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Supreme Court Upholds Arbitration Award in Favor of British Natural Gas Investor in Argentina

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On March 5, 2014, the United States Supreme Court upheld a $185 million arbitration award obtained by the United Kingdom's BG Group PLC against the Republic of Argentina, pursuant to a bilateral investment treaty. The Court reversed the finding of the Court of Appeals for the District Court of Columbia that the arbitration panel lacked jurisdiction over the dispute, finding that the arbitrators, and not a court, properly determined whether the treaty's conditions to arbitration had been satisfied.

In *BG Group PLC v. Republic of Argentina*, 572 U.S. __ (2014), the Supreme Court interpreted the dispute resolution provision contained in an investment treaty between the United Kingdom and Argentina (the "Treaty"), requiring each nation to afford the others' investors "fair and equitable treatment" and forbidding the "expropriation of investments" by either nation. The Treaty permits investors to submit disputes to a local court in the country where the investment is made, and permits arbitration "where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to [that] tribunal . . ., the said tribunal has not given its final decision."

BG Group, a British company, belonged to a consortium holding a majority interest in MetroGas, an Argentine natural gas distributer. At the time that BG Group made its investment, Argentine law provided that gas tariffs would be payable in U.S. dollars, and would be set at levels that would assure a reasonable return to gas distribution firms. After its financial crisis, however, Argentina passed an amended law making tariff payments peso-denominated, causing BG Group to sustain losses from its investment. BG Group claimed that Argentina's actions violated the Treaty, and initiated arbitration in the Treaty's designated site for arbitration, Washington DC. Finding the Treaty's "fair and equitable treatment" provision was violated, the arbitration panel awarded BG Group $185 million in damages. The arbitrators rejected Argentina's argument that the panel lacked jurisdiction over the dispute because the local litigation requirement was not followed, finding instead that Argentina's conduct excused BG Group's failure to comply.

The District Court confirmed the arbitration award under the New York Convention and the Federal Arbitration Act, but the Court of Appeals for the District of Columbia vacated, finding on *de novo* review that BG's failure to bring suit in Argentina and wait 18 months prior to commencing arbitration was not excused.

On review, the Supreme Court held that the arbitration panel's determination that it had jurisdiction over the parties' dispute cannot be disturbed. The Court reasoned that the dispute was not one about "whether the parties are bound by a given arbitration clause," which would be typically be a question for a court to decide. Rather, it deemed the satisfaction of the Treaty's local litigation requirement a "procedural precondition" to arbitration, which was appropriately resolved by the arbitrators. The Court likened the local litigation prerequisite to other issues typically reserved for arbitrators rather than judges, such as "time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate." The Court also held that a treaty is simply a contract between nations, to be determined according to the parties' intent, and therefore, the fact that the document at issue is a treaty does not make a critical difference to its analysis.

Justices Roberts and Kennedy dissented, reasoning that there is no express agreement to arbitrate between a host country and an investor. For such an agreement to form, they argued, the investor must first meet any specified conditions to arbitrability in an investment treaty: here, the obligation to bring suit in local courts and wait 18 months. Such obligation, the dissent argued, is a "condition on a signatory country's consent to arbitrate, and not merely a condition on performance of a pre-existing arbitration agreement." Justice Roberts explained: "It is no trifling matter for a sovereign nation to subject itself to suit by private parties; we do not presume that any country – including our own – takes that step lightly."