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REPUBLIC OF ARGENTINA V. BG GROUP PLC

Janis H. Brennan
Foley Hoag LLP, Washington, D.C.

Janis H. Brennan

Interpreting treaty provisions traditionally the province of international arbitral tribunals, the U.S. Court of Appeals for the District of Columbia (665 F.3d 1363, Jan. 17, 2012) has vacated a final arbitration award rendered under the UNCITRAL Rules against Argentina and in favor of BG Group PLC, a British investor in Argentina. The court held that the arbitrators exceeded their authority by ignoring the intentions of the United Kingdom (UK) and Argentina when they included, in their 1993 Bilateral Investment Treaty (BIT), a precondition that an aggrieved investor seek resolution of its claims in the national courts for 18 months prior to initiating arbitration — a step that BG Group did not take before filing its arbitration against Argentina. The court's ruling, which reversed two decisions of the U.S. District Court for the District of Columbia in the case, also overturned the lower court's confirmation of the award.

The Court of Appeals' interpretation of the UK/Argentina BIT's preconditions to arbitration has already carried over to the international arbitration world. In an award issued on February 10, 2012, by the UNCITRAL tribunal in *ICS Inspection and Control Services Ltd. v. Argentina,* the tribunal declined to exercise jurisdiction because ICS — like BG Group — had not complied with the prerequisite of submission of its dispute to the Argentine courts for 18 months. In so ruling, the tribunal noted that its analysis of the BIT accords with the court's decision in *BG Group.*

Like most of the dozens of arbitrations lodged against Argentina in the past ten years, BG Group's claims arose from the country's 2001-2001economic crises. BG Group had invested in the gas distribution company MetroGAS, created when Argentina privatized its state-owned gas companies in the 1990's. By 1998, BG Group held a 45.11% interest in MetroGAS, through direct investment and indirect investment via a consortium. MetroGAS held a 35-year exclusive license to distribute gas in metropolitan Buenos Aires, with tariffs calculated in U.S. dollars, stated in pesos at a U.S. dollar-pegged rate set by a government currency board, and adjusted semi-annually for inflation based on the U.S. Product Price Index.

When Argentina's economy collapsed, the government promulgated an emergency law, resolutions and decrees to address the crises. Among other acts that BG Group claimed adversely impacted its investment, the emergency regime abolished the currency board that had set the peso/U.S. dollar rates; ended inflation adjustments based on foreign price indexes; changed U.S. dollar adjustment clauses like the one in the MetroGAS license to peso-based clauses; and required renegotiation of public service licenses. In April 2003, BG Group initiated arbitration proceedings against Argentina under article 8(3) of the BIT, triggering a three-month period during which the parties could agree upon one of three possible fora: the International Centre for Settlement of Investment Disputes (ICSID), a sole "international arbitrator," or an ad hoc tribunal under the UNCITRAL Rules.

When BG Group and Argentina failed to agree upon any of the three fora, the company submitted its claims to the "default" forum also provided for in BIT article 8(3): arbitration under the UNCITRAL Rules. The arbitration was heard by a three-arbitrator panel in proceedings seated in Washington, D.C. BG Group claimed that Argentina had expropriated its investment in MetroGAS in contravention of BIT article 5 and breached BIT article 2(2) by failing to accord fair and equitable treatment to its investment.

Advancing arguments that were later to become the focus of the Court of Appeals' decision, Argentina challenged the jurisdiction, or competence, of the tribunal, on the grounds that BIT articles 8(1) and (2) allowed arbitration only after a dispute had been submitted to the host state's courts and remained unresolved "after a period of eighteen months." The UNCITRAL tribunal joined Argentina's jurisdictional objections to the merits of the dispute and, in December 2007, rendered its final award on all issues. In rejecting Argentina's jurisdictional challenge, the tribunal concluded that article 8(2) could not "be construed as an absolute impediment to arbitration" and that, in light of the restrictions Argentina's emergency measures had placed on recourse to its own courts, any other reading of article 8(2) would lead to an "absurd and unreasonable result" prohibited by the Vienna Convention on the Law of Treaties. The tribunal went on to reject BG Group's expropriation claims, but found that Argentina had violated BIT article 2(2) by first creating a regulatory framework on which BG Group relied in making its investment and then altering it in a manner that violated "the principles of stability and predictability inherent to the standard of fair and equitable treatment." The tribunal awarded BG Group over US$185 million in damages.

In March 2008, Argentina filed a petition to vacate or modify the award with the U.S. District Court for the District of Columbia, and BG Group subsequently moved for the award's

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confirmation. During three years of proceedings, the District Court rejected Argentina's vacatur arguments under both §10(a) of the U.S. Federal Arbitration Act (FAA) and the New York Convention, concluding that it had no choice but to defer to the arbitrators' "colorable, if not reasonable, interpretation" of BIT article 8(2). The District Court also confirmed the award under FAA §207 and the Convention. It was from these decisions that Argentina appealed.

In its January 2012 decision, the Court of Appeals determined whether the District Court had erred as a matter of law, and/or in its factual findings, in deciding that it had no authority to conduct its own evaluation of arbitrability under BIT article 8(2), as well as article 8(1)'s express requirement that a dispute be submitted to the "competent tribunal" of the host state. The court conducted this determination under the vacatur grounds in FAA §10(a)(4), analyzing whether — as Argentina had argued in the District Court — the award should be vacated because the arbitrators had "exceeded their powers" in interpreting articles 8(1) and (2) to determine their own power to hear the dispute.

To conduct its FAA §10(a)(4) determination, the court analyzed two issues fundamental to U.S. courts' historical application of the FAA in multiple contexts: First, who — the court or the arbitrators — should determine whether a dispute under the BIT was arbitrable, and second, if arbitrability was to be determined by the court, what did the UK and Argentina intend by articles 8(1) and (2)? To answer the first question, the court keyed on U.S. courts' longstanding reservation of the authority to determine arbitrability, except where there is "clear and unmistakable evidence" that the parties to an arbitration agreement (here, BIT article 8) had agreed that the arbitrators would determine arbitrability. The court first determined that the District Court had "clearly erred" in its factual findings when it took statements by Argentina's counsel out of context and ignored other of his statements to conclude that, in oral argument below, Argentina had "conceded that the [BIT] provided that the arbitrator would decide the question of arbitrability."

Although acknowledging that the BIT "does not directly answer" whether the UK and Argentina intended a court or an arbitrator to determine arbitrability where the conditions of articles 8(1) and (2) had not been met, the court found no "clear and unmistakable evidence" that the two countries intended to grant that authority to an arbitrator. In that regard, the court found three features of the BIT to be telling. First, on their face, articles 8(1) and (2) place a "temporal limitation" on the applicability of article 21 of the 1976 UNCITRAL Rules, which grants arbitrators the power to determine a dispute's arbitrability, such that UNCITRAL article 21 would not apply until an investor had submitted its dispute to the host state's courts for 18 months. Second, article 9(2), governing the resolution of disputes between the UK and Argentina over the BIT, places no preconditions on arbitration of those disputes, indicating that the two countries knew how to — but in article 8 did not — vest authority over arbitrability with an arbitrator. Finally, given that articles 8(1) and (2) require an investor first to submit its dispute to a court, there is no basis to conclude that the UK and Argentina "would have been surprised to have a court, and not an arbitrator, decide" whether those articles' preconditions had been met.

On the basis of this analysis, the court held that the question of arbitrability is for the court to decide and, accordingly, that the District Court "erred as a matter of law" when it failed to examine the BIT for "clear and unmistakable evidence" that the UK and Argentina had empowered the UNCITRAL arbitrators to determine the arbitrability of BG Group's claims, where the company had failed to comply with articles 8(1) and (2).

With this holding, all that remained was for the court to conduct its second fundamental inquiry, i.e., a determination of the UK's and Argentina's intent in articles 8(1) and (2), and to enforce that intent in accordance with its terms, as required by U.S. Supreme Court precedent. In reality, the court had advanced toward that determination in its arbitrability analysis, when it decided that articles 8(1) and (2) functioned as preconditions to arbitration and the applicability of the UNCITRAL Rules. But — in an analysis that is as close as the court came to the type of "admissibility" (or "procedural") vs. "jurisdictional" (or "competence") analysis typical of ICSID and other arbitral tribunals' examination of treaty preconditions to their adjudicatory authority — the court took care to distinguish Supreme Court precedent restricting judicial inquiry prior to the arbitration of labor disputes. In the court's view, the BIT — as "an international investment treaty between two sovereigns" — was "entirely different" from the labor arbitration context, and moreover, articles 8(1) and (2) explicitly require judicial proceedings prior to arbitration. As a result, the U.S. federal policy favoring arbitration could not "function to override the intent of" the UK and Argentina in requiring an 18-month attempt to resolve disputes in the national courts. Because BG Group had disregarded that requirement when it initiated arbitration, its dispute with Argentina was not arbitrable, and — in effect — the UNCITRAL arbitrators had "exceeded their powers" both in determining their own authority to hear the case and in rendering the award.

On February 15, 2012, BG Group filed a petition seeking rehearing by the same three-judge panel that rendered the January 17, 2012 decision, or — failing that — a rehearing by the court *en banc,* on the grounds that the decision contradicts a previous Court of Appeals decision and does not conform to U.S. Supreme Court precedent. On March 15, 2012, the Court of Appeals denied both of BG Group's requests. As of this writing, it remains to be seen whether BG Group will file a petition for certiorari to the U.S. Supreme Court for review of the decision.

Advisory Board member Janis H. Brennan is a partner in the international litigation and arbitration practice of ITA Supporting Member Foley Hoag LLP in Washington, D.C. She may be reached at jhbrennan@foleyhoag.com.