U.S. Supreme Court Clarifies Standard of Review of Investment Treaty Arbitration Awards

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By: Martin Gusy and Matthew Weldon

On March 5, 2014, in its first review of a case involving arbitration under an international investment treaty, the U.S. Supreme Court issued its opinion in *BG Group plc v. Republic of Argentina*, 12-138, and clarified the standard of review for investment treaty awards in courts of the United States.

**News, Events & Highlights**

Sanctions are Announced in Response to Actions in the Ukraine

On March 6th President Obama signed a new Executive Order in direct response to threats to the peace, security, or stability of Ukraine, as well as efforts to assert governmental authority in the Crimean region without the authorization of the Government of Ukraine. This Executive Order allows the United States to sanction any individual or entity that is responsible for or complicit in actions or policies that undermine democratic processes or institutions in Ukraine or that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine. It further allows the United States to sanction persons who are involved in the misappropriation of state assets of Ukraine.
States.

The appeal arose of a $185 million award issued by an arbitration tribunal convened under the 1976 UNCITRAL International Arbitration rules in favor of BG Group, pursuant to the Argentina-United Kingdom Agreement for the Promotion and Protection of Investments, Art. 8(2), Dec. 11, 1990, 1765 U. N. T. S. 38 (the “Treaty”).

In brief, BG Group claimed that a change in Argentina’s law and regulatory practices violated provisions in the Treaty forbidding the “expropriation” of investments and requiring that each nation give “fair and equitable treatment” to investors from the other state. Prior to these changes to

or have asserted governmental authority over any part or region of Ukraine without the authorization of the Government of Ukraine. The Executive Order can be found here.

Most recently, the Obama Administration announced it has imposed visa bans on officials and others deemed responsible for actions that have undermined Ukraine’s sovereignty and territorial integrity.

The Canadian government has also imposed economic sanctions in the form of asset freezes against former President Viktor Yanukovych and 17 others, including the former Prime Minister and other ministers and advisors and their associates and family members. The Freezing Assets of Corrupt Foreign Officials (Ukraine) Regulations took effect on March 5, 2014. Canadian companies are now prohibited from engaging in business with the designated foreign persons. There are prohibitions against dealing directly or indirectly in any property wherever located of the designated persons and against entering into or facilitating any financial transaction related to such dealings. Providing financial services or other related services in respect of a listed person’s property is also prohibited.

In Brussels, the 28-nation European Union announced measures to freeze the assets of former President Yanukovych, and of 17 of his closest aides and family members, holding them responsible for the embezzlement of state funds. The European Union also took the first steps towards additional diplomatic and economic sanctions against Russia by immediately suspending talks on a wide ranging political and economic pact and on visa liberalization, which would have made it easier for Russians to travel to Europe. European Union leaders also laid out a three-stage process that could end in wide ranging economic sanctions if the Russians fail to de-
Argentina’s law and regulatory practices, BG Group had purchased a controlling interest in the previously state-owned Argentine gas distribution company, MetroGAS, pursuant to a public tender. BG Group argued that the new laws, some of which changed the basis for calculating gas tariffs from dollars to pesos, turned MetroGas’s previously profitable business into a losing enterprise in violation of the Treaty.

The dispute between the parties was submitted to an arbitral panel pursuant to the Treaty. Specifically, Article 8 of the Treaty authorizes either party to submit a dispute “to the decision of the competent tribunal of the Contract Party in whose territory the investment was made,” i.e., a local court, and for arbitration: “(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal..., 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.”

The arbitral panel found that although Argentina had not “expropriate[d]” BG Group’s investment, it had denied BG Group “fair and equitable treatment,” and on that basis awarded the $185 million in damages.

In 2008, BG Group sought confirmation of the award under the New York Convention and the Federal Arbitration Act in the District Court for the District of Columbia, and Argentina sought for the District Court to vacate the award on the ground that the arbitrators lacked jurisdiction. The District Court denied Argentina’s challenge and confirmed the award. However, on appeal, the Court of Appeals for the District of Columbia Circuit reversed the District Court and found that the interpretation and application of Article 8’s local litigation requirement was a matter for courts to decide *de novo*, that is without deference to the views of the arbitrators on the subject. The Court of Appeals went on to find that the circumstances did not excuse the BG Group’s failure to comply with the requirements. Rather, BG Group
must commence a lawsuit in Argentina’s courts and wait eighteen months before filing for arbitration. Because BG Group had not done so, the Court of Appeals found that arbitrators lacked authority to decide the dispute and vacated the award.

In an opinion authored by Justice Breyer, the Supreme Court reversed the Court of Appeals and held that a court of the United States, in reviewing an arbitration award made under the Treaty, should interpret and apply “threshold” provisions concerning arbitration using the framework developed for interpreting similar provisions in ordinary contracts. In other words, courts of the United States should apply the same provisions that are used in international commercial arbitration in the investment treaty arbitration context as well. Under this established framework, the local litigation requirement of the arbitration agreement is a matter for arbitrators primarily to interpret and apply, and the Supreme Court held that courts of the United States should review the arbitrators' interpretation of such interpretation and application with deference.

This clarification of the standards applicable to the review of jurisdictional decisions by an arbitrator provides an important guiding principle for lower courts and reinforces that arbitrators' decisions on “threshold” questions about arbitration, including the meaning and application of procedural preconditions for the use of arbitration, are to be reviewed with deference. In some commentator’s opinion, the decision more importantly appropriately limits the ability of parties to an arbitration, parties who have agreed to arbitrate their dispute, to later challenge the outcome of that arbitration in a local court.

The Official Syllabus summarizes the views of the Court, as follows.

Held:

1. A court of the United States, in reviewing an arbitration award made under the Treaty, should interpret and apply “threshold” provisions concerning arbitration using the framework developed for interpreting similar provisions in ordinary contracts. Under that framework, the local litigation requirement is a matter for arbitrators primarily to interpret and apply.
Courts should review their interpretation with deference. Pp. 6–17.

(a) Were the Treaty an ordinary contract, it would call for arbitrators primarily to interpret and to apply the local litigation provision. In an ordinary contract, the parties determine whether a particular matter is primarily for arbitrators or for courts to decide. See, e.g., Steelworkers v. Warrior & Gulf Nav. Co., 363 U. S. 574, 582. If the contract is silent on the matter of who is to decide a “threshold” question about arbitration, courts determine the parties’ intent using presumptions. That is, courts presume that the parties intended courts to decide disputes about “arbitrability,” e.g., Howsam v. Dean Witter Reynolds, Inc., 537 U. S. 79, 84, and arbitrators to decide disputes about the meaning and application of procedural preconditions for the use of arbitration, see id., at 86, including, e.g., claims of “waiver, delay, or a like defense to arbitrability,” Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U. S. 1, 25, and the satisfaction of, e.g., “time limits, notice, laches, [or] estoppel,” Howsam, 537 U. S., at 85. The provision at issue is of the procedural variety. As its text and structure make clear, it determines when the contractual duty to arbitrate arises, not whether there is a contractual duty to arbitrate at all. Neither its language nor other language in Article 8 gives substantive weight to the local court’s determinations on the matters at issue between the parties. The litigation provision is thus a claims-processing rule. It is analogous to other procedural provisions found to be for arbitrators primarily to interpret and apply, see, e.g., ibid., and there is nothing in Article 8 or the Treaty to overcome the ordinary assumption. Pp. 7–9.

(b) The fact that the document at issue is a treaty does not make a critical difference to this analysis. A treaty is a contract between nations, and its interpretation normally is a matter of determining the parties’ intent. Air France v. Saks, 470 U. S. 392, 399. Where, as here, a federal court is asked to interpret that intent pursuant to a motion to vacate or confirm an award made under the Federal Arbitration Act, it should normally apply the presumptions supplied by American law. The presence of a condition of “consent” to arbitration in a treaty likely
does not warrant abandoning, or increasing the complexity of, the ordinary intent-determining framework. See, e.g., Howsam, supra, at 83–85. But because this Treaty does not state that the local litigation requirement is a condition of consent, the Court need not resolve what the effect of any such language would be. The Court need not go beyond holding that in the absence of language in a treaty demonstrating that the parties intended a different delegation of authority, the ordinary interpretive framework applies. Pp. 10–13.

(c) The Treaty contains no evidence showing that the parties had an intent contrary to the ordinary presumptions about who should decide threshold arbitration issues. The text and structure of Article 8’s litigation requirement make clear that it is a procedural condition precedent to arbitration. Because the ordinary presumption applies and is not overcome, the interpretation and application of the provision are primarily for the arbitrators, and courts must review their decision with considerable deference. Pp. 13–17.

2. While Argentina is entitled to court review (under a properly deferential standard) of the arbitrators’ decision to excuse BG Group’s noncompliance with the litigation requirement, that review shows that the arbitrators’ determinations were lawful. Their conclusion that the litigation provision cannot be construed as an absolute impediment to arbitration, in all cases, lies well within their interpretative authority. Their factual findings that Argentina passed laws hindering recourse to the local judiciary by firms similar to BG Group are undisputed by Argentina and are accepted as valid. And their conclusion that Argentina’s actions made it “absurd and unreasonable” to read Article 8 to require an investor in BG Group’s position to bring its grievance in a domestic court, before arbitrating, is not barred by the Treaty. Pp. 17–19.

665 F. 3d 1363, reversed. 4 BG GROUP PLC v. REPUBLIC OF ARGENTINA

BREYER, J., delivered the opinion of the Court, in which SCALIA, THOMAS, GINSBURG, ALITO, and KAGAN, JJ., joined, and in which SOTOMAYOR, J., joined except for
Part IV–A–1. SOTOMAYOR, J., filed an opinion concurring in part. ROBERTS, C. J., filed a dissenting opinion, in which KENNEDY, J., joined.

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