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UNITED STATES SUPREME COURT GIVES DEFERENCE TO ARBITRATORS IN INVESTMENT TREATY CASES

On March 5, the U.S. Supreme Court, in a 7 to 2 decision, ruled that an appellate court erred in setting aside a US$185 million arbitral award rendered under the UNCITRAL rules and pursuant to the United Kingdom–Argentina Bilateral Investment Treaty, and reinstated that award for UK investor, BG Group PLC. The majority opinion, authored by Justice Breyer, held that U.S. courts should review local litigation requirements in international investment treaties "with the deference that courts ordinarily owe arbitration decisions."[1] Justice Breyer's holding viewed the local litigation rule as a procedural requirement rather than a substantive precondition to arbitration, thus allowing the arbitrators, rather than a national court, to decide its meaning and application. The Court's decision affects the role of U.S. courts in interpreting and enforcing arbitral awards rendered pursuant to investment treaties, and it extends a more general pro-arbitration trend in U.S. jurisprudence to cases filed against sovereign states.

BG GROUP PLC V. REPUBLIC OF ARGENTINA: THE INVESTMENT ARBITRATION AND THE D.C. COURTS

Argentina and the UK signed a Bilateral Investment Treaty ("BIT") on December 11, 1990, with the purpose of promoting and protecting foreign investment in the Argentine economy. Article 8(2) of the BIT provides that disputes under the Treaty between an investor and Argentina must first be submitted to a competent tribunal in the sovereign state where the investment was made. Subsequently, the dispute can go to international arbitration at one party's request if (i) a period of 18 months has elapsed since the dispute was presented to the tribunal and no decision has been made; or (ii) a final decision was made by the tribunal, but the parties still disagree. Article 8(3) of the BIT specifies that if a dispute goes to arbitration and the parties cannot agree on arbitration procedures, the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules") will govern.

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BG Group held substantial shares of MetroGAS, a private Argentine gas transportation and distribution company. MetroGAS was granted a 35-year exclusive license to distribute gas in and around Buenos Aires. The tariffs on this license would be calculated in U.S. dollars and could be adjusted every six months for inflation based on the United States Product Price Index ("PPI"). Between 2001 and 2002, the Argentine economy collapsed. In response, the government enacted Emergency Law 25.561 to prohibit inflation adjustments based on PPI and converted dollar-based tariffs to Argentine peso-based tariffs. Then, Argentina passed Decree 214/02, Article 12 ("Article 12"), which stayed, for a period of 180 days, compliance with injunctions and trial judgments resulting from lawsuits relating to the Emergency Law. Additionally, Argentina established a "renegotiation process" for public contracts, such as the MetroGas license, but simultaneously barred any firm that was litigating against Argentina in court or arbitration from participation in those renegotiations.

BG Group filed a Notice of Arbitration under Article 8 of the BIT and submitted the dispute to arbitration in the United States under the UNCITRAL Rules eight months after Article 12 had expired. The arbitration was seated in Washington, D.C. BG Group claimed that the emergency laws had negatively affected their investment in MetroGAS and sought damages.

Argentina opposed arbitration, claiming that the arbitral tribunal did not have jurisdiction over the parties because the dispute had not been submitted to an Argentine tribunal for a period of at least 18 months, which submission was a precondition to commencing arbitration under Article 8(2) of the BIT. BG Group argued before the arbitral tribunal that waiting to meet the requirements of Article 8(2) of the BIT would have been futile. The arbitral tribunal determined that they had jurisdiction over the dispute and issued an award on the merits in favor of BG Group.[2] On the jurisdictional point, the tribunal held that Argentina had enacted laws hindering judicial recourse to the point where compliance with the BIT's local litigation requirement was implicitly waived.

Both parties filed petitions for review in the United States District Court for the District of Columbia, which upheld the arbitration award, stating that the arbitral tribunal could decide its own jurisdiction. The United States Court of Appeals for the District of Columbia Circuit overturned that decision and found that the arbitral tribunal did not have jurisdiction because BG Group had not complied with the local litigation requirements of Article 8(2) of the BIT. The appellate court further held that, as the local litigation requirement was a precondition to Argentina's granting its consent to arbitration, the arbitral tribunal's decision regarding compliance with that precondition must be reviewed *de novo*. As a result, the circuit court set aside the arbitral tribunal's award.

THE SUPREME COURT'S DECISION

The Supreme Court decided the question that had split the inferior U.S. courts, namely: "whether a court of the United States, in reviewing an arbitration award made under the Treaty, should interpret and apply the local litigation requirement *de novo*, or with the deference that courts ordinarily owe arbitration decisions."[3]

The Court viewed the BIT as an ordinary contract between private parties. In doing so, Justice Breyer found that the local litigation requirement was a procedural condition precedent to arbitration, which determined "*when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all."[4] Thus, as a procedural precondition rather than a substantive bar to arbitrability, Justice Breyer found that, "courts presume that the parties intend arbitrators, not courts, to decide disputes about [the local litigation requirement's] meaning and application."[5] The Court found nothing in Article 8 of the BIT to overcome this presumption. The Court also rejected the position of the U.S. Solicitor-General that the local litigation provision should be treated differently because it is a condition laid down by a state, and not a private party. While the Court acknowledged that it typically "respect[s] the Government's views about the proper interpretation of treaties,"[6] it saw no reason to abandon or increase "the complexity of our ordinary intent-determining framework" for arbitration clauses.[7]

The upshot of this conclusion is that a U.S. court presented with an application to review an arbitral award must do so under a "highly deferential" standard.[8] Because Argentina had "hindered recourse to its domestic judiciary," the Tribunal held that it would be "absurd and unreasonable" to require local litigation before resorting to investment

arbitration.[9] While the majority stopped short of characterizing Argentina's actions as "absurd and unreasonable," it did endorse the Tribunal's characterization as falling within its mandate under the agreement.[10]

The concurring and dissenting opinions contain positions that may bear upon future disputes. Justice Sotomayor agreed with the majority that the local litigation requirement was a procedural requirement in the BIT, but she wrote separately to address the precedential value of the decision for later cases. In her view, if the local litigation provision had been expressly labeled a "condition on the treaty party's consent to arbitrate, that would … change the analysis as to whether the parties intended the requirement to be interpreted by a court or an arbitrator."[11] The dissent, authored by Chief Justice Roberts and joined by Justice Kennedy, took issue with the majority's decision to consider the BIT as an ordinary contract between private parties.[12] In their view, when looking at the BIT as an act of state between co-equal sovereigns, with all the deference that comes with that conclusion, the local litigation requirement can only be viewed as a precondition to the formation of an agreement to arbitrate against the state. "It is no trifling matter for a sovereign nation to subject itself to suit by private parties," the Chief Justice said; "we do not presume that any country—including our own—takes that step lightly."[13] Thus, without having submitted to the local courts before it initiated arbitration, the dissent would have held that BG Group had no agreement to arbitrate against Argentina.

THE IMPACT OF THE SUPREME COURT'S DECISION

In some contexts, sovereign consent to convene an arbitration occupies a special place in the law. At least one federal judge has said that the federal policy in favor of arbitration carries special force when the agreement to arbitrate is contained in a treaty as opposed to a private contract.[14] Take, for example, the recurring situation where parties use the U.S. courts to seek evidence by way of 28 U.S.C. § 1782 for use in international arbitration proceedings. Where that arbitration is convened by treaty and not by contract, U.S. courts will more readily lend their assistance.[15]

This decision, which on its face runs counter to the idea that U.S. courts will treat investment treaty arbitration differently than commercial arbitration, still furthers, however, the same objective. It furthers the Supreme Court's recent string of pro-arbitration rulings. Further, when the issue concerns the validity of an award, it brings investment treaty cases within the favorable ambit of its commercial arbitration jurisprudence. In ruling that the local litigation requirement in the BIT was procedural and that a U.S. court should afford deference to the arbitrators, the majority reinforced the concept of arbitral sovereignty within its jurisdiction—irrespective of whether the consent to arbitration came in the form of an arm's-length contract between two commodities brokers or an act of state between two sovereigns. This will naturally render the United States a favorable place to seat UNCITRAL investment arbitration proceedings, as U.S. courts interpret the resulting awards in accordance with the "basic objective of … investment treat[ies]."[16]

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ENDNOTES

1 *BG Group PLC v. Republic of Argentina*, 572 U.S. ____, slip op. at 2 (Mar. 5, 2014).

2 *BG Group Plc. v. The Republic of Argentina*, UNCITRAL Final Award, Dec. 24, 2007 (hereinafter "Award") available at http://italaw.com/sites/default/files/case-documents/ita0081.pdf.

3 *BG Group PLC*, slip op. at 2.

4 *Id.* at 8.

5 *Id.*

6 *Id.* at 10–11.

7 *Id.* at 12.

8 *Id.* at 17.

9 *Id.* at 18 (citing Award at ¶ 147).

10 *Id.* at 18.

11 *Id.* at 3 (Sotomayor, J., concurring).

12 *Id.* at 1 (Roberts, C.J., dissenting).

13 *Id.* at 9 (Roberts, C.J., dissenting) (citing *United States v. Bormes*, 568 U. S. ____, slip op. at 4 (2012) (Congress must "unequivocally express[ ]" its intent to waive the sovereign immunity of the United States (quoting *United States v. Nordic Village, Inc.*, 503 U. S. 30, 33 (1992))).

14 *Republic of Ecuador v. Chevron Corp.*, 2010 WL 1028349 (S.D.N.Y. Mar. 16, 2010).

15 *Compare* Roger P. Alford, *Ancillary Discovery to Prove Denial of Justice*, 53 VA. J. INT'L L. 127, 135–39 (2012) (noting that some "federal district courts have concluded that private arbitral tribunals are not 'international tribunals'" within the meaning of Section 1782, but that there have been "over twenty" federal court decisions concerning Section 1782 requests in the investment treaty contest since Intel and suggesting that all such proceedings meet the statutory requirement for a "foreign or international tribunal").

16 *BG Group PLC*, slip op. at 18.

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