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BG Group v. Republic of Argentina: A Supreme Misunderstanding of Investment Treaty Arbitration

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I. INTRODUCTION 541
II. *BG GROUP V. REPUBLIC OF ARGENTINA* 550
  A. *The BIT Arbitration* 550
  B. *The Lower U.S. Court Decisions* 553
  C. *The U.S. Supreme Court Decision* 555
III. THE STRUCTURE AND SOVEREIGN NATURE OF BITS 562
  A. *The Architecture of BITs* 563
  B. *The Inaptness of the FAA Arbitrability Framework* 564
IV. INTERPRETING THE BIT 569
  A. *The Vienna Convention and the BIT's Object and Purpose* ... 570
  B. *Deference and the Role of Courts at the Seat of Arbitration* .. 573
V. CONCLUSION 574

I. INTRODUCTION

In *BG Group, PLC v. Republic of Argentina*, a divided U.S. Supreme Court determined for the first time the standard of review of an investment treaty award.[1] The Court held that because the requirement in the U.K.-Argentina Bilateral Investment Treaty (BIT) that the investor first litigate its dispute in national courts was merely a procedural prerequisite to investor-state arbitration—rather than a substantive condition of consent to the treaty itself—U.S. courts could not review de novo the jurisdictional basis of the resulting

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1. BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1204 (2014).

arbitral award but instead had to accord the award appropriate deference.[2] While the result may be correct, the reasoning is not.

Critically, in reaching its decision, the Court failed to interpret the BIT as a whole under the Vienna Convention on the Law of Treaties (Vienna Convention),[3] and looked only to its idiosyncratic domestic case law involving the Federal Arbitration Act (FAA).[4] Under one strand of FAA jurisprudence, the question of whether the arbitrator or the court determines if a dispute is arbitrable turns on whether the dispute involves issues of procedural arbitrability or gateway questions of substantive arbitrability.[5] The former are presumptively for arbitrators to resolve, while the latter are presumptively for courts to decide.[6] In *BG Group*, the tribunal in the underlying arbitration determined it had jurisdiction even though the investor had not met the litigation requirement on the ground that Argentina had unilaterally prevented access to its judiciary.[7] To determine Argentina's subsequent challenge of the award in U.S. courts, the Court operated under its FAA framework and therefore had to decide if the arbitrability of the litigation requirement was a determination for the arbitrators, in which case the award was due appropriate deference, or one for courts, in which event the award could be reviewed de novo.[8]

Writing for the majority, Justice Breyer concluded that the local-litigation

2. *Id.* at 1204, 1207.

3. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; *Vienna Convention on the Law of Treaties*, UNITED NATIONS TREATY COLLECTION [hereinafter *Vienna Convention Signatories*], https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf (last visited Mar. 1, 2016) (listing the signatories of the Vienna Convention on the Law of Treaties).

4. *BG Grp.*, 134 S. Ct. at 1206.

5. *Id.* at 1206–07. Note that the majority in *BG Group* labels the two categories of disputes as (1) disputes about the meaning and application of particular procedural preconditions for the use of arbitration and (2) disputes about arbitrability, and initially refers only to the latter disputes as "arbitrability" disputes. However, as the cases the Court itself cites in support of this bifurcation indicate, the term "arbitrability" has been used elsewhere and generally to mean the question of whether the dispute may be arbitrated or proceed to arbitration. *See id.* Thus, it is linguistically clearer and less confusing simply to label the two categories as disputes about procedural arbitrability and substantive arbitrability respectively, and this article proceeds on that understanding. *But see* George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration,* 37 YALE J. INT'L L. 1, 12 (2012) (lamenting that "an overly broad definition of arbitrability produces analytic mischief").

6. *BG Grp.*, 134 S. Ct. at 1206–07.

7. BG Grp. PLC v. Republic of Argentina, Final Award, ¶¶ 51–53 (UNCITRAL Arbitral Trib. 2007) [hereinafter BG Grp. Final Award], http://www.italaw.com/sites/default/files/case-documents/ita0081.pdf.

8. *BG Grp.*, 134 S. Ct. at 1206.

requirement only determined when, and not whether, arbitration would begin and it was not a precondition to the existence of the arbitral agreement.[9] Accordingly, it was a procedural question of arbitrability presumptively reserved for arbitrators, so the courts owed deference to the arbitrators' decision and could not review it de novo.[10] Justice Sotomayor joined the majority but wrote a separate concurrence to caution that such a presumption is rebuttable, for example, by contrary treaty language—not present here—that conditions the state parties' consent to arbitrate on the relevant issue.[11] Chief Justice Roberts and Justice Kennedy dissented, concluding that the local-litigation requirement was in fact a gateway question of substantive arbitrability, which should thus be resolved independently by the courts.[12]

In so deciding, the Court treated the investment treaty award no differently from a domestic award subject to the FAA.[13] The Court in the process not only transposed the flaws inherent in the arbitrability analysis articulated in its FAA jurisprudence, but exacerbated it by ignoring the public international attributes of investor-state arbitration.[14] On the first count, the arbitrability analysis is intrinsically incoherent for relying on the nebulous concept of intent to discern an issue that the parties will likely not have considered at all.[15] Further, what counts as procedural rather than substantive is anybody's guess, turning on semantics and vividly exemplified in the fractured opinions in *BG Group*.[16]

More fundamentally, however, the reasoning is flawed because the Court disregarded the triangular structure and public international dimensions of investment treaty arbitration. Not only is an investment treaty award obviously different from a domestic arbitration award, it is distinct from awards arising from contract-based international arbitrations, including international commercial arbitrations. In particular, the unique nature and structure of investment treaty arbitration have a corresponding impact on the laws applicable to and determination of the standard of review of an investment

9. *Id.* at 1207.
10. *Id.* at 1204.
11. *Id.* at 1213 (Sotomayor, J., concurring).
12. *Id.* at 1216 (Roberts, C.J., dissenting).
13. *Id*. at 1206 (majority opinion) (concluding that it would "treat [the BIT] as if it were an ordinary contract between private parties").
14. *See infra* Part II.B; *cf. BG Grp.*, 134 S. Ct. at 1215 (Roberts, C.J., dissenting) (criticizing the majority for disregarding the structural and international attributes of the BIT and treating it as an ordinary contract between parties rather than a treaty between two sovereign nations).
15. *See BG Grp.*, 134 S. Ct. at 1208; *infra* Part II.C.
16. *See BG Grp.*, 134 S. Ct. at 1216 (Roberts, C.J., dissenting); *infra* Part II.C.

treaty award. Specifically, this Article argues that an investment treaty constrains the ability of the court at the seat of arbitration from determining the standard of review by exclusive reference to its national law. Rather, the court must interpret the investment treaty under international law, including the Vienna Convention, in determining the standard of review of the investment treaty award. This stands in contrast to a court's determination of the standard of review of a domestic arbitration award or award resulting from contract-based international arbitration.

Concerning domestic arbitrations, because a national court will by default and in general have jurisdiction over the domestic *dispute* (not just the award) absent the arbitration clause and there is no question that national law alone applies to a domestic dispute, the court can apply national law exclusively and without qualification to determine the relevant standard of review of a domestic arbitration award.[17] The *opposite* is true of an investment treaty award. A national court's jurisdiction, if any, over an investment dispute does not extend to the dispute itself but is strictly limited to the enforcement or vacatur of the investment treaty award, and even then would not exist but for the arbitration clause. In any such enforcement or vacatur proceedings brought under the New York Convention, the applicability of the national law is likewise limited.

Further, while it is true that the New York Convention has been read to permit the court at the seat of arbitration—which is ordinarily chosen by the parties—to apply its national law (the *lex arbitri*) in vacatur proceedings, the Convention does not in fact *require* the (sole) application of national law, much less exclude the application of international law in such cases.[18] Article V(1)(e) merely provides that one ground for refusing the recognition and enforcement of a foreign arbitral award is where the award "has been set aside or suspended

17. *See infra* Part IV.

18. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(e), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. The New York Convention contains no express provision regarding the vacatur or annulment of awards, but in Article V(1)(e), it refers to the possibility of the award being set aside by the domestic court at the arbitral seat. *See id*. Article V(1)(e) has been read to permit the court at the arbitral seat to apply its domestic law in vacating the award. *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3163–65 (2d ed. 2014) (noting that the New York Convention "leave[s] the subject of annulment primarily to local law in the arbitral seat" and that "the New York Convention (and other international arbitration conventions) have frequently been interpreted as . . . leaving the subject [of annulment] entirely to national law"); *see also* Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 21 (2d. Cir. 1997) ("We read Article V(1)(e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award.").

by a competent authority of the country in which, or under the law of which, that award was made."[19]

Additionally, to the extent justification for applying the *lex arbitri* rests on the fact that the disputing parties had chosen the seat of arbitration, that justification is undermined by the triangular nature of investment treaty arbitration: The disputing parties here are the investor and the host state, whereas the parties to the investment treaty itself are the home state and the host state.[20] Yet it is the investment treaty that authorizes, and is the basis for, investor-state arbitration. Under these circumstances, it is surely more reasonable to understand that when sovereign state parties allow for investor-state arbitration subject to the New York Convention, they are empowering the courts at the seat of arbitration—which are chosen *not* by both of the state parties, but by the disputing investor and the host state[21]—to determine the validity of any resulting arbitral award in a manner consistent with the investment treaty, rather than just with the *lex arbitri* (the law of the seat of arbitration). [22] Indeed, the investment treaty should be understood as circumscribing the ability of the court to apply exclusively the *lex arbitri*. The *lex arbitri*, after all, is the national law of a third and otherwise unconnected state that was not even chosen by both state parties to the treaty.[23]

It is in this respect that one may distinguish contract-based international arbitration, particularly between private commercial parties. [24] There, the disputing parties are entirely and solely responsible for reaching agreement on *both* the relevant arbitration clause and seat of arbitration.[25] In contrast to the

19. New York Convention, *supra* note 18, at art. V(1)(e).

20. *See infra* Part III.A.

21. *Cf.* Ondřej Chvosta, *The Potentially Applicable Systems of Law in Commercial and Investment Arbitrations: A Comparative Perspective*, 22 WILLAMETTE J. INT'L L. & DISP. RESOL. 1, 23 (2014) ("The BIT is an international treaty entered into between two states. Investors are not a party to the BIT, even though the treaty was drafted for their benefit. Therefore, unless the BIT provides that the arbitration clause is to be governed by the law that the host state and the investor agree upon—or a similar provision specifically providing for the freedom to choose the governing law—BIT arbitration clauses are governed by the same law as the BIT. And because the BIT is a source of public international law, it must be construed in accordance with the principles contained in the Vienna Convention on the Law of Treaties (Vienna Convention).").

22. *See id.*

23. *See generally Lex Arbitri*, BLACK'S LAW DICTIONARY (10th ed. 2014)

24. *See generally* Marta Infantino, *International Arbitral Awards' Reasons: Surveying the State-of-the-Art in Commercial and Investment International Dispute Settlements*, 5 J. INT'L DISP. SETTLEMENT 175, 180 (2014).

25. *Cf.* Canada v. S.D. Myers, Inc., [2004] F.C. 38 (Can.) (noting that Canada and Mexico were asserting that the appropriate standard of review of a NAFTA award has to be determined in

role of the treaty in triangular investment treaty arbitration, there is no reason to think that the contract should otherwise constrain the review of contract-based international arbitration awards in relation to the *lex arbitri*.[26]

Further, to permit the *lex arbitri* exclusively to determine the standard of review of any investment treaty arbitral award would lead to the unsettling result that an award issued under any single investment treaty is potentially subject to as many different standards of review as there are jurisdictions—depending solely on which seat of arbitration the investor and host state happen to agree upon.[27] Equally troublesome, then, is the corollary consequence that the various awards issued under any single investment treaty (between different investors and the relevant host state) could be subject to varying standards of review. Surely the state parties must have intended any and all awards issued under the same investment treaty to be reviewable or binding to the same degree? As opposed to, say, an international commercial arbitration agreement that is unlikely to be reactivated once binding arbitration is initiated because this suggests an irreparable breakdown of relations between the disputing parties,[28] an investment treaty is designed to apply to every investor from each of the state parties to the investment treaty over the entirety of the treaty's shelf life.[29] In other words, while an international commercial arbitration agreement

accordance with NAFTA "because this international arbitration involves a State, and the State has only consented to arbitration to the extent provided in NAFTA . . . [which] is a different situation from where private parties have agreed that the international arbitration will decide the whole matter in issue between the private parties").

26. This is not to say that the standard of review of awards arising from contract-based international arbitration may not be separately constrained by the New York Convention. *See* BORN, *supra* note 18, at 3167–68 (noting that to read a binding arbitration agreement as an irrelevant or merely advisory arbitration followed by de novo judicial resolution of disputes would unjustifiably "convert an agreement to arbitrate into an agreement to mediate and an award into a mere recommendation").

27. *Cf.* George A. Bermann, *Ascertaining the Parties' Intentions in Arbitral Design*, 113 PENN ST. L. REV. 1013, 1018–19 (2009) ("Certainly, in international arbitration, the law of arbitration at the place of arbitration is considered to supply the rules governing the arbitral process itself. That is to say, the parties are deemed, in designating an arbitral seat, to have submitted their arbitration as such to that body of law, including its rules or presumptions as to arbitral design.").

28. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) ("Courts and arbitration in the context of most commercial contracts are resorted to because there has been a breakdown in the working relationship of the parties . . . ."); Craig Shepherd, *ADR Strategy in the United Arab Emirates*, 2009 WL 2966293, at *2 (2009) ("ADR is also used as a means of resolving general commercial disputes. For example, . . . mediation can offer a negotiated solution that preserves the ongoing business relationship between the parties, which may break down irretrievably once litigation or arbitration has been commenced.").

29. *See* Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L L.J. 353, 353–54 (2015).

will likely result in just one arbitral award, if at all, an investment treaty can spawn multiple investment awards over its lifetime.

In sum, and rendered in instant terms, the U.S. courts should have viewed the arbitration agreement between BG Group and Argentina through the prism of the U.K.-Argentina BIT and its provisions on investor-state dispute settlement, and interpreted the BIT under international law in reviewing the *BG Group* award instead of relying exclusively on FAA case law. Thus grounded, the resulting interpretation may be informed by very different factors, if not yield a different result.

For instance, one should interpret the U.K.-Argentina BIT, as with any treaty, by looking first to the Vienna Convention, which has critical and added relevance here because it is binding on both the U.K. and Argentina as parties thereto.[30] Such an interpretation might reasonably take note of the fact that while the investor is required first to litigate the dispute in the national courts of the host state, the dispute must be referred to international arbitration if the court has not rendered a final decision within eighteen months or *even when the court has done so but either party contests the decision*.[31] As detailed below, this commitment in the BIT to arbitrate finally all outstanding investor-state disputes could lead to the conclusion that, in the absence of explicit language to the contrary, U.S. courts should defer to the *BG Group* arbitrators to resolve arbitrability questions, regardless of whether they are procedural or substantive.[32]

The point here is not to advance any particular interpretation of the U.K.-Argentina BIT as it relates to the standard of review of the award. Rather, the interpretation above is offered merely to illustrate that an approach both focused on the relevant investment treaty and reliant upon the Vienna Convention may turn on factors entirely different from those compelled by the *lex arbitri*. In *BG Group*, for example, the *lex arbitri* led to the idiosyncratic, if not incoherent, determination of whether the relevant arbitrability question is

30. *See Vienna Convention Signatories*, *supra* note 3.

31. Article 8(2)(a) of the BIT provides, inter alia, that investor-state disputes arising thereunder: *shall* be submitted to international arbitration . . . 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; [or] *where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute*. 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, U.K.-Arg., art. 8(2)(a), Dec. 11, 1990, 1765 U.N.T.S. 34 [hereinafter U.K.-Arg. BIT] (emphasis added).

32. *See infra* Part IV.A.

procedural or substantive.[33] Thus, the misguided result may well be one at odds with the "ordinary meaning" of the relevant treaty.[34]

Additionally, it would be quite curious to think that the U.K. and Argentina governments meant for any award issued under the BIT to be potentially subject to a multiplicity of standards of review that would crystallize only upon a side agreement between the investor and the host state, rather than subjecting all arbitral awards arising under the BIT to judicial review to the same degree (whatever it may be). Likewise, it bends the mind to imagine that the various awards arising under the U.K.-Argentina BIT over the years should be subject to varying and different standards of review when it would be more sensible to presume that the two governments must have meant for all awards arising under the BIT to be reviewable or binding to the same degree because the states would have had a shared understanding of the relative weight and place of the arbitral process in the investment treaty scheme.

This acute failure to differentiate between investment treaty and contract-based international arbitration awards, and to consult the relevant investment treaty in the case of the former on the applicable standard of review, is not limited to U.S. courts. In applications to set aside or annul an investment arbitral award, other national courts have applied the equivalent of a de novo standard of review to positive jurisdictional determinations of arbitrators by looking exclusively to prior national court decisions that did not involve investment treaties.[35] Relying exclusively on national law under these circumstances to arrive at a categorical rule cannot be squared with the proper recognition of investment treaty awards as born ultimately of an agreement between sovereign states, which requires that the particular investment treaty be interpreted to determine the applicable standard of review.[36] Through its

33. *See* BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1206–07 (2014).

34. *See* Vienna Convention, s*upra* note 3, at art. 31.

35. *See, e.g.*, Canada v. S.D. Myers, Inc., [2004] F.C. 38 (Can.) (looking exclusively to Canadian law and to decisions not involving investment awards to determine the standard of review of a NAFTA award); Republic of Ecuador v. Occidental Exploration & Prod. Co., [2006] EWHC (Comm) 345 [7], [79], [2006] Lloyd's Rep. 773 (Eng.), *aff'd*, [2007] EWCA (Civ) 656 (Eng.) (stating baldly that it was well established under English law that the standard of review of the investment treaty award before it was one of "correctness" without elaborating on the law or whether it involved investment arbitral awards).

36. *But see* Caroline Henckels, *Balancing Investment Protection and the Public Interest: The Role of the Standard of Review and the Important of Deference in Investor-State Arbitration*, 4 J. INT'L DISP. SETTLEMENT 197 (2013) (stating that because most investment treaties do not generally stipulate the applicable standard of review, "tribunals must rely on their inherent powers in the determination of the appropriate standard of review to the extent that the treaty text does not shed light on the matter").

decision, the Court in *BG Group* furthered this fundamental misunderstanding by ensnaring parties in investor-state disputes who select a U.S. jurisdiction as their seat of arbitration in distracting and misconceived litigation over whether the relevant arbitrability question is procedural or substantive.

It bears observing here that whereas international commercial arbitral awards may generally be challenged in national courts and subject to judicial review,[37] the same is not true of all investment treaty awards. Significantly, those investment treaty awards issued under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention),[38] may be challenged through an internal annulment procedure by an ad hoc committee appointed in accordance with ICSID Convention provisions, but are immunized from judicial review in every Contracting State.[39] In contrast, non-ICSID Convention investment treaty awards, such as the award at issue in *BG Group*, may be subject to judicial review by national courts in a challenge mounted by the party seeking to set aside the award in the seat of arbitration under the laws of that state.[40] Because the majority of investor-state disputes are brought under the ICSID Convention,[41] the adverse effects of adopting an approach like the one taken in *BG Group* will be mitigated to some degree. Nonetheless, since non-ICSID awards remain a significant segment of investment treaty awards,[42] and investment treaties such as the U.K.-Argentina BIT often allow disputing parties to choose between different arbitral fora, *BG Group* and other decisions like it will have palpable

37. *See* Ernst-Ulrich Petersmann, *International Rule of Law and Constitutional Justice in International Investment Law and Arbitration*, 16 IND. J. GLOBAL LEGAL STUD. 513, 527 (2009) (noting that "the international legal obligation to enforce commercial awards pursuant to Article III of the New York Convention is subject to limited judicial review by domestic courts" whereas "awards rendered pursuant to ICSID procedures must be executed without further analysis by the domestic judiciary and are only subject to ICSID annulment proceedings").

38. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 5, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

39. *See id*. *See generally* David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID REV.: FOREIGN INV. L.J. 21, 23–26 (1992) (explaining the differences between a judicial appeal and the annulment procedure for ICSID).

40. *See* Petersmann, *supra* note 37; *see also infra* Part IV.A.

41. *See Recent Developments in Investor-State Dispute Settlement*, UNITED NATIONS CONF. TRADE & DEV. 1, 9 (Apr. 2014) [hereinafter *Recent Developments*], http://unctad.org/en/PublicationsLibrary /webdiaepcb2014d3_en.pdf (representing that 62% of known investor-state dispute settlement cases have been brought under ICSID).

42. *See id.* (representing that 38% of known investor-state dispute settlement cases have been brought under the rules of institutions other than ICSID).

negative consequences, including the (non-)resolution of investor-state disputes in a manner that is at odds with what is reasonably understood to be contemplated by the relevant investment treaty.

Part II describes in detail *BG Group* and related decisions. Part III explains why the Court's approach is misguided and fundamentally inconsistent with the structure and nature of investment treaties. Part IV proposes instead that national courts, including U.S. courts, should look to the Vienna Convention and accord international investment treaty awards deference consistent with the "ordinary meaning" of the relevant investment treaty. Such an approach could minimize the possibility that awards issued under any particular investment treaty would be subject to varying standards of review resulting from national courts applying their domestic laws exclusively—and possibly contrary to the sovereign will of the state parties.[43]

II. *BG GROUP V. REPUBLIC OF ARGENTINA*

A. The BIT Arbitration

BG Group involves one of a raft of investment treaty arbitrations brought against Argentina following the state's enactment of emergency laws in 2002 to combat a mounting economic crisis enveloping Argentina at that time.[44] In the case at hand, a British investor that owned an interest in an Argentinian gas distribution company had initiated an arbitral claim in 2003 against the Argentinian government under the BIT, alleging that the emergency laws violated the expropriation and fair and equitable treatment provisions of the BIT.[45]

Certain regulatory measures under the emergency laws unpegged the Argentinian peso from the U.S. dollar and converted dollar-denominated tariffs—including the gas tariffs applicable to BG Group's investment—into peso-denominated tariffs at a rate of one peso per dollar.[46] Because the exchange rate at the time was approximately three pesos to the dollar, BG

43. *See id*.

44. *See* Republic of Argentina v. BG Grp. PLC, 764 F. Supp. 2d 21, 25 n.3 (D.D.C. 2011) (noting that more than twenty-five foreign investors initiated arbitration against Argentina claiming violations of BITs as a result of the emergency law's impact). *See generally* Paolo Di Rosa, *The Recent Wave of Arbitrations Against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 U. MIAMI INTER-AM. L. REV. 41, 44 (2004).

45. BG Grp. Final Award, *supra* note 7, ¶¶ 73, 84–85.

46. *Id.* ¶ 70; *see also* BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1198 (2014).

Group's investment became a losing venture overnight.[47] The ensuing arbitration was governed by the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL),[48] and BG Group and Argentina agreed to Washington, D.C. as the seat of arbitration.[49]

In the arbitration, Argentina argued, inter alia, that BG Group's claims were inadmissible because Article 8 of the BIT authorized recourse to arbitration only after the investor litigated for eighteen months in the Argentine courts, and BG Group failed to meet this local-litigation requirement.[50] Specifically, Article 8(2) provides that investor-state disputes arising under the BIT shall be submitted to international arbitration in the following two scenarios:

> [I]f one of the Parties so requests, in any of the following circumstances: (i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision[,] [or] (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute; [or if] the Contracting Party and the investor of the other Contracting Party have so agreed.[51]

In response, BG Group argued, inter alia, that the local-litigation requirement was senseless under the circumstances because there was no practical possibility of the Argentine courts rendering a decision on the matter within the eighteen-month period.[52] Agreeing with BG Group, the *BG Group* tribunal (the Tribunal) determined that the local-litigation requirement could not, as a matter of treaty interpretation, be construed as an absolute

47. *BG Grp.*, 134 S. Ct. at 1204; BG Grp. Final Award, *supra* note 7, ¶ 77.

48. Article 8(3) of the BIT allows the parties to choose between referring their dispute to either the International Centre for the Settlement of Investment Disputes (ICSID) or to an international arbitrator or *ad hoc* tribunal under the United Nations Commission on International Trade Law (UNCITRAL) Rules. *See* U.K.-Arg. BIT, *supra* note 31, at art. 8(3). Additionally, the BIT provides that if "there is no agreement to one of the above alternative procedures, the Parties to the dispute shall be bound to submit it to arbitration under [the UNCITRAL Rules]." *Id*. Because the parties failed to agree on submission of the dispute to ICSID, BG Group submitted the arbitration under the UNCITRAL Rules. BG Grp. Final Award, *supra* note 7, ¶ 4.

49. Petition to Vacate or Modify Arbitration Award at 2, Republic of Argentina v. BG Grp. PLC, 764 F. Supp. 2d 21 (D.D.C. Mar. 21, 2008) (No. 08-0485) [hereinafter Petition to Vacate].

50. BG Grp. Final Award, *supra* note 7, ¶¶ 140–41.

51. *See* U.K.-Arg. BIT, *supra* note 31, at art. 8(2).

52. BG Grp. Final Award, *supra* note 7, ¶ 142.

impediment.[53] The Tribunal reasoned that it was simply not reasonable to enforce such a local-litigation requirement "[w]here recourse to the domestic judiciary is unilaterally prevented or hindered by the host State."[54] Indeed, to do so "would lead to the kind of absurd and *unreasonable result proscribed by Article 32 of the Vienna Convention*, allowing the State to unilaterally elude arbitration, which has been the engine of the transition from a politicized system of diplomatic protection to one of direct investor-State adjudication."[55]

In order to ensure the full implementation of the laws, Argentina had enacted legislation staying all suits brought by claimants impacted by the emergency laws.[56] Further, while Argentina had established a process for renegotiating public service contracts that had been impacted, it barred any licensee seeking redress in a judicial, arbitral, or other forum from participating in the process.[57] In sum, it was simply untenable for Argentina to simultaneously:

> [R]estrict the effectiveness of domestic judicial remedies as a means to achieve the full implementation of the Emergency Law and its regulations; [] insist that Claimant go to domestic courts to challenge the very same measures; and [] exclude from the renegotiation process any licensee that does bring its grievance to local courts.[58]

After rejecting Argentina's argument and affirming its jurisdiction to hear the claims,[59] the Tribunal went on to determine that Argentina had breached the fair and equitable treatment provision of the BIT and awarded BG Group $185 million in damages.[60]

53. *Id.* ¶ 147.
54. *Id*.
55. *Id*. (emphasis added). Article 32(b) of the Vienna Convention provides that "[r]ecourse may be had to supplementary means of interpretation . . . in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 . . . [l]eads to a result which is manifestly absurd or unreasonable." Vienna Convention, *supra* note 3, at art. 32(b).
56. BG Grp. Final Award, *supra* note 7, ¶¶ 148–52.
57. *Id*. ¶¶ 78–81, 154.
58. *Id*. ¶ 156.
59. *Id.* ¶¶ 240, 407.
60. *Id.* ¶ 444 (stating that the actual sum was $185,285,485.85).

B. The Lower U.S. Court Decisions

As it was entitled to do, Argentina challenged the arbitral award at the seat of arbitration and filed a motion to vacate the award in the United States District Court for the District of Columbia.[61] Argentina filed the motion on multiple grounds, including that the arbitrators, in failing to enforce the local-litigation requirement, exceeded their powers pursuant to section 10(a)(4) of the FAA or else acted in manifest disregard of the law.[62]

In rejecting Argentina's arguments, the court first emphasized that "'judicial review of arbitral awards is extremely limited' and that [the court] 'do[es] not sit to hear claims of factual or legal error by an arbitrator' in the same manner that an appeals court would review the decision of a lower court."[63] Quoting the Supreme Court itself, the district court noted that "careful scrutiny of an arbitrator's decision would frustrate the FAA's 'emphatic federal policy in favor of arbitral dispute resolution' . . . a policy that 'applies with special force in the field of international commerce.'"[64] As such, "[i]n order for Argentina to prevail in its efforts to vacate the Award under Section 10(a)(4) [of the FAA], it must demonstrate that the 'arbitrator stray[ed] from interpretation and application of the agreement and effectively dispense[d] his own brand of industrial justice.'"[65] Specifically, the Tribunal:

> [C]orrectly turned to the text of Article 8(2)(a)(i) of the Investment Treaty and relevant international law sources [including Article 32 of the Vienna Convention] in attempting to discern its jurisdiction to hear BG Group's claims, and it relied upon a colorable, if not reasonable, interpretation of these provisions in concluding that the matter was arbitrable. Under Section 10(a)(4) and controlling case law, the Court

61. *See* Petition to Vacate, *supra* note 49, at 1.

62. Republic of Argentina v. BG Grp. PLC, 764 F. Supp. 2d 21, 39 (D.D.C. 2011), *rev'd*, 665 F.3d 1363 (D.C. Cir. 2012), *rev'd*, 134 S. Ct. 1198 (2014); BG Grp. PLC v. Republic of Argentina, 715 F. Supp. 2d 108, 121, 123 (D.D.C. 2010), *rev'd*, 665 F.3d 1363 (D.C. Cir. 2012), *rev'd*, 134 S. Ct. 1198 (2014). In the first decision in 2010, the district court denied Argentina's motion to vacate or modify the arbitral award pursuant to sections 10(a) and 11 of the FAA, and in the second decision in 2011, the district court confirmed the award pursuant to section 207 of the FAA and the New York Convention. *See BG Grp.*, 764 F. Supp. 2d at 39; *BG Grp.*, 715 F. Supp. 2d at 112–13.

63. *BG Grp.*, 715 F. Supp. 2d at 116 (quoting Teamsters Local Union No. 61 v. United Parcel Serv., Inc., 272 F.3d 600, 604 (D.C. Cir. 2001)).

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

65. *Id*. at 121 (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 671 (2010)).

is without authority to disturb the panel's conclusions.[66]

The district court adopted a similarly deferential standard in BG Group's favor concerning Argentina's argument that the Tribunal acted in "manifest disregard of the law."[67] The court noted that, in order to prevail, "Argentina must demonstrate 'more than error or misunderstanding with respect to the law'"[68] and instead "must show that (1) the arbitrators knew of a governing legal principle[,] yet refused to apply it or ignored it altogether[,] and (2) the law ignored by the arbitrators was well[-]defined, explicit, and clearly applicable to the case."[69] Again, because "the arbitral panel did not '*ignore* the plain language of the [Investment] Treaty'" in resolving the jurisdictional question but instead "*construed* Article 8(2)(a)(i) of the Investment Treaty together with Article 32 of the Vienna Convention and determined that the former was not applicable under the particular circumstances of this case"; it can, thus, "hardly be said that the panel *disregarded* the applicable law."[70]

After denying Argentina's motion to vacate the award, the court in a separate decision granted BG Group's motion to confirm the award pursuant to section 203 of the FAA and the New York Convention.[71] On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's decision and vacated the award.[72] Instead of adopting a deferential standard and looking to the Vienna Convention, the appellate court framed the critical question as one of intent, namely whether the state parties to the BIT "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."[73] This, in turn "raises the antecedent question of whether the contracting parties intended the answer to be provided by a court or an arbitrator."[74]

As explained in more detail below, this analytical framework is derived from the Supreme Court cases of *First Options of Chicago, Inc. v. Kaplan* and

66. *Id*. at 122.
67. *Id.* at 123.
68. *Id.*
69. *Id*. (emphasis added).
70. *Id*.
71. Republic of Argentina v. BG Grp. PLC, 764 F. Supp. 2d 21, 39 (D.D.C. 2011), *rev'd*, 665 F.3d 1363 (D.C. Cir. 2012), *rev'd*, 134 S. Ct. 1198 (2014).
72. BG Grp. PLC v. Republic of Argentina, 665 F.3d 1363, 1366 (D.C. Cir. 2012), *rev'd*, 134 S. Ct. 1198 (2014).
73. *Id.* at 1369.
74. *Id.*

Howsam v. Dean Witter Reynolds, Inc.[75] The U.K.-Argentina BIT does not address the antecedent question directly, but in light of "Article 8(1) and (2)'s requirement that disputes first be brought to a *court*," the Court of Appeals regarded the BIT as "a prime example of a situation where the 'parties would likely have expected a court' to decide arbitrability."[76] As such, the Court of Appeals determined that the question of the dispute's arbitrability was for the court to determine independently, and because it concluded "that BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration," it reversed the district court's decision and vacated the award.[77]

C. The U.S. Supreme Court Decision

After granting BG Group's petition for a writ of certiorari, a divided Supreme Court went on to reverse the decision of the D.C. Circuit.[78] Although the majority of the Court came to the opposite conclusion as the D.C. Circuit, they in fact shared the same approach to the problem, which was to ask the antecedent question of whom—court or arbitrator—the parties intended to interpret and apply the local-litigation requirement in the BIT.[79] Because the BIT was silent on this question, the Court had to "determine the parties' intent with the help of presumptions."[80]

Writing for the majority—which included Justices Scalia, Thomas, Ginsburg, Alito, and Kagan—Justice Breyer concluded that the local-litigation requirement only determined as a matter of procedure when, and not whether, arbitration would begin and was not a precondition to the existence of the arbitral agreement.[81] Accordingly, the Court presumed that the parties intended for the arbitrators—not the courts—to decide the issue and held that the award was owed deference and courts could not review it de novo.[82] Justice Sotomayor joined in the majority opinion but wrote a separate concurrence to

75. *See* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 81 (2002); First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 940 (1995); *infra* Part II.B. *See generally* Jarrod Wong, *Arbitrating in the Ether of Intent*, 40 FLA. ST. U. L. REV. 165, 174–81 (2013) (discussing the analytical framework established by *First Options* and *Howsam*).
76. *BG Grp.*, 665 F.3d at 1371 (quoting *Howsam*, 537 U.S. at 83).
77. *Id*. at 1373.
78. BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1205, 1213 (2014).
79. *Id.* at 1206.
80. *Id*.
81. *Id.* at 1210.
82. *Id.*

emphasize that such a presumption is rebuttable and would have been rebutted had, for example, there been contrary treaty language—not present here—that conditioned the state parties' consent to arbitrate on the local-litigation requirement being met.[83] In the dissent, joined by Justice Kennedy, Chief Justice Roberts concluded that the local-litigation requirement was a condition to the formation of any agreement, which also encompassed its existence and validity, to investor-state arbitration and that the parties must have intended its interpretation as a matter for the courts to decide de novo.[84]

A critical line that divides the Court is what to make of the fact that the relevant agreement to be construed for divining the parties' intent is a treaty between states rather than a private contract between persons.[85] The majority concluded that it made no difference here and that it would "treat the [BIT] before [them] as if it were an ordinary contract between private parties."[86] So the majority looked to domestic case law developed under the FAA to resolve the issue.[87] Under that jurisprudence:

> Where ordinary contracts are at issue, it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide. If the contract is silent on the matter of who primarily is to decide "threshold" questions about arbitration, courts determine the parties' intent with the help of presumptions.[88]

Specifically, the presumption is that courts will decide gateway or substantive questions of arbitrability of a dispute, whereas arbitrators will determine procedural questions of arbitrability.[89] Gateway or substantive arbitrability questions are those questions that are applicable in the narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter and the parties would likely have thought that they agreed for an arbitrator to decide the matter. Consequently, referring the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may not have agreed to arbitrate.[90]

83. *Id.* at 1213–15 (Sotomayor, J., concurring).
84. *Id*. at 1215–16 (Roberts, C.J., dissenting).
85. *Id.* at 1206–07 (majority opinion).
86. *Id*. at 1206.
87. *Id.*
88. *Id.* (citations omitted).
89. *Id*. at 1206–07.
90. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83–84 (2002).

As the Court sees it, examples of substantive arbitrability questions include disputes "about whether the parties are bound by a given arbitration clause";[91] disagreements over "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy,"[92] such as whether a labor-management layoff controversy falls within the arbitration clause of a collective-bargaining agreement; and disputes over whether an arbitration clause for various enumerated grievances also covers damage claims from breach of a no-strike agreement.[93]

In contrast, questions of procedural arbitrability arise in "other kinds of general circumstance[s] where parties would likely expect that an arbitrator would decide the gateway matter" and are presumptively for the arbitrator to decide.[94] Examples of such questions include procedural defenses to arbitrability such as waiver or delay and "the satisfaction of 'prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate.'"[95]

Here, the majority determined that the interpretation of the local-litigation requirement is an issue of procedural arbitrability because "[i]t determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all."[96] Additionally, nothing in Article 8 "give[s] substantive weight to the local court's determinations on the matters at issue between the parties" and conversely "provides that *only* the 'arbitration decision shall be final and binding on both Parties.'"[97] The BIT "authorizes the use of international arbitration associations, the rules of which provide that arbitrators shall have the authority to interpret provisions of this kind."[98]

Further, the majority observed that international arbitrators "are likely more familiar than are judges with the expectations of foreign investors and

91. *Id.* at 84 (noting a court also decides arbitrability questions such as whether parties who did not sign an arbitration agreement are bound to it and whether an arbitration agreement surviving a corporate merger binds the resulting corporation).

92. *Id.* (citing AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 651–52 (1986) (holding that a particular type of controversy includes labor-management layoffs dealing with arbitration clauses in a collective-bargaining agreement)).

93. *See id.* (citing Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 241–43 (1962)).

94. *Id*.

95. BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1207 (2014) (quoting *Howsam*, 537 U.S. at 588).

96. *Id*.

97. *Id*. (quoting U.K.-Arg. BIT, *supra* note 31, at art. 8(4)).

98. *Id*. at 1210 (citing U.K.-Arg. BIT, *supra* note 31, at art. 8(3) (referencing the UNICTRAL and ICSID Arbitration Rules)).

recipient nations regarding the operation of the provision,"[99] which is instructive since comparative institutional expertise is a factor in determining the parties' likely intent.[100] The majority additionally regarded the local-litigation requirement as "highly analogous to procedural provisions that both this Court and others have found are for arbitrators, not courts, primarily to interpret and to apply," including questions of whether a party filed an arbitration notice within the time limit set in the arbitral rules, whether a mandatory pre-arbitration grievance procedure had been followed, and whether the pre-arbitration "good faith negotiations" requirement had been met.[101]

As summarized by the majority: "The upshot is that our ordinary presumption applies and it is not overcome. The interpretation and application of the local litigation provision is primarily for the arbitrators. Reviewing courts cannot review their decision *de novo*. Rather, they must do so with considerable deference."[102]

In deciding this, the majority rejected arguments advanced by the United States government, which had filed an amicus brief contending, inter alia, that the public international nature of the BIT meant that the local-litigation requirement may be "a condition on the [United] State's consent to enter into an arbitration agreement" and that courts should, therefore, "review de novo the arbitral tribunal's resolution of objections based on an investor's non-compliance."[103] The majority maintained, however, that "[a]s a general matter, a treaty is a contract, though between nations" and that "[i]ts interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent."[104]

Further, the majority noted that in the context of a motion to vacate an award made in the United States under the FAA, American law presumptions consistent with Article V(1)(e) of the New York Convention should apply,

99. *Id.*
100. *Id.* (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002)).
101. *Id*. at 1208.
102. *Id*. at 1210.
103. *Id*. at 1208. As other commentators have noted, the unnecessary and awkward discussion of "conditions of consent," which does not appear in the U.K.-Argentina BIT, might be traced to the United State's desire to preserve the possibility of seeking de novo review of any failure to meet such "conditions of consent" in U.S. investment treaties. *See* Anthea Roberts & Christina Trahanas, *Judicial Review of Investment Treaty Awards:* BG Group v. Argentina, 108 AM. J. INT'L L. 750, 762 (2014) ("The U.S. government clearly wanted to preserve its ability to seek de novo review for non-compliance with expressly labeled 'conditions of consent' in U.S. treaties, yet this position led it to draw a line that looked ad hoc and self-serving, leaving the Court frustrated and confused.").
104. *BG Grp.*, 134 S. Ct. at 1208.

which provides that an award may be "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."[105] While the majority was prepared to assume that couching a prerequisite to arbitration as a "condition to consent" may suggest that the parties considered the prerequisite to be significant, it would not resolve the arbitrability question definitively and in any case was not language present in Article 8 of the U.K.-Argentina BIT.[106]

While Justice Sotomayor agreed that the local-litigation requirement here was a procedural question of arbitrability as phrased, and therefore joined in the majority's opinion, she penned a separate concurrence.[107] Her concurrence distanced her from the majority's dictum that a treaty's express reference to a "condition to consent" to arbitration was inconclusive in determining whether the parties intended for the condition to be resolved by a court.[108] Such an express condition was not present in the BIT, and the dictum was thus unnecessary—if not incorrect—in her view.[109] She considered the question of consent to be "especially salient in the context of a bilateral investment treaty, where the treaty is not an already agreed-upon arbitration provision between known parties, but rather a nation state's standing offer to arbitrate with an amorphous class of private investors."[110] In this particular respect, she agreed with the dissent's observation that "'[i]t is no trifling matter' for a sovereign nation to 'subject itself to international arbitration' proceedings, so we should not 'presume that any country . . . takes that step lightly."[111]

For the dissenting Justices, however, the public international nature of treaties meant that courts get to independently resolve not just conditions to arbitration expressed as such, but also prerequisites to arbitration like the local-litigation requirement in the U.K.-Argentina BIT.[112] Chief Justice Roberts began the dissent by taking the majority to task for disregarding the structural and international attributes of the BIT and treating it "as if it were an ordinary contract between private parties" rather than "a treaty between two sovereign nations" to which the investor is not a party.[113]

105. *Id.*; *see also* New York Convention, *supra* note 18, at art. V.
106. *BG Grp.*, 134 S. Ct. at 1209.
107. *Id*. at 1213 (Sotomayor, J., concurring).
108. *Id*.
109. *Id*.
110. *Id*.
111. *Id*. at 1214 (citing *id.* at 1219–20 (Roberts, C.J., dissenting)).
112. *See generally id*. at 1215–24 (Roberts, C.J., dissenting).
113. *Id*. at 1215.

The dissent then noted that the BIT does not itself constitute an agreement to arbitrate with the investor.[114] Rather, the dissent described it as an agreement between the U.K. and Argentina that each state will unilaterally offer to arbitrate relevant investment disputes with investors from the other country, which the investor "may accept by complying with its terms," including the local-litigation requirement at issue here.[115]

As the dissent saw it:

> By incorporating the local litigation provision in Article 8(1), paragraph 8(2)(a) establishes that provision as a term of Argentina's unilateral offer to arbitrate. To accept Argentina's offer, an investor must therefore first litigate its dispute in Argentina's courts—either to a 'final decision' or for 18 months, whichever comes first. Unless the investor does so[,] . . . it has not accepted the terms of Argentina's offer to arbitrate, and thus has not formed an arbitration agreement with Argentina.[116]

For the dissent, then, "[s]ubmitting the dispute to the courts is thus a condition to the formation of an agreement, not simply a matter of performing an existing agreement."[117] Since this is a question of "whether there was such an agreement," and not simply when the agreement arose, the dissent considered it a substantive question of arbitrability "for a court, not an arbitrator, to decide."[118]

The dissent further relied on the BIT's public international nature to bolster this conclusion.[119] Specifically, the dissent regarded it more reasonable to construe the local-litigation requirement as a condition of consent to arbitration because sovereign states would not readily subject themselves to suit by private parties, particularly in the context of investor-state arbitration when a state may thereby "permit[] private adjudicators to review its public policies and

114. *Id.* at 1216.
115. *Id.* at 1215–16; *see also* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV.: FOREIGN INV. L.J. 232, 234 (1995) ("[A]n investor may wait until a dispute has arisen to announce its intention to avail itself of the arbitral mechanism—which until that moment is compulsory only as to the State."); Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 135, 137 (2006) (discussing the structure of BITs generally).
116. *BG Grp.*, 134 S. Ct. at 1218 (Roberts, C.J., dissenting).
117. *Id.* at 1216.
118. *Id*. at 1215–16.
119. *Id.* at 1219.

effectively annul the authoritative acts of its legislature, executive, and judiciary."[120] Therefore, there are practical reasons for insisting on the local-litigation requirement that may "help to narrow the range of issues that remain in controversy by the time a dispute reaches arbitration[,] . . . induce the parties to settle along the way[, or even] obviate the need for arbitration" should the investor prevail in the courts.[121]

In response to the dissent, the majority opinion acknowledged that it was possible to read the local-litigation requirement as one of the terms of a unilateral standing offer, but it held that "doing so is not consistent with [its] case law interpreting similar provisions appearing in ordinary arbitration contracts."[122] More significantly, the majority did not view the treaty language as amenable to the dissent's interpretation. As the majority read it, the local-litigation provision on its face concerned the "arbitration's timing, not the Treaty's effective date; or whom its arbitration clause binds; or whether that arbitration clause covers a certain kind of dispute."[123] Although the local-litigation requirement obligates the parties affirmatively to submit their claims to local courts for adjudication initially, the majority considered it telling that "Article 8 provides that only the decision of the arbitrators (*who need not give weight to the local court's decision*) will be 'final and binding.'"[124]

Because the local-litigation requirement "has no direct impact on the resolution of their dispute," the majority concluded that the provision is "a claims-processing requirement and is not a requirement that affects the arbitration contract's validity or scope" and, accordingly, was a procedural question of arbitrability to be resolved by arbitrators who deserved decision-making deference from the court.[125] Having decided that a deferential standard of review of the arbitral award was applicable, the majority went on to provide that review, which is described in more detail below.[126] Because the majority found that the arbitrators' determinations were either unchallenged by Argentina or else within the arbitrators' interpretive authority, it concluded that the arbitrators' decisions were lawful and thus reversed the judgment of the D.C. Circuit.[127]

120. *Id*. at 1220.
121. *Id.* at 1221.
122. *Id.* at 1211 (majority opinion).
123. *Id*.
124. *Id*. (emphasis added).
125. *Id* at 1211–12.
126. *See infra* Part III.B.
127. *BG Grp.*, 134 S. Ct. at 1206.

III. THE STRUCTURE AND SOVEREIGN NATURE OF BITS

The majority saw no reason to distinguish a BIT from a contract between private parties that contains an arbitration clause; however, each belongs to a distinct legal regime, and different legal considerations apply between the two that impact the arbitrability of disputes arising under the respective agreements. Unlike a private contract, a BIT is a treaty between two sovereign states and its interpretation is governed by the Vienna Convention.[128] The triangular nature of a BIT further complicates any arbitrability analysis and requires the sharp delineation between (a) the treaty itself, which—as noted—is between two states, and (b) the arbitration agreement arising under the treaty but between an investor and the host state.[129] The BIT precedes, allows for, informs, and ultimately grounds the investor-state agreement to arbitrate, but is separate from it.[130]

As set out below, these differences explain why the court at the seat of arbitration (including the Court in *BG Group*) should consult the Vienna Convention whenever it reviews an investment treaty award on an annulment application rather than applying the *lex arbitri* exclusively. While a national court would in general have jurisdiction over parties to a domestic dispute in the absence of the arbitration clause—and thereby bolstering the court's authority to determine the dispute's arbitrability under national law—the same is not true of parties to an investment treaty dispute because the national court would not otherwise have jurisdiction over a foreign investor and a sovereign host state. Although the New York Convention permits a court at the seat of arbitration—chosen incidentally by the investor and the host state and not both states—to apply its national law in annulment applications, it does not require the application of national law, nor does it prohibit the application of international law, which is apt here because the ultimate source of authority for the investment treaty award is the treaty itself.[131]

Moreover, investment treaty awards can be distinguished not just from domestic arbitral awards, but also awards arising under contract-based international arbitration, including international commercial arbitral awards. Contract-based international arbitration awards are issued under arbitration agreements entered into by—and based entirely on the consent between—the

128. *See generally* Vienna Convention, *supra* note 3.
129. *See BG Grp.*, 134 S. Ct. at 1216 (Roberts, C.J., dissenting).
130. *Id.*
131. *See supra* notes 18–19 and accompanying text.

disputing parties, and thus may perhaps be subject without more to the *lex arbitri*.[132] Further, permitting national courts to determine the standard of review of any investment treaty arbitral award under their individual and idiosyncratic national laws would mean that there could be as many standards of review as there are awards under the *same* investment treaty—surely an incongruous state of affairs.

A. The Architecture of BITs

As its name suggests, a BIT is an agreement between two states that governs the treatment of investments made in the territory of each state by individuals or companies from the other state.[133] BITs are broadly similar in their organization and content, and in general address at least three substantive issues: (1) conditions for the admission of foreign investors to the host State; (2) standards of treatment of foreign investors and investments, including protection against expropriation; and (3) methods for resolving investment disputes.[134]

Significantly, only states, not investors, enter into BITs.[135] Notwithstanding, a BIT confers on a foreign investor rights that the investor may directly enforce through the BIT's dispute settlement provisions.[136] These provisions typically authorize the foreign investor to submit an investment dispute between it and the contracting host state to international arbitration.[137] Thus, when a state enters into a BIT, it effectively extends a standing offer to eligible investors from the other contracting state to arbitrate any relevant investment dispute.[138] Should the investor choose to accept the offer, the investor may often do so simply by initiating arbitration proceedings and thereby perfecting the agreement between the foreign investor and the host state to arbitrate the investment dispute.[139]

In short, any arbitration agreement between the host state and the

132. *Cf. supra* note 26.
133. Brief for the United States as Amicus Curiae in Support of Vacatur and Remand at 1, BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014) (No. 12-138), 2013 WL 4737184, at *1 [hereinafter Amicus Curiae Brief].
134. *See* Wong, *supra* note 115, at 141.
135. *See id.* at 142.
136. *See id.*
137. *See id.*
138. *See id.*
139. *See id.*

investor—and any award issued thereunder—is derived from, and finds its authority in, the BIT.[140] Accordingly, one must interpret the BIT in order to determine the nature, scope, and effect of the resulting investor-state arbitration and award.[141] The interpretation of investment treaties, as with all treaties, is governed by the Vienna Convention, which is generally accepted as customary international law.[142]

Here, for example, one must interpret the U.K.-Argentina BIT to comprehend fully the arbitration between BG Group, the British investor, and Argentina. Because the United Kingdom and Argentina are both parties to the Vienna Convention,[143] the Vienna Convention necessarily controls the BIT's interpretation.[144] Indeed, because the Vienna Convention is customary international law, it would also be binding as such on the United States even though it has not ratified the Convention.[145] In its amicus brief in *BG Group*, the United States acknowledged it "generally recognizes [the Vienna Convention] as an authoritative guide to treaty interpretation."[146] As a preliminary matter, then, there is little question here that the Court needs to consult the Vienna Convention in order to interpret properly the U.K.-Argentina BIT.

B. The Inaptness of the FAA Arbitrability Framework

Instead of turning to the Vienna Convention to interpret the U.K.-Argentina BIT, however, the Court falls back on its domestic FAA arbitrability jurisprudence[147] and, in doing so, overlooks the public international dimensions of investment arbitration. The Court's FAA arbitrability framework is derived from two prior Supreme Court cases: *First Options of Chicago, Inc. v.*

140. *See* Amicus Curiae Brief, *supra* note 133, at 7–8.
141. *See, e.g.*, INT'L CTR. SETTLEMENT INV. DISPUTES, DISPUTE SETTLEMENT: 2.3 CONSENT TO ARBITRATION 1, 17–21 (2003).
142. The International Court of Justice (ICJ) has described the Vienna Rules of Interpretation as reflecting customary international law. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 43 (July 9); Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 37 (Mar. 31); *see also* Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Court*, 28 VA. J. INT'L L. 281, 286 (1988).
143. *See supra* notes 3, 30 and accompanying text. The Vienna Convention was ratified by the United Kingdom on June 25, 1971 and then by Argentina on December 5, 1972. *See Vienna Convention Signatories*, *supra* note 3, at 1–2 (listing the signatories of the Vienna Convention).
144. *See* Vienna Convention, *supra* note 3.
145. *See supra* notes 124–26 and accompanying text.
146. Amicus Curiae Brief, *supra* note 133, at 17 n.4.
147. *See* BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1206–07 (2014).

Kaplan[148] and *Howsam v. Dean Witter Reynolds, Inc.*[149] The FAA approach determines the question of whether any dispute is arbitrable (i.e., whether the arbitrator has jurisdiction over the dispute) by asking who, court or arbitrator, is entitled to answer that arbitrability question.[150] Under this framework, the "who" question is treated much in the same way as the "whether" question, namely by determining the parties' intent on the issue as reflected in the contract.[151]

Where the contract is silent on who should decide the dispute's arbitrability—as will often be the case given its abstruseness—this "who" question is determined by relying on presumptions that purportedly construct the purely hypothetical bargain the parties would have concluded concerning the issue had they considered it at the time of contracting.[152] In this regard, the Court distinguished between "substantive arbitrability," which is presumptively a "question of arbitrability" for courts, and "procedural arbitrability," which is presumptively reserved for arbitrators.[153]

In its elaboration of this distinction, the Court described substantive arbitrability questions as questions on gateway matters that contracting parties would likely have expected a court to have decided,[154] and procedural arbitrability questions as questions that arise in "other kinds of general circumstance[s] where parties would likely expect that an arbitrator would decide the gateway matter."[155] As might be expected from this circular definition, which I have criticized elsewhere for its reliance on the nebulous concept of "intent,"[156] reasonable minds can differ markedly on whether any particular arbitrability question is "substantive" or "procedural."[157]

148. 514 U.S. 938 (1995).
149. 537 U.S. 79 (2002).
150. *See supra* notes 79–80 and accompanying text.
151. *See generally* Wong, *supra* note 75, at 171–72 (2012) (discussing the analytical framework established by *First Options* and *Howsam*).
152. *See supra* notes 88–89 and accompanying text.
153. *Howsam*, 537 U.S. at 84–85 (quoting Unif. Arbitration Act § 6(c) & cmt. 2 (amended 2000), 7 U.L.A. 12–13 (Supp. 2002)). Although the *Howsam* Court quotes and relies on the Revised Uniform Arbitration Act (RUAA), which refers to "substantive arbitrability" and "procedural arbitrability" in distinguishing between arbitrability matters to be decided by the court and the arbitrator, respectively, the Court does not itself consistently employ those terms. Instead, the Court refers to the former but not the latter as true "questions of arbitrability." *Id*. at 84. Because the RUAA terminology is less confusing, this Article adopts that terminology, including when it describes the Court's rulings.
154. *Id.* at 83–84.
155. *Id*. at 84.
156. *See* Wong, *supra* note 75, at 172, 180, 183.
157. *See supra* note 90 and accompanying text.

Indeed, *BG Group* demonstrates vividly the pliancy of the test in the divided opinions of the Court.[158] More fundamentally, however, this arbitrability framework is inapposite in the investor-state arbitration context because these presumptions are very much anchored in a domestic legal setting and system. In differentiating between substantive and procedural arbitrability questions, the Court in *Howsam* has described the former as involving:

> [T]he kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.[159]

This is abundantly true in a domestic context and is the case in *Howsam* because both parties there are based in the U.S. and U.S. courts would undoubtedly have jurisdiction over the dispute and the parties in the absence of a valid arbitration agreement between the parties.[160] Put differently, the claimant would have been entitled to his day in court as a plaintiff if there were no arbitral agreement or an invalid arbitral agreement between the parties, and the claimant might therefore have expected the court to decide such gateway questions. This default expectation justifies a court relying exclusively on national law in determining the arbitrability of the domestic dispute.

This situation is not true of investor-state arbitration under a BIT. A third-party national court would have no jurisdiction over the investor and the host state but for the BIT and the disputing parties' designation of the seat of arbitration, and even then only with respect to the enforcement or vacatur of non-ICSID investment treaty awards.[161] For instance, in *BG Group*, U.S. courts

158. *See generally* BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1203 (2014).
159. *See Howsam*, 537 U.S. at 83–84.
160. AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986) ("Unless the [U.S.-based] parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.").
161. *See* Janet A. Rosen, *Arbitration Under Private International Law: The Doctrine of Separability and Competence de la Competence*, 17 FORDHAM INT'L L.J. 599, 599–600 (discussing that third-party national courts may have jurisdiction in an international arbitration because arbitration provides parties the authority to privately resolve disputes and the opportunity to select which set of rules will govern, "simultaneously divesting [certain] courts of such authority"). *See generally* 81 AM. JUR. TRIALS *Arbitrating Claims—at Home and Abroad* § 4 (2001) (explaining that international commercial arbitration is often expressed through contract that identifies a seat of arbitration that is not within the

would have had no jurisdiction over BG Group and Argentina but for the BIT and the fact that the host state and the investor had selected Washington, D.C. as the seat of arbitration, and then only with respect to the enforcement or vacatur of the award.[162] Put differently, U.S. courts would not ordinarily sit to determine the BIT claims of a British investor against Argentina, and for that reason, the parties would not otherwise expect U.S. courts to decide the arbitrability question.[163] U.S. courts should thus not treat investment treaty awards as if they were domestic awards, nor apply reflexively and exclusively U.S. law in determining the arbitrability of the dispute in *BG Group*.

Although the New York Convention permits the court at the seat of arbitration to apply its national law in annulment proceedings, the Convention neither requires the application of national law, nor precludes the application of international law in these cases.[164] As argued above, the domestic conceptual underpinnings of the FAA arbitrability framework counsel against looking to national law exclusively in an international context. Indeed, any national court should look to international law, including the Vienna Convention, whenever it reviews an investment treaty award because the award is ultimately grounded in the agreement between the state parties to the investment treaty to authorize investor-state arbitration. It is the investment agreement between the state parties, rather than the random choice of the non-identical disputing parties, that should more effectively control the determination of the standard of review. Accordingly, one would more reasonably understand the state parties' authorization of investor-state arbitration as empowering the courts at the seat of arbitration to determine the validity of any resulting arbitral award in a manner consistent with the investment treaty and not simply with the *lex arbitri*. The *lex arbitri* is but the national law of a third and otherwise unconnected state chosen not by the states party to the treaty but the disputing parties.[165] The investment treaty is best understood as constraining the ability of the court at the seat of the arbitration to look only to its national law to determine the validity of and standard of review applicable to investment treaty

court of one party or another to ensure impartiality).

162. BG Grp. Final Award, *supra* note 7, at 1.

163. *Id*.

164. *See* New York Convention, *supra* note 18, at art. V(1)(e); *cf.* BORN, *supra* note 18, at 3163–64; Laura M. Murray, *Domestic Court Implementation of Coordinative Treaties: Formulating Rules for Determining the Seat of Arbitration Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 41 VA. J. INT'L L. 859, 868–71 (2001); *supra* note 18 and accompanying text.

165. *Cf.* Chvosta, *supra* note 21, at 23.

awards. Rather, courts must necessarily look to international law, including the Vienna Convention, in interpreting the investment treaty.

Additionally, the fact that the *lex arbitri* is not chosen by both state parties to the treaty distinguishes investment treaty awards not just from domestic arbitral awards, but also from awards arising from contract-based international arbitrations. In the case of the latter, it is the parties to the contract alone who decide on and have consented to *both* the arbitration clause and the seat of arbitration. As there is not the disconnect present in triangular investment treaty arbitration,[166] there is no reason to think that the contract should circumscribe the ability of the court at the chosen seat of arbitration to review an award arising from a contract-based international arbitration in relation to the *lex arbitri*.[167]

Further, allowing the *lex arbitri* exclusively to control the standard of review of any investment treaty arbitral award would mean that an award issued under any single investment treaty is potentially subject to multiple standards of review, turning on whichever forum the investor and host state randomly agree upon in a side agreement to the treaty.[168] Equally worrying is the related proposition that the various awards issued under any single investment treaty (between different investors and the relevant host state) could be subject to varying standards of review. Both propositions are at odds with the more reasonable presumption that the state parties would have intended any and all awards issued under the same investment treaty to be reviewable or binding to the same degree in terms of the state parties' understanding of the integrity of the arbitral process.

Moreover, as opposed to an international arbitration agreement in a stand-alone contract, which will likely result in just one binding arbitral award once binding arbitration is initiated because it points to an irremediable breakdown of relations between the disputing parties,[169] an investment treaty can generate

166. *Cf.* Canada v. S.D. Myers, Inc., [2004] F.C. 38 (Can.) (noting that Canada and Mexico were asserting that the appropriate standard of review of a NAFTA award has to be determined in accordance with NAFTA "because this international arbitration involves a State, and the State has only consented to arbitration to the extent provided in NAFTA . . . [which] is a different situation from where private parties have agreed that the international arbitration will decide the whole matter in issue between the private parties").

167. As noted previously, this is not to say that the review of awards arising from contract-based international arbitrations may not be separately circumscribed by the New York Convention. *See supra* note 26.

168. *Cf.* Bermann, *supra* note 27, at 1018–19.

169. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) ("Courts and arbitration in the context of most commercial contracts are resorted to because there has been a

multiple investment awards as it is designed to apply to every investor from each of the state parties to the investment treaty over the entirety of its lifetime.[170] This additional point of distinction between the two lends further support to the argument that even if it is justifiable to look exclusively to the *lex arbitri* in determining the standard of review of awards arising from contract-based international arbitrations, the same may not be true of investment treaty awards.

The simple fact is that UNCITRAL arbitration, like much non-ICSID international arbitration, relying as it does on the New York Convention, was not designed for investment treaty arbitration but rather for contract-based international arbitration.[171] For this and the other reasons discussed above that pivot on differences between the two regimes, they should not be treated alike. Rather, investment treaties should be understood to constrain appropriately the review of the validity of investment treaty awards by national courts at the seat of arbitration, and notwithstanding how that process may operate with regard to awards arising from contract-based international arbitration.

IV. INTERPRETING THE BIT

I offer here, consistent with the Vienna Convention, an alternative interpretation of the U.K.-Argentina BIT as it relates to the standard of review of the award, as well as a counterexample. Despite their zealous posture, I am not proffering them as "correct" interpretations, but rather and simply to illustrate that an approach trained on the relevant investment treaty and Vienna Convention may turn on factors quite different from those dictated by the *lex arbitri*—here, the mutable determination under the Court's FAA jurisprudence of whether the relevant arbitrability question is procedural or substantive—with a result that may be at variance with the "ordinary meaning" of the relevant treaty.[172]

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breakdown in the working relationship of the parties . . . ."); Shepherd, *supra* note 28, at *2 ("ADR is also used as a means of resolving general commercial disputes. For example, . . . mediation can offer a negotiated solution that preserves the ongoing business relationship between the parties, which may break down irretrievably once litigation or arbitration has been commenced.").

170. *See* Roberts, *supra* note 29, at 353–54.

171. *See* Paul D. Friedland & Lucy Martinez, *The UNCITRAL Arbitration Rules: A Commentary. By David D. Caron, Lee M. Caplan & Matti Pellonää*, 101 AM. J. INT'L L. 519, 522 (2007) (book review) ("The UNCITRAL Rules . . . were drafted before the explosion of bilateral investment treaties (BITs) in the 1990s and were designed to deal with contract-based arbitrations.").

172. *See* Vienna Convention, s*upra* note 3, at art. 31.

A. One Possible Interpretation Based on the Vienna Convention

Practically the bible on the interpretation of treaties, the Vienna Convention is not just the authority on the subject, it is also broadly accepted as reflecting customary international law.[173] Article 31, the core of the Convention, provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[174] However, while the U.K.-Argentina BIT provides for investor-state arbitration, it does not address the applicable standard of judicial review of any resulting arbitral award.[175] It is thus necessary to interpret the investment arbitration provisions in the BIT to try and draw a conclusion on the applicable standard of judicial review.[176]

What emerges plainly from a review of Article 8, which governs the resolution of investor-state disputes under the BIT, is that any such outstanding dispute is to be categorically and finally resolved by arbitration.[177] After requiring that any investor-state dispute arising under the BIT first be referred to the courts of the host state,[178] the BIT goes on to provide that such a dispute "shall be submitted to international arbitration" upon the request of the investor or the host state under the following circumstances: where both parties agree; where the local courts have not provided a final decision within eighteen months of the dispute's submission; or, most critically, where a final decision has been rendered within eighteen months but the parties are still in dispute.[179] Finally, Article 8(4) states in no uncertain terms that the "arbitration decision shall be final and binding on both Parties."[180]

As reflected in Article 8, the object and purpose of the investor-state dispute settlement mechanism provided in the U.K.-Argentina BIT is for the parties to arbitrate any dispute to finality if it is not resolved to either party's satisfaction, including when either party remains dissatisfied after litigation in

173. *See supra* notes 144–45 and accompanying text. It is not hyperbole to describe the Vienna Convention as "the virtually indispensable scaffolding for the reasoning on questions of treaty interpretation." Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989 (Supplement, 2006: Part Three)*, 77 BRITISH Y.B. INT'L L. 1, 19 (2006).
174. Vienna Convention, *supra* note 3, at art. 31.
175. *See* U.K.-Arg. BIT, *supra* note 31, at art. 8.
176. *Id.* at art. 8(4).
177. *See id*.
178. *Id*. at art. 8(1).
179. *Id*. at art. 8(2).
180. *Id*. at art. 8(4).

Argentine courts.[181] To read the U.K.-Argentina BIT as allowing for de novo judicial review of any resulting arbitral award would fundamentally displace the state parties' agreement to resolve investor-state disputes through binding arbitration.[182] As Gary Born has argued in the context of the New York Convention, "it is a fundamental and necessary element of arbitration agreements and arbitral awards to provide for binding dispute resolution, not for an irrelevant or merely advisory arbitration followed by de novo judicial resolution of disputes," which would otherwise and unjustifiably "convert an agreement to arbitrate into an agreement to mediate and an award into a mere recommendation."[183]

A related principle premised on the efficiency and efficacy of respecting arbitral decisions is expressed in the European Court of Justice's analysis of the policies underlying most national arbitration legislation: "[I]t is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment or refusal to recognise an award should be possible only in exceptional circumstances."[184]

National courts have recognized this principle and, in the review of investment awards no less, noted that: "Courts are warned to limit themselves in the strictest terms to intervene only rarely in decisions made by consensual, expert, international arbitration tribunals, including on issues of jurisdiction."[185]

U.S. courts also are in broad general agreement and have "consistently interpreted the provisions of the FAA concerning vacatur and confirmation of awards in a robustly pro-enforcement fashion."[186] As one court put it:

181. *See id.*; *see also* BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1207 (2014).

182. BORN, *supra* note 18, at 1207; *see also* Charles H. Brower II, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, 40 COLUM. J. TRANSNAT'L L. 43, 76 (2001) (noting in the context of NAFTA that "[h]aving consented to binding arbitration, the NAFTA Parties cannot frustrate that obligation by condoning extensive judicial review").

183. *Id.* at 3167–68.

184. Case C-126/97, Eco Swiss China Time Ltd. v. Benetton Int'l NV, 1999 E.C.R. I-3079.

185. United Mexican States v. Cargill, Inc. (2011), 107 O.R. 3d 528 (Can. Ont. C.A.). However, the court stated that no deference was owed for "true question[s] of jurisdiction" although it emphasized that "the role of the reviewing court is to identify and narrowly define any true question of jurisdiction" and that the "onus is on the party that challenges the award." *Id.* at 544–45; *see also* Corporacion Transnacional de Inversiones, S.A. de C.V. v. STET Int'l S.p.A. *(*1999), 45 O.R. 3d 183 (Can. Ont. Sup. Ct. J.) ("An arbitral award is not invalid because, in the opinion of the court hearing the application, the Arbitral Tribunal wrongly decided a point of fact or law . . . . Where a tribunal's jurisdiction is called into question as it is here, an applicant must overcome 'a powerful presumption' that the Arbitral Tribunal acted within its powers." (quoting Quintette Coal, Ltd. v. Nippon Steel Corp. (1990), [1991] 1 W.W.R. 219 (B.C. C.A.))).

186. BORN, *supra* note 18, at 3181.

> [I]t is settled that upon judicial review of an arbitrators' award "the court's function in . . . vacating an arbitration award is severely limited," being confined to determining whether or not one of the grounds specified by 9 U.S.C. § 10 for vacation of an award exists. An award will not be set aside because of an error on the part of the arbitrators in their interpretation of the law. Judicial review has been thus restricted in order to further the objective of arbitration, which is to enable parties to resolve disputes promptly and inexpensively, without resort to litigation and often without any requirement that the arbitrators state the rationale behind their decision.[187]

Or as the U.S. Supreme Court itself has observed:

> Under the FAA, courts may vacate an arbitrator's decision "only in very unusual circumstances." That limited judicial review, we have explained, "maintain[s] arbitration's essential virtue of resolving disputes straightaway." If parties could take "full-bore legal and evidentiary appeals," arbitration would become "merely a prelude to a more cumbersome and time-consuming judicial review process."[188]

However, in adopting the FAA arbitrability framework in *BG Group*, the Court has essentially endorsed the "cumbersome and time-consuming judicial review process" it previously disavowed.[189] The uncertain and malleable classification of an arbitrability question as substantive or procedural, and the ability of the relevant court to review the former de novo, can only encourage a respondent to seek a second bite at the apple in the vacatur of the award.

Such an outcome is inconsistent with the investor-state dispute settlement process provided in the U.K.-Argentina BIT, which mandates the arbitral resolution of all such outstanding disputes, including disputes that have been determined by local Argentine courts but whose determinations are contested by either party.[190] Rather, it is arguably more compatible with the U.K.-Argentina BIT to require the court at the arbitral seat to defer to the arbitrators' decisions, regardless of whether they relate to procedural or substantive arbitrability, because the BIT evidences a firm commitment to resolve finally

187. Office of Supply, Gov't of the Republic of Kor. v. N.Y. Navigation Co., 469 F.2d 377, 379 (2d Cir. 1972).
188. Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068 (2013) (alteration in original).
189. *Id.*
190. *See* U.K.-Arg. BIT, *supra* note 31, at arts. 2, 8.

by arbitration all investor-state disputes that are not otherwise resolved to both parties' satisfaction.[191]

B. Deference and a Counterexample

It should be emphasized that the question of whether the court owes deference to the arbitrator's decision turns on the interpretation of the particular BIT.[192] While the above offered interpretation of Article 8 of the U.K.-Argentina BIT suggests that the state parties contemplated a limited role for reviewing courts, this may not always be the case for other BITs.

For instance, imagine that a Greek company with an investment in Mexico submits a dispute arising under the Mexico-Greece BIT to arbitration under UNCITRAL rules with its seat in San Francisco after unsuccessfully pursuing a similar action in the domestic courts of Mexico. Assume further that the UNCITRAL tribunal determines that it has jurisdiction notwithstanding the fork-in-the-road provision in the BIT, which limits the investor to choosing just one of several agreed-upon dispute resolution procedures,[193] and ultimately issues an award against Mexico. Should Mexico seek to vacate the award in the United States District Court for the Northern District of California on the ground that the arbitrators exceeded their powers? Mexico may have a compelling argument that the court should review the award de novo.

In contrast to providing ultimately for binding arbitration as in the U.K.-Argentina BIT, the Mexico-Greece BIT states plainly that "[i]f an investor or his investment that is a legal person initiates proceedings before a national tribunal, the investor may not submit a claim to arbitration under this Part [relating to the settlement of disputes between the investor and the host state]."[194] Therefore, the Mexico-Greece BIT may not reasonably be interpreted to vest the arbitrators with final authority to decide all issues.[195] Accordingly, under the Vienna Convention, it would probably be more

191. *Id.*
192. BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1203–04 (2014).
193. Article 10(1) of the Mexico-Greece BIT provides that investor may choose to submit disputes arising thereunder "to any competent courts or administrative tribunals of the Contracting Party, party to the dispute; . . . or by arbitration in accordance with this Article under . . . the Arbitration Rules of . . . [UNCITRAL]." Agreement Between the Government of the United Mexican States and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments, Mex.-Greece, art. 10(1)(a), (c)(iii), Nov. 30, 2000, 2449 U.N.T.S. 213; *see also id.* at art. 9(2).
194. *Id*. at art. 9(2).
195. *See id.*

consistent with the object and purpose of the Mexico-Greece BIT, and in light of the ordinary meaning of its fork-in-the-road provision, to determine that the U.S. court may review de novo the question of whether the tribunal exceeded its powers in assuming jurisdiction over the dispute.[196]

The point here is simply that investment treaties can bear differently on the standard of review of resulting awards by national courts. Directly interpreting the treaty under the Vienna Convention on that question, rather than simply relying on the potentially distorting lens of the *lex arbitri*, is more congruent with the unique shape and nature of investment treaty arbitration.

V. CONCLUSION

Predictably, the Court fell back on a routine application of its FAA arbitrability framework in reviewing the investment treaty award in *BG Group*. However, that framework is not equal to the task—not least because it fails to account for the public international character of such awards and the triangular structure of the underlying investment treaties.[197] The sounder approach is to engage the Vienna Convention in interpreting the relevant treaty.[198] To do otherwise, and allow the *lex arbitri* exclusively to determine the review of investment treaty awards, is to invite the incongruous possibility of subjecting any and all awards issued under a particular investment treaty to varying standards of review that may well be contrary to the sovereign will of the state parties to the treaty.

196. *See supra* Part III.A.
197. *See supra* Part III.B.
198. *See supra* Part IV.A.

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