Why BG v Argentina is bigger than you think

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The US Supreme Court is scheduled to hear oral argument in the BG Group v Argentina case on 2 December. Mark Bravin and Eric Goldstein of Winston & Strawn in Washington, DC, who filed an amicus curiae brief for Ecuador in support of Argentina, explain why the case is much more significant than the question presented to the court suggests – and not just because a US$185 million arbitral award hangs in the balance.

In June 2013, the US Supreme Court agreed to consider the following question: “In disputes involving a multi-staged dispute resolution process, does a court or instead the arbitrator determine whether a precondition to arbitration has been satisfied?” Absent from that question, however, is the groundbreaking context. This is the court’s first opportunity to determine what standards US federal courts should use when deciding whether to confirm an investor-state arbitral award rendered under a treaty, where the state argues that it has not consented to the arbitration. The court’s decision could produce a new policy regarding the deference paid to arbitrators. In turn, it may affect the foreign relations of the United States in its dealings with other nations under existing and prospective treaties governing investment protection and dispute resolution. It also may influence how foreign courts treat the issue in analogous circumstances.

Overview of the case

BG v Argentina centres on a clause in the 1990 bilateral investment treaty (BIT) between the UK and Argentina that requires an investor to litigate any treaty-based investment dispute in the host state’s courts for 18 months before initiating arbitration. In other words, the BIT reflects the two states’ unambiguous shared intent to
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consent to arbitration of investment disputes only if certain conditions were first satisfied.

After seeing its investment in Argentina’s natural gas distribution sector adversely affected by certain market-correction measures Argentina took in the wake of an economic crisis, BG Group purported to accept Argentina’s standing offer (contained in the BIT) to arbitrate claims by British investors for violations of their rights under the BIT. It did so, however, by initiating arbitration without first going to Argentine courts at all – much less giving those courts 18 months to resolve the dispute.

Accordingly, Argentina objected that the arbitral panel, seated in the United States, lacked jurisdiction to decide the dispute. The panel received written submissions and held hearings on the jurisdictional question. In a unanimous award in 2007, arbitrators Guillermo Aguilar-Alvarez, Alejandro Garro and Albert Jan van den Berg rejected Argentina’s jurisdictional objections and ruled in BG Group’s favour. The panel determined that, under international law principles and the Vienna Convention on the Law of Treaties, compliance with the litigation condition was excused because alleged intervention by the Argentine government in the country’s court system made that option futile. The panel further ruled for BG Group on the merits of the dispute, awarding it US$185 million.

Argentina petitioned a US district court to vacate the arbitration award. The court concluded that the arbitral panel had jurisdiction to determine its own jurisdiction, to which determination the court would defer. Applying the deferential standard, the district court denied Argentina’s petition to vacate and granted BG Group’s cross-petition to confirm the award. Its analysis invoked both the US Federal Arbitration Act and the New York Convention.

In January 2012, the US Court of Appeals for the DC Circuit reversed this decision. It recognised the primary importance of giving effect to the states parties’ shared intent, asking: Did the UK and Argentina, “as contracting parties, intend that an investor under the Treaty could seek arbitration without first fulfilling” the litigation condition?

US Supreme Court precedents – all in the context of commercial, not investor-state, arbitration – establish that US courts should defer to arbitrators’ decisions about the arbitrability of a dispute absent evidence that the contracting parties likely would have expected a court to make that decision. That “exception” recognises the importance of avoiding “the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate” (Howsam v Dean Witter Reynolds). On the other hand, US courts have afforded “considerable leeway” to an arbitrator’s determination of arbitrability where there is “clear and unmistakable evidence” that the parties intended for the arbitrator to decide the question (First Options v Kaplan). And the UK-Argentina BIT incorporates the UNCITRAL Arbitration Rules, which according to at least one US appeals court manifests “clear and unmistakable” evidence that the contracting parties intended for the arbitrator to determine arbitrability (see Republic of Ecuador v Chevron Corp).

In BG, the DC Circuit concluded that the states’ intent dictated that a court would review independently an arbitrator’s determination, and have the final say, as to ar-
bitrability. Looking to the UK-Argentina BIT, the DC Circuit held that the UNCITRAL Rules did not become applicable until after the investor satisfied the treaty’s litigation condition.

Analysing the BIT through the lens of the states’ intent, the court then concluded that article 8(3) permitted “only one possible outcome on the [arbitrability question] . . . namely, that BG Group was required to commence a lawsuit in Argentina’s courts and wait eighteen months before filing for arbitration.” And in light of an “explicit” treaty provision, the court reasoned, the federal pro-arbitration policy must yield to the parties’ intent.

Are all arbitrations created equal?

Had BG arisen out of a typical commercial arbitration between private parties, the Supreme Court could quite easily apply its precedents to determine whether the DC Circuit properly reserved the question of arbitrability for itself, rather than deferring to the arbitrators’ analysis. But this case raises the novel question whether investor-state treaty arbitrations are like all other arbitrations when it comes to enforcing an arbitral award (or compelling arbitration in the first instance).

In urging reversal, BG Group argues that investor-state arbitral awards rendered under a treaty warrant the same standard of review as awards rendered under a private contract. BG Group’s brief reminds the court that the Federal Arbitration Act is the foundation of the United States’ strong pro-arbitration policy, particularly in the field of international commerce. Under the Federal Arbitration Act, judicial review of any decision within the arbitrators’ competence is weighted in favor of the enforcement of arbitral awards. Such deference is warranted here, BG Group argues, because Argentina’s objection challenges “procedural arbitrability” and is presumptively for the arbitral panel to decide. Accordingly, the arbitral panel’s determination is subject only to deferential, not de novo, judicial review. In BG Group’s view, the DC Circuit doubly erred – first by determining that the arbitrability question is presumptively to be resolved by a court, and second by declining to find that incorporating the UNCITRAL rules into the treaty manifested “clear and unmistakable” evidence that the parties intended for the arbitral panel to decide arbitrability.

Argentina responds that the court’s commercial arbitration precedents command affirmation in this case. After all, “the purpose of judicial interaction with arbitration is ‘to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties.’” With that purpose in mind, Argentina argues that the DC Circuit’s decision was proper under Howsam, which presumptively leaves to courts the decisions “whether the parties are bound by a given arbitration clause’ and ‘whether an arbitration clause in a concededly binding contract applies to a particular type of controversy[.]’” Further, Argentina explains that in this case, the UNCITRAL Rules do not amount to “clear and unmistakable” evidence that the parties agreed to arbitrate arbitrability: “The Rules become relevant once an agreement to arbitrate is formed under the Treaty, which did not happen here; and in any event they do not purport to bind parties beyond their consent.”
Are investor-state arbitrations under treaties different?

But those arguments lose sight of the fact that the challenged BG arbitral award arose from an investment treaty between two sovereigns. As the DC Circuit recognised, that fact places this case in an entirely different context from the Supreme Court’s commercial arbitration precedents.

A state’s reasons for including international arbitration as a means to resolve investor-state disputes under a treaty are quite different from those of commercial parties. For example, states will negotiate for guaranteed access by their own nationals to arbitration of qualifying disputes to avoid the risk – if not the reality – that national courts may be biased in favor of their own government in an investment dispute. Such sovereign concerns are fundamentally different from those of commercial parties, who include arbitration clauses in their business agreements to avoid courtroom procedures in favour of the perceived ease and greater informality, and supposedly faster final outcomes, of arbitration.

Enter the United States, which, in a brief by the Solicitor General, supports the overturning of the DC Circuit’s decision: “In determining whether a treaty requirement is a condition on the State’s consent to arbitrate, a reviewing court should not employ presumptions derived from domestic contract law, but should instead apply principles of treaty interpretation in examining the treaty’s text and other relevant materials for determining the treaty parties’ intent.”

Urging a paradigm shift for judicial review of investor-state arbitral awards rendered under treaties, the US argues that “[t]he presumptions set forth in [private party arbitration cases] cannot be applied wholesale to the distinct context of investor-state arbitral proceedings conducted pursuant to investment treaties.” Although “[i]nvestor-state arbitration is, like private arbitration, a matter of consent[,] . . . in the investor-state context, the relevant agreement concerning the arbitral tribunal’s authority is contained in the investment treaty itself and is therefore a function of the treaty parties’ shared intent.” And “[a]pplying the [private party arbitration] presumptions wholesale to investment treaties would graft onto those treaties default provisions that the treaty parties did not anticipate.”

As for the appropriate standard of judicial review, the US argues that it “depends on whether the objection [to arbitration] goes to the host state’s consent to enter into an arbitration agreement with the investor.” De novo review, it maintains, is appropriate as to an arbitral tribunal’s ruling on a state’s threshold objection that the treaty does not authorise arbitration of one or more of an investor’s claims. By contrast, it advises, courts should review deferentially the tribunal’s resolution of issues unrelated to alleged non-compliance with a condition on consent to arbitration.

In support of a paradigm shift: relevant principles

It seems clear that treaty interpretation principles should govern a reviewing court’s construction of an investment treaty. So doing will assist the court to determine how to address a state’s objection that it did not consent to arbitrate a particular investor-state dispute (thus preventing an agreement to arbitrate from being formed). In construing a treaty, the Supreme Court instructs US courts to begin with the plain
language and the context in which that language is used. Courts have a “responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties” (Air France v Saks). If necessary, courts should then look beyond the written language to the treaty’s history and negotiation, its purpose, as well as the construction the parties have adopted in practice. As the US explains in its brief, these basic principles of treaty interpretation apply whether or not the US is a party to the treaty at issue. Although not a party to the Vienna Convention, which codifies these principles, the US recognises it as an authoritative guide to treaty interpretation.

For several reasons, the Supreme Court in BG could hold squarely that a state’s consent-based objection to arbitration is subject to de novo review. In the US, the Foreign Sovereign Immunities Act (FSIA) contains the exclusive criteria for establishing consent or waiver of immunity from US courts’ exercise of jurisdiction to adjudicate disputes involving foreign sovereigns. The FSIA’s exceptions are narrowly construed. And appellate courts review de novo whether subject-matter jurisdiction exists under the FSIA. Limiting the circumstances in which federal courts can exercise jurisdiction over a foreign state reflects not only longstanding practices of respect for sovereignty and comity, but also the US’s interest in receiving similar treatment from foreign courts.

Under the FSIA’s “arbitration exception,” federal courts may exercise subject-matter jurisdiction over an action to confirm an award made pursuant to an agreement to arbitrate. But this exception contains the predicate condition that the foreign state in fact agreed to arbitrate the particular dispute at issue. Accordingly, the question whether an investor’s purported acceptance of a state’s treaty offer to arbitrate consummates a valid arbitration agreement invokes an exception to the FSIA requiring narrow construction and de novo review.

Similarly, the New York Convention – often the vehicle for seeking recognition and enforcement of non-domestic arbitral awards (including BG Group’s award against Argentina) – permits a reviewing court to refuse to recognise and enforce an award that “deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or . . . contains decisions on matters beyond the scope of the submission to arbitration.” Here, too, the focus is on acceptance matching offer – whether the state in fact agreed to arbitrate that particular dispute.

Wider implications

Whether the Supreme Court affirms the DC Circuit’s decision is certainly important to the parties. But how the Court addresses the problem could have much wider implications for the enforceability of awards in investor-state treaty arbitrations. Because satisfaction of the local litigation condition – and hence Argentina’s consent to arbitration – is in dispute, the court’s decision could determine whether the emphatic US policy in favour of arbitral dispute resolution will override the intent of states parties to investment treaties.
Cases referenced


Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 394 (2d Cir. 2011)