitration clause covers a particular claim, are questions for the court to decide” (citing *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1206–07 (2014)); *Klein v. ATP Flight Sch., LLP*, 14-CV-1522 JFB GRB, 2014 WL 3013294, at *4 (E.D.N.Y. July 3, 2014) (similar). Such domestic considerations are beyond the scope of this Note.

213. E.g., *infra* notes 218–21 and accompanying text.

214. See George A. Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37 YALE J. INT’L L. 1, 2 (2012) (noting that “effective” commercial arbitration typically includes “speed, economy, informality, technical expertise, and avoidance of national fora”).

215. See BORN, *supra* note 4, at 15 (explaining that “most international business prefer, and actively seek, the privacy and confidentiality that the arbitral process offers” because it “focuses the parties on an amicable, business-like resolution of their disagreements” (footnote omitted)).

216. See Thomas E. Carbonneau, *At the Crossroads of Legitimacy and*

the *BG Group* decision may be read to hem in independent judicial review of arbitral awards and discourage vacatur proceedings,²¹⁷ private parties may be more likely to site their commercials arbitrations or enforce their ICA awards in the United States.

Thus far, U.S. lower courts have decided only a handful of cases touching on ICA since March 2014. For example, in *Commissions Import Export S.A. v. Republic of the Congo*,²¹⁸ plaintiff sought to collect on an English judgment that enforced an international commercial arbitration award.²¹⁹ Although the panel held that the FAA did not preempt state law in this case and the panel did not rely on *BG Group* for its decision,²²⁰ it did cite *BG Group* for the proposition that the FAA “reflects a congressional judgment that the ‘emphatic federal policy in favor of arbitral dispute resolution . . . applies with special force in the field of international commerce.’”²²¹

Arbitral Autonomy, 16 AM. REV. INT'L ARB. 213, 234 (2005) (“[M]any vacatur proceedings [under the FAA] result in a complete re-enactment of the arbitral proceedings on a public record before a court. . . . An attempt to vacate the award will, therefore, result in destroying the confidentiality of arbitral proceedings.”).

217. See *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1213 (2014) (“We would not necessarily characterize [the] actions [by Argentina] as rendering [the] domestic court-exhaustion requirement ‘absurd and unreasonable,’ but at the same time we cannot say that the arbitrators’ conclusions are barred by the [BIT].”).

218. No. 13-CV-7004, 2014 WL 3377337 (D.C. Cir. July 11, 2014).

219. See *id.* at *1 (noting that plaintiff “prevailed in 2000 in an arbitration in Paris, France,” “obtain[ed] a judgment in 2009 from a court in England enforcing the arbitral award,” and ultimately “sued in the United States to enforce the foreign judgment under state law”).

220. *Id.* at *11 (“[W]e hold that the limitations period in [the FAA] does not preempt the longer limitations period in the D.C. Recognition Act for enforcing a foreign court judgment. . . . We remand the case for the district court to determine whether the English Judgment is enforceable under the D.C. Recognition Act.”).

221. *Id.* at 8 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 631 (1985)); see also *Seed Holdings, Inc. v. Jiffy Int’l AS*, 13 CIV. 2284 JGK, 2014 WL 1141717, at *11 (S.D.N.Y. Mar. 21, 2014) (reviewing an ICA award and noting the distinction between substantive and procedural questions of arbitrability (citing *BG Grp., PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1206–08 (2014))).

In *Ecopetrol S.A. v. Offshore Exploration and Production L.L.C.*,²²² Ecopetrol S.A., the national oil company of Colombia,²²³ and the Korean National Oil Corporation (Purchasers) sought to enforce two arbitral awards against Offshore Exploration and Production L.L.C. (Offshore).²²⁴ Offshore is a Delaware corporation with its principal place of business in Houston, Texas.²²⁵ Offshore argued that one of the awards “should be vacated because the arbitral panel incorrectly determined that it had jurisdiction over the dispute underlying the award.”²²⁶ But the district court in the Southern District of New York rejected this argument, noting that “[w]hen parties have clearly and unmistakably submitted a disputed issue for arbitration, an arbitral panel’s decision should rarely be set aside.”²²⁷ The court relied on *BG Group* to support the proposition that because Offshore did not dispute that the parties agreed to allow the arbitrators to rule on objections to their jurisdiction, “the familiar and deferential standards that apply to judicial review of arbitral awards apply to review of the arbitral panel’s determination that it had jurisdiction to issue the . . . Award.”²²⁸

As more U.S. lower courts have occasion to consider vacatur and enforcement of ICA awards in the coming years, the citations to *BG Group* will increase, and parties must understand where certain dispute-resolution provisions fall on the substantive–procedural arbitrability spectrum.

V. An Improved Host-Country Litigation Requirement

Although U.S. law on ITA may be clearer after *BG Group*, the question persists: What can Argentina and other similarly

222. No. 14 Civ. 529 (S.D.N.Y. Sept. 10, 2014).

223. *Offshore Exploration & Prod. L.L.C. v. Morgan Stanley Private Bank, N.A.*, 986 F. Supp. 2d 308, 311 (S.D.N.Y. 2013).

224. See *Ecopetrol*, No. 14 Civ. 529, at *1 (“The Purchasers now seek to confirm the Interim Award and the Supplemental Interim Award . . .”).

225. *Offshore*, 986 F. Supp. 2d at 311.

226. *Ecopetrol*, No. 14 Civ. 529, at *9 (footnote omitted).

227. *Id.* (citation omitted).

228. *Id.*

situated countries do to more effectively protect their sovereignty in bilateral investments treaties? Commentators have noted that “[i]f investment arbitration is to fulfill its promise[,] . . . some mechanism must be found to promote greater sensitivity to vital host state interests.”²²⁹ The answer may be an improved host-country litigation requirement:

[A] lot of times nobody think[s] that’s going to change anything, but you can understand Argentina or any other country saying, look, before we’re going to arbitrate, you know, try our courts, you may find—you may be surprised, right?²³⁰

This Part contends that ITA participants should heed Chief Justice Roberts’s admonition to BG at oral argument.²³¹ Part V.A proposes language that treaty drafters should consider drawing from or incorporating if they wish to create or restructure a dispute-resolution mechanism that includes a host-country litigation requirement.²³² Part V.B explains how the proposed language avoids specific problems that arose in *BG Group* and asserts that an improved litigation requirement combats the broader criticism that the current ITA regime does not adequately protect host-country sovereignty.²³³

A. Proposed Language to Consider

The language below is not intended to be lifted from the page and stuck directly into the dispute-resolution section of a bilateral investment treaty. As with any agreement, the unique bargaining positions and goals of the contracting parties will heavily inform the drafting of the document, including the

229. Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT’L L. 365, 399 (2003).

230. Or. Arg. Tr., *supra* note 166, at 11 (questioning of BG by Chief Justice Roberts).

231. *See also* BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1219 (2014) (Roberts, C.J., dissenting) (“It is no trifling matter for a sovereign nation to subject itself to suit by private parties; we do not presume that any country—including our own—takes that step lightly.” (citation omitted)).

232. *Infra* Part V.A.

233. *Infra* Part V.B.

dispute-resolution mechanism.²³⁴ Further, it would be foolish to think this Note sets forth language immune from the interpretation controversies that haunt all complex agreements.²³⁵

But given that “[m]ore than 1,300 of [the] 2,857 bilateral investment treaties (BITs) [in effect at the end of 2012] . . . have reached their ‘anytime termination phase,’”²³⁶ with a total of 1,598 projected to have reached that stage by 2018,²³⁷ countries should be increasingly eager to modify existing BITs or tailor new ones to their liking.²³⁸ With that in mind, the language below seeks to generate ideas on how treaty partners can incorporate a host-country litigation requirement that increases respect for national sovereignty and aids arbitrators in later proceedings while still affording investments sufficient protection:

All disputes shall be finally resolved by international arbitration. Prior to arbitration, the complaining party shall submit the dispute to the national courts of the country in which the investment is located. During these proceedings, the parties to the dispute shall undertake good-faith efforts to brief factual issues occurring or having occurred in the host country and legal issues involving host-country law. The courts shall apply the host-country law in effect at the time the investment was made, unless the parties to the dispute agree otherwise.

Upon the earlier of a dispositive decision by a host-country court or eighteenth months, either party to the dispute may request arbitration. Before issuing a final award, the arbitral tribunal shall review findings of fact and legal determinations concerning host-country law made by the host-country’s courts. The arbitral tribunal shall apply the host-country law

234. *Cf. supra* notes 34–38 and accompanying text (emphasizing the consensual nature of arbitration).

235. For an excellent volume on treaty interpretation issues in ITA, see generally J. ROMESH WEERAMANTRY, *TREATY INTERPRETATION IN INVESTMENT ARBITRATION* (2012).

236. UNCTAD *Inv. Rpt.*, *supra* note 2, at x.

237. *Id.* at 109.

238. *Id.* (“The significant number of expired or soon-to-expire BITs creates distinct opportunities for updating and improving the [international investment arbitration] regime.”).

in effect at the time the investment was made, unless the parties to the dispute agree otherwise.

The arbitral tribunal shall have jurisdiction to hear any objections that the above requirement to litigate in the host-country's courts has not been satisfied.

B. Avoiding the Pitfalls in BG Group and Addressing Broader Criticisms of the International Investment Treaty Arbitration Regime

1. Good-Faith Obligation

Throughout the proceedings, BG contended that nothing productive would have come from litigating in the Argentine courts prior to arbitration.²³⁹ That may be true under the letter of the United Kingdom–Argentina BIT because it does not require that the parties litigate vigorously or until a court issues a decision, only that the parties to the dispute maintain a case in the Argentine courts for eighteen months.²⁴⁰ By including a good-faith obligation to litigate, the proposed language incentivizes investors and host countries to develop a record in the host-country's courts.²⁴¹ Even if they do not, there is still recourse to arbitration after a period of time.²⁴²

239. See, e.g., Or. Arg. Tr., *supra* note 166, at 57–58 (suggesting that BG could have simply filed in the Argentine courts and then waited eighteen months without doing anything else to fulfill the litigation requirement).

240. See *supra* notes 111–13 and accompanying text (laying out the dispute-resolution section from the BIT); Or. Arg. Tr., *supra* note 166, at 45–47 (questioning whether the eighteen-month requirement was really useful for the parties and a condition on consent to arbitration when BG could have simply filed a suit in the courts and “ke[pt] it alive perfunctorily” to satisfy the requirement).

241. See MCLACHLAN ET AL., *supra* note 59, at 70 (“At time tribunals will have to consider findings of domestic law by national courts, tribunals, or regulatory bodies on the status of investments in domestic legal systems.”). “[I]n the absence of any evidence that the findings are tainted by some lack of due process, deference should be shown to decisions of domestic courts or tribunals.” *Id.* (citation omitted).

242. *Supra* Part V.A.

2. *Stabilization of Applicable Host-Country Law*

Effective usage of stabilization clauses in individual commercial agreements between foreign investors and countries inspires their inclusion here.²⁴³ During development of the record in the host-country courts, the stabilization clauses protect investors from adverse changes in host-country law.²⁴⁴ The proposed language freezes applicable host-country law for the purposes of litigation and arbitration at that which is in effect when an investment is made. It ensures that the host country cannot legislate to the detriment of investors after an investment is made, a fundamental goal of BITs.²⁴⁵ Accordingly, investors would be able to learn on the front-end the contours of the domestic law that will apply if a dispute arises. For example, in disputes involving regulatory expropriation by the host country, the investor could point to the text of the BIT to support its position on applicable host-country law rather than hoping an arbitral tribunal will later discard the litigation requirement because it believes the host country impeded the investor's ability to litigate in the courts, as was the case in *BG Group*.²⁴⁶ Instead of stabilizing the law at the time the treaty is signed for all investments ever made under the BIT, the proposed language freezes host-country law at the time of investment for particular investments, allowing the host country to retain more legislative flexibility.²⁴⁷

243. *Supra* notes 63–67 and accompanying text.

244. *See supra* Part II.C (describing the role of host-country law in international arbitration).

245. *See* VANDEVELDE, *supra* note 3, at 4 (explaining that a goal of BITs generally is the “stabilizing effect . . . of preserving a particular set of host state policies”). “The role of the BIT . . . is to stabilize . . . obligations, either to reassure investors or to prevent an easy reversal of the underlying policies, and to publicize the stabilization.” *Id.*

246. *Supra* note 118 and accompanying text.

247. *See supra* note 67 and accompanying text (suggesting that countries typically refrain from including stabilization clauses in treaties).

3. *Clear Deference to the Arbitral Tribunal on Challenges to Compliance with the Litigation Requirement*

The amount of discretion and deference that should be afforded arbitrators was a major point of contention in *BG Group*. As noted above, the Court's opinion invoked the substantive-procedural delineation for whether questions of arbitrability are for a court or an arbitrator.²⁴⁸ However, given that BITs rarely mirror one another exactly, it is difficult to say, based on *BG Group*, which side of the substance-procedure divide provisions from other treaties would fall if reviewed by a U.S. court or another national court.²⁴⁹

The proposed language avoids this issue by clearly committing to the arbitral tribunal challenges regarding fulfillment of the litigation requirement.²⁵⁰ But it also requires arbitral tribunals to examine host-country rulings before issuing a final decision.²⁵¹ The language does not mandate the tribunal follow a particular standard of review. The goal is to require arbitrators to consider host-country court findings without imposing an artificial standard likely to engender unnecessary acrimony over whether the standard has been correctly employed.²⁵² In this way, the language attempts to encourage sequential review of certain issues but does not contemplate a separate judicial body would substantively review the decisions of the arbitrators.

VI. Conclusion

In the foreseeable future, direct international arbitration between foreign investors and host countries will remain the

248. *Supra* notes 186–88 and accompanying text.

249. *See supra* Part IV.A.2 (describing Justice Sotomayor's concurrence and her emphasis on the narrowness of the Court's decision).

250. *Supra* Part V.A.

251. *Supra* Part V.A.

252. *But cf.* Bjorklund, *supra* note 26, at 812–13 (advocating for “sequential review” in order to “maximize[] the dispensation of justice to a particular investor and minimize[] intrusion on the sovereignty of the state whose system is being called into question”).

dominant method of conclusively resolving investment disputes arising out of international treaties. It is paramount to many foreign investors that BITs include access to a neutral, independent tribunal to ensure protection of investments. But many critics and countries argue that the current international investment treaty arbitration regime does not take adequate measure of national sovereignty concerns. The case of *BG Group, PLC v. Republic of Argentina* throws this theme into sharp relief. By the plain text of the BIT, Argentina required any U.K. investor to litigate in its courts before seeking arbitration. But arbitration was held in the United States before either BG or Argentina had litigated, and the Supreme Court of the United States determined it should not disturb the findings of the arbitrators.

The facts and ultimate legal disposition of *BG Group* should prompt countries to consider implementing or improving host-country litigation requirements in their BITs. Such requirements, drawing from the concepts mentioned above, would help the ITA system reach the proper balance between national sovereignty and investment protection.