ARBITRABILITY IN BILATERAL INVESTMENT TREATIES: THE CASE THAT APPLIED INTERNATIONAL LAW TO JUSTIFY ITS NON–APPLICATION

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I. INTRODUCTION

Attorney General Loretta Lynch arrives at the White House one morning and discovers on her desk a notice compelling the United States of America to appear at an arbitral proceeding in Brussels for an alleged breach of a U.S.-Armenia bilateral investment treaty. An

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Armenian corporation claims damages due to the failure of the U.S. to provide the company "fair and equitable treatment." The corporation has bypassed the requirement that investors first litigate claims in U.S. courts. The U.S. disputes the tribunal's jurisdiction, but a Belgian court of appeals finds jurisdiction proper under Belgian procedural law. This vignette is fictitious yet, as this article will illustrate, entirely proper under current American jurisprudence. To prevent this scenario, U.S. domestic law should consider international treaty arbitration law in analyzing consent as a prerequisite to arbitration.

International investment treaty arbitration ("ITA") typically involves arbitration by an investor against a sovereign country, often under a bilateral investment treaty ("BIT").[1] In contrast to international commercial arbitration ("ICA"), which "involve[s] commercial disputes between private parties,"[2] ITA requires an arbitral tribunal "to perform very substantial, multi–step, legal work before reaching its final decision"[3] and consider, among other factors, "the BIT itself, the law of the Contracting State, [and] the rules and principles of international law."[4]

Although the arbitral tribunal's final decision is heavily grounded on international principles, "[h]ost–country law retains significance in international investment disputes, notwithstanding the BIT movement and its focus on international law."[5] "The tribunal must inquire into its jurisdiction to hear the claim and whether the claimant has stand-

1. *See* Stephen R. Halpin III, *Stayin' Alive?: BG Group, PLC v. Republic of Argentina and the Vitality of Host–Country Litigation Requirements in Investment Treaty Arbitration*, 71 WASH. & LEE L. REV. 1979, 1981 (2014) (citing GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 42 (2012) (noting that, "most BITs provide significant substantive protections for investments made by foreign investors, including guarantees against expropriation and denials of fair and equitable treatment.")); *see generally* NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 1–2 (4th ed. 2004) (describing the historical roots of arbitration).

2. *See* BORN, *supra* note 1, at 411.

3. Bernard Hanotiau, *Investment Treaty Arbitration and Commercial Arbitration: Are They Different Ball Games? The Legal Regime/Framework*, *in* 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE 146, 148 (Albert Jan van den Berg ed., 2009).

4. Richard H. Kreindler, *The Law Applicable to International Investment Disputes*, *in* ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS 401, 404 (Norbert Horn & Stefan Michael Kröll eds., 2004); *see also* ANTONIO R. PARRA, APPLICABLE LAWS IN INVESTOR STATE ARBITRATION 4 (2008).

5. Halpin, *supra* note 1, at 1989 (citing CAMPBELL MCLACHLAN QC, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 69–70 (2007) (stating that "[t]he investments of non–State actors are creatures of private law and tribunals cannot avoid addressing issues arising under the law pursuant to which investments owe their existence in adjudicating treaty questions.")).

ing to bring the claim."[6] Given the extent and complexity of the factors considered:

> Divining the applicable law is a more complicated task than in the strictly commercial context. A BIT is often thought of as a 'self–contained legal system,'[7] and choice–of–law provisions in BITs frequently direct a tribunal to consider, among others, 'the BIT itself, the law of the Contracting State, [and] the rules and principles of international law.'[8]

Recently, in *BG Group PLC v. Republic of Argentina*,[9] the U.S. Supreme Court set a precedent for eschewing the multi–step ITA analysis described above. The Court's decision was in favor of the interpretive presumptions of U.S. private commercial arbitration law to determine the "arbitrability" of BIT disputes. This threshold question is critical as it determines "whether an arbitral tribunal has the authority to decide, as an initial matter, that a given dispute should be submitted to arbitration for a determination of whether the arbitral tribunal has jurisdiction over the dispute."[10] *BG Group* was the first time the Court ruled on an investor–state dispute arising out of a BIT between two sovereign nations. The Court held that an arbitral tribunal's determination of whether a treaty requirement is a condition on the State's consent to arbitrate is subject to deferential, not *de novo*, review.[11] In so holding, the Court expressly declined to apply principles of treaty interpretation to determine the appropriate standard of review.[12] Instead, the Court employed standards derived from the context of private arbitration, effectively side–stepping international

6. *Id.* at 1987–88 (citing Hanotiau, *supra* note 3, at 148 ("In investment arbitration, the issue of jurisdiction is nearly invariably raised by the respondent. It leads the arbitral tribunal to determine whether claimant has standing . . . but also whether it qualifies for protection under the applicable BIT . . . .")).

7. *See id*. at 1988 (quoting Richard H. Kreindler, *The Law Applicable to International Investment Disputes*, *in* ARBITRATING FOREIGN INVESTMENT DISPUTES: PROCEDURAL AND SUBSTANTIVE LEGAL ASPECTS 401, 404 (Norbert Horn & Stefan Michael Kröll eds., 2004); *see also* Jieying Ding, *Enforcement in International Investment and Trade Law: History, Assessment and Proposed Solutions* 47 GEO. J. INT'L L. 1137, 1143 (2016).

8. Halpin, *supra* note 1, at 1988.

9. BG Grp. PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014); *accord* Chevron Corp. v. Republic of Ecuador, 795 F.3d 200, 205 (D.C. Cir. 2015) (holding that an arbitral tribunal's determination of whether a treaty requirement is a condition on the State's consent to arbitrate is subject to deferential, not *de novo*, review).

10. Laurence Shore, *Defining 'Arbitrability'*, N.Y. L. J. (June 15, 2009), http://www.newyorklawjournal.com/id=1202431398140/–Defining–Arbitrability#ixzz3oZyLUf6R (noting that, "what the United States calls 'arbitrability' can be an exceedingly complicated question, both here and internationally.").

11. *See BG Grp. PLC*, 134 S. Ct. 1198 (2014).

12. *Id.*

treaty principles in favor of domestic arbitration law presumptions to determine the arbitrability of the sovereign nation's consent to arbitration.[13] *BG Group* and its progeny stand for the proposition that a private multinational commercial interest can sidestep host–country law and international treaty principles by submitting a dispute directly to arbitration before a court has determined whether a precondition to arbitration has been satisfied, and that the U.S. will give deference to the arbitrator's findings under the presumptions of ordinary U.S. contract law.

Still, treaty interpretation, international law, and international policy all militate in favor of interpreting the arbitrability of a treaty under governing international–law principles as opposed to the contract–law framework employed in domestic arbitration law analysis. First, the *BG Group* decision relies on a blatant misconstruction by the arbitral tribunal of Articles 31 and 32 of Vienna Convention on the Law of Treaties (the "Vienna Convention"), which the U.S. "generally recognizes . . . as an authoritative guide to treaty interpretation."[14] Second, the *BG Group* Court's application of private commercial arbitration principles to ITA fails to consider standard investor–state arbitration defenses under international law, such as the exhaustion of local remedies requirement.[15] Third, because an arbitration agreement often implicates a nation's sovereign interests and entails large financial stakes, U.S. courts should treat traditional international law conditions on consent as conditions precedent to consent to arbitration unless the text and other relevant evidence sufficiently indicate otherwise.

II. "Purposeful Availment" of Customary International Law of Treaties

The imposition of U.S. contract law in ITA stems from an ITA tribunal's flawed interpretation of the Vienna Convention on the Law of Treaties. Although not a party, the United States "considers many of the provisions of the Vienna Convention . . . to constitute customary international law on the law of treaties."[16] In deferring to the ITA

13. *Id.*

14. *See, e.g.*, Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 433 (2d Cir. 2001), *cert. denied*, 534 U.S. 891 (2001) (citing Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 309 (2d Cir. 2000)).

15. *See* BG Group PLC v. Republic of Argentina, 134 S. Ct. 1198, 1208-13 (2014).

16. *Compare* Frequently Asked Questions, *Vienna Convention on the Law of Treaties*, U.S. Dep't of State, http://www.state.gov/s/l/treaty/faqs/70139.htm (last visited Feb. 29, 2016) (noting that the United States is not a party to the Vienna Convention on the Law of Treaties since,

tribunal's problematic determination of arbitrability, and therefore to its interpretation of the BIT, the *BG Group* Court tacitly approved the tribunal's misuse of Articles 31 and 32 of the Vienna Convention to misconstrue "existing customary international law."[17]

A. The Road to the Vienna Convention and Back

The U.S. Supreme Court upheld a judgment in favor of a British natural gas consortium against Argentina under a BIT to which the U.S. is not a party.[18] To fully grasp this outcome, one must understand how ITA law and U.S. law intersect.

The dispute in *BG Group* involved a BIT entered into in 1990 between Great Britain and the Republic of Argentina.[19] The claimant in the arbitration, BG Group PLC. ("BG"), was a British corporation with "a direct and an indirect ownership interest in MetroGAS S.A.[,] . . . a natural gas distribution company incorporated in Argentina."[20] BG filed notice of arbitration in 2003 pursuant to Article 8 of the BIT, which provided for the submission of disputes "to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made."[21] The BIT provided for two exceptions to this general jurisdiction requirement. It allowed for submission to international arbitration in the following cases:

> (a) if one of the Parties so requests, in any of the following circumstances:

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although "[t]he United States signed the treaty on April 24, 1970 . . . [t]he . . . Senate has not given its advice and consent to the treaty.") *with Chubb*, 214 F.3d at 309 (stating that, "[t]he United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.") *and* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. III intro. note, at 144–45 (1987) (discussing the Vienna Convention's codification of customary international law governing international agreements and the acceptance of the Convention by the United States).

17. *See* Karl Zemanek, *Vienna Convention on the Law of Treaties*, U.N. AUDIOVISUAL LIBRARY OF INT'L LAW, http://legal.un.org/avl/pdf/ha/vclt/vclt–e.pdf (quoting Guinea–Bissau v. Sen., ICJ REP. 53, para. 48 (Nov. 12, 1991) (stating that, "[a]rticles 31 and 32 of the Vienna Convention on the Law of Treaties . . . may in many respects be considered as a codification of existing customary international law . . . .")).

18. *See* BG Grp. PLC v. Republic of Argentina, Final Award, at 5 (UNCITRAL Dec. 24, 2007), [hereinafter Final Award], http://www.italaw.com/sites/default/files/case-documents/ita0081.pdf.

19. *See id.* (referencing the Agreement Between the Government of the United Kingdom and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S 33 [hereinafter Arg.–U.K. BIT]).

20. *See* Final Award, *supra* note 18, at 5.

21. *Id.* at 5–6 (citing Arg.–U.K. BIT, *supra* note 19, at art. 8 (describing the article as, "Settlement Disputes Between an Investor and the Host State")).

(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;
(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute; [or]
(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.[22]

BG did not attempt to litigate the dispute in Argentina, however.[23] Instead, it sought Argentina's agreement, under Article 8 of the BIT, to submit the dispute to the International Centre for Settlement of Investment Disputes ("ICSID").[24] Argentina naturally declined.[25] BG then referred the dispute to arbitration under the UNCITRAL rules, a procedure proper under Article 8 of the BIT only "[i]f after a period of three months . . . of the claim there [was] no agreement to [either one of the ICSID or UNCITRAL] alternative procedures."[26]

Whether a feat of cynicism, brilliance, or both, BG Group's decision to bypass the BIT's exhaustion provisions and file for ad hoc arbitration under the UNCITRAL rules proved to be fateful for Argentina.[27] Under the UNCITRAL regime, "the place of arbitration [is] determined by the arbitral tribunal having regard to the circumstances of the case."[28] Thus, the BG tribunal was free to select an Argentine, British, or any other UNCITRAL member State locality, as the place, or "seat," of arbitration for the dispute.[29] However, the

22. *See* Final Award, *supra* note 18, at 6.

23. *Id.* at 48; *see also* Arg.–U.K. BIT, *supra* note 19, at art. 8 (stating that, "[d]isputes . . . which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party . . . shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting party in whose territory the investment was made.").

24. *See* Final Award, *supra* note 18, at 7.

25. *Id.* at 8.

26. *See* Final Award, *supra* note 18, at 6 (alteration in original) (citing Arg.–U.K BIT, *supra* note 19, at art. 8).

27. *See* BORN, *supra* note 1, at 412 (noting that, "many BIT arbitrations are conducted under general institutional arbitration rules, such as UNCITRAL Rules . . . [or] [i]n other instances . . . subject to specialized and *sui generis* dispute resolution mechanisms . . . .").

28. UNCITRAL Arbitration Rules (as revised in 2010), G.A. Res. 65/22, U.N. Doc. A/RES/65/22, art. 18(1) (Jan. 10, 2010) (noting that, "[i]f the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.").

29. *See FAQ – Origin, Mandate and Composition of UNCITRAL*, UNCITRAL, http://www.uncitral.org/uncitral/en/about/origin_faq.html#members (last visited Mar. 21, 2016) (stating that

tribunal was constituted in 2004 in Washington D.C.[30] in accordance with Article 7(1) of the UNCITRAL Rules.[31] Thus, because BG filed for arbitration in Washington D.C., the tribunal was also free to select Washington D.C. as the "seat" of arbitration.

This determination is no trivial matter.[32] "The 'place' or 'seat' of the arbitration is important because the law of the 'place' or 'seat' will affect a number of issues, including the powers of the arbitral tribunal, the availability and quality of state court intervention in the arbitral proceedings, and the enforceability of the arbitrators' award."[33] Indeed,

> once parties have agreed where to arbitrate, the law of the seat of arbitration (law of the situs or *lex arbitri*) provides procedural rules that parties must follow during arbitration [and] sets forth the grounds on which parties may vacate an arbitral award. In the United States, the FAA grants the U.S. federal district court embracing the location where an award is made the power to vacate the award on certain procedural grounds.[34]

Accordingly, the *BG Group* claim became justiciable in the United States when Argentina petitioned under the Federal Arbitration Act ("FAA") to vacate the arbitral award rendered against it in the U.S. for its alleged violation of a BIT. Thereafter, the U.S. District Court for the District of Columbia confirmed the award, the U.S. Court of Appeals for the District of Columbia Circuit reversed, and the U.S. Supreme Court granted certiorari. However, since the FAA

"UNCITRAL was originally composed of 29 States; its membership was expanded in 1973 to 36 States and again in 2004 to 60 States.").

30. *See* Final Award, *supra* note 18, at 7.

31. *Id.*; *see also* UNCITRAL Arbitration Rules, *supra* note 28, at art. 7(1) (noting that, "[i]f the parties have not previously agreed on the number of arbitrators, and if within 30 days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.").

32. *See* Halpin, *supra* note 2, at 1992 (FAA determines seat)*; but see* BORN, *supra* note 1, at 116 (citations omitted) ("In contrast to legislation in most countries, the FAA grants U.S. courts a potentially significant role in the selection of the arbitral seat in international arbitrations. In particular, the FAA grants U.S. courts the power to compel arbitration (under §4, §206 and §303 of the FAA) in a particular place. In issuing orders compelling arbitration under the FAA, U.S. courts have therefore sometimes specified the place where the arbitration is to proceed. In some cases, U.S. courts have issued orders compelling arbitration within the United States, even where parties have agreed to arbitration in accordance with institutional rules specifying an alternative means of selecting a seat. This approach is at odds with the overwhelming weight of authority, with U.S. obligations under Article II of the Convention and with principles of party autonomy.").

33. *See* JOHN W. HINCHEY & TROY L. HARRIS, INTERNATIONAL CONSTRUCTION ARBITRATION HANDBOOK § 5:13 (2015).

34. *See* Halpin, *supra* note 1, at 1992.

controlled procedurally with respect to the seat of arbitration,[35] Argentina's ability to wrest the dispute from U.S. law was greatly diminished from the moment the tribunal asserted jurisdiction. In this sense, the threshold question is: on what basis could the tribunal assert jurisdiction?

The tribunal expressly stated that the applicable law governing the arbitration would be defined by the BIT, which provides that the "arbitral tribunal [would] decide [the] dispute in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in this dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law."[36] Argentina's troubled economic and political history seems to have been pivotal in the tribunal's decision to rely on "applicable principles of international law," by way of the Vienna Convention, to produce an outcome it deemed just. Argentina entered into the BIT at the height of President Menem's extremely market–oriented economic policy, which he launched "amid the worst economic crisis in the country's history."[37] Argentina had pegged the peso to the U.S. dollar, but was never able to maintain parity.[38] At the time of the BG dispute, Argentina was restructuring and renegotiating its debt to reflect economic realities.[39] Emergency measures involved temporarily barring creditors from bringing suit in Argentine courts.[40] Persuaded "that under the dire circumstances surrounding the emergency measures, the Executive Branch sought to prevent the collapse of the financial system by (i) directly interfering with the normal operation of its courts, and (ii) by excluding litigious licensees from the renegotiation process,"[41] the tri-

35. *See* 9 U.S.C. § 10(a) (West 2012) (granting U.S. courts "in and for the district wherein the award was made" power to "make an order vacating the award" for reasons such as corruption, fraud or prejudice).

36. *See* Arg.–U.K BIT, *supra* note 19, at art. 8; *see also* Final Award, *supra* note 18, at 6 (stating "BG appointed Professor Albert Jan van den Berg and Argentina appointed Professor Alejandro M. Garro as arbitrators, both of whom jointly designated Guillermo Aguilar Alvarez as president of the tribunal.").

37. Carlos Menem, BRITANNICA, http://www.britannica.com/biography/Carlos–Menem (last visited Mar. 2, 2016).

38. *See* Indep. Evaluation Office of the Int'l Monetary Fund, *The Role of the IMF in Argentina, 1991-2002*, Pub. No. 70403, Int'l Monetary Fund 1 (July 2003), www.imf.org/External/NP/ieo/2003/arg/070403.pdf.

39. See *id*. at 4.

40. Petition of the Republic of Argentina to Vacate or Modify Arbitration Award at 53, BG Grp. PLC v. Republic of Argentina, 665 F.3d 1363 (D.C. Cir. 2012) (No. 08–0485 (RBW)), http://www.italaw.com/documents/BGvArgentina.pdf.

41. *Id*.

bunal excused BG from its duty to exhaust local remedies and ultimately awarded the British consortium $185,285,485 in damages, $247,300 in arbitration costs, and $437,073 plus £2,414,141 in legal fees and expenses.[42] Argentina's only avenue of redress was, oddly enough, through a U.S. district court. Yet, as we will see, in a strange twist of fate, the *BG Group* Court's use of U.S. contract law served to reinforce a peculiar application of international law.

B. International Vienna Convention Jurisprudence

The BG arbitration tribunal's award against Argentina is grounded on two provisions of the Vienna Convention. While the tribunal "accept[ed] Argentina's position that as a matter of treaty law investors acting under the Argentina–U.K. BIT [had to] litigate in the host State's courts for 18 months before they [could] bring their claims to arbitration," the tribunal held that "[a]s a matter of treaty interpretation . . . Article 8(2)(a)(i) [could not] be construed as an absolute impediment to arbitration."[43] The tribunal reasoned that "[w]here recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, any such interpretation would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention."[44] According to the tribunal, "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,"[45] was the type of manifest absurdity contemplated by Article 32.[46]

Article 32 is a sister provision of Article 31,[47] which states that international treaties are to be interpreted according to the "ordinary language" of their provisions.[48] Article 32 creates an exception to this

42. *Id*. at 3-4.

43. *See* Final Award, *supra* note 18, at 50.

44. *Id*.

45. *Id*.

46. *See id*. The Final Award is silent with respect to whether an interpretation of the BIT that would permit BG to patently disregard Article 8(2)(a)(i) would also result in a manifest absurdity. *See id*.

47. *See* Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S 331 [hereinafter Vienna Convention] ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, 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: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.").

48. *See id*. at art. 31(1) (providing 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.").

rule when an attempt to interpret the plain language of the treaty "[l]eads to a result which is manifestly absurd or unreasonable."[49] The British corporation first seized on this provision in its writ of certiorari to the U.S Supreme Court, arguing that under the Vienna Convention, "a treaty shall not be *applied* in a manner that produces an absurd or unreasonable result."[50] The actual language of Article 32 provides that the exception arises when an "interpretation"—not an *application*—leads to a result which is manifestly absurd or unreasonable.[51] The U.S Supreme Court in *BG Group* seems to have missed this distinction. While acknowledging that the arbitration tribunal's interpretation of the Vienna Convention was "controversial,"[52] the Court concluded that the arbitrators' conclusions were not barred by the BIT as the arbitrators did not "'stra[y] from interpretation and application of the agreement' or otherwise 'effectively dispens[e] their own brand of . . . justice.'"[53] Yet the Court need only have consulted the official reports of the International Law Commission to confirm just how far the *BG Group* arbitrators strayed from the ordinary meaning of the Vienna Convention in order to stray from the ordinary meaning of Article 8(2)(a)(i) of the BIT.

The arbitral tribunal claimed that its decision was commanded "[a]s a matter of treaty interpretation."[54] Yet the official records of the General Assembly of the Vienna Convention make clear that the International Law Commission ("ILC") never intended Article 32 to function as a mechanism for importing extrinsic factors into treaty interpretation when the ordinary language of the treaty stands for itself; rather, "[t]he word 'supplementary' emphasizes that article [32] does *not* provide for alternative, autonomous, means of interpretation but only for means to aid an interpretation governed by the principles contained in article [31]."[55] With respect to the "manifestly absurd or

49. *See id*. at art. 32.

50. Petition for a Writ of Certiorari, *BG Grp. PLC*, 665 F.3d 1363, 1368 *petition for cert. filed*, 2012 WL 3091067 (U.S. July 27, 2012) (No. 12–138) (citing Vienna Convention, *supra* note 47, at art. 32(b)).

51. Vienna Convention, *supra* note 47, at art. 32.

52. *See* BG Grp. PLC v. Republic of Argentina, 134 S. Ct. 1198, 1212-13 (2014) ("We would not necessarily characterize these actions as rendering a domestic court–exhaustion requirement 'absurd and unreasonable'. . .").

53. *Id.* at 1213 (citing Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 671 (2010) (quoting Major League Baseball Players Assn. v. Garvey, 532 U.S. 504, 509, (2001) (per curiam)) (alternation in original) (internal quotation marks omitted).

54. *See* Final Award, *supra* note 18, at 50.

55. Int'l Law Comm'n, Rep. on the Work of its 18th Sess., May 4 – July 19, 1966, U.N. Doc. A/6309/Rev/1, 2 Y.B Int'l L. Comm'n 173, 223; GAOR, 21st Sess., Supp. No. 9 (1966). http://legal.un.org/ilc/documentation/english/reports/a_cn4_191.pdf.

unreasonable" exception in which the tribunal expressly couched its decision, the ILC made clear that this exception was "limited to cases where the absurd or unreasonable character of the *'ordinary' meaning* is manifest"[56]—i.e., "cases where *interpretation* under article [31] gives a result which is manifestly absurd or unreasonable."[57]

In clarifying the ancillary role of Article 32, the ILC cited a 1925 case in which the Permanent Court of International Justice eschewed the strict construction of Poland's postal rights urged by Danzig.[58] There, the Court stated that, "the rules as to a strict or liberal construction of treaty stipulations can be applied *only in cases where ordinary methods of interpretation have failed*."[59] The ILC summary notes confirm that the Vienna Convention drafters intended to enforce a "two stage approach to interpretation,"[60] with Article 31 being the default provision and Article 32 being "decisive only when the processes set out in article [31] failed to eliminate ambiguity or obscurity."[61]

C. U.S. Vienna Convention Jurisprudence

Notwithstanding the original U.S. position on Articles 31 and 32 of the Vienna Convention, prevailing U.S. law has shown a deference to the ILC–intended meaning of Article 32. The case of *Bank of New York v. Yugoimport*, recently decided by the U.S. Court of Appeals for the Second Circuit, illustrates this well.[62] In *Yugoimport*, the Bank of New York brought a state law interpleader action to resolve the ownership of funds in a deposit account to which Yugoimport, a Serbian entity, claimed full ownership.[63] The Republics of Croatia and

56. *Id.* (emphasis added) (internal quotation marks omitted).

57. *Id.* (emphasis added).

58. *See* Polish Postal Service in Danzig, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 11, at 41 (May 16).

59. *Id*. at 39 (emphasis added).

60. J. G. Merrills, *Two Approaches To Treaty Interpretation*, 1968–69 AUSTRALIAN Y.B. INT'L L. 55, 57 (1971) (describing that this strict view stood in contrast with the U.S. view that "the text of the treaty should be regarded as simply the formal embodiment of the parties' shared intentions and requiring the interpreter to make, as a matter of course, a far ranging inquiry into non–textual matters." (citing Summary Record of the 873d Meeting on the Law of Treaties, [1966] 1 Y.B. Int'l L. Comm'n, at 206, U.N. Doc. A/CN.4/SR.873.)).

61. *See Summary Record of the 873d Meeting on the Law of Treaties*, [1966] 1 Y.B. Int'l L. Comm'n, at 206, U.N. Doc. A/CN.4/SR.873 [hereinafter Summary Record], http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr872.pdf&lang=EFS (according to Special Rapporteur, Sir Humphrey Waldock, this approach represented the "existing rule.").

62. *See, e.g.*, 745 F.3d 599 (2d Cir. 2014).

63. *See id*. at 602.

Slovenia, however, contended that the funds should be divided among the states pursuant to a multilateral treaty, the interpretation of which was governed by the Vienna Convention.[64] Like the plaintiff in *BG Group*, Yugoimport relied on extrinsic evidence in an effort to avoid a "plain language interpretation"[65] of the international treaty. On appeal, Yugoimport contended that the district court should have credited this evidence.[66] The Appeals Court expressly rejected Yugoimport's position, holding that the evidence "could [not] properly have been taken into consideration under the interpretive rules set forth in the Vienna Convention."[67] The Court explained that under Article 32,

> courts may consider certain, limited types of external evidence only to confirm the ordinary meaning of the text, or where the ordinary meaning is ambiguous or would lead to absurd results. External evidence may not be admitted to create ambiguity where there is none or to compel an interpretation different from the text's ordinary meaning.[68]

Similarly, when interpreting provisions of the Warsaw Convention, the U.S. Supreme Court explicitly stated that "analysis must begin . . . with the text of the treaty and the context in which the written words are used."[69] This is true because "it is [a court's] responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties."[70]

III. Traditional Sovereign Substantive Defenses to Investor Claims

In adopting a private commercial arbitration framework, the U.S. District Court for the District of Columbia and the U.S. Supreme Court did not consider the traditional international law defenses available in investor–state arbitration, and thereby failed to engage in the

64. *Id.*

65. *Id.* at 611.

66. *Id.*

67. *Id.* at 611-12.

68. *Id.* at 611.

69. *See* Air France v. Saks, 470 U.S. 392, 396-97 (1985) (citing Maximov v. United States, 373 U.S. 49, 53-54 (1963)). *Id.* at 598.

70. *Id.* at 399 (alteration added) (citing Reed v. Wiser, 555 F.2d 1079 (2d Cir. 1977), *cert. denied*, 434 U.S. 922; Day v. Trans World Airlines, Inc., 528 F.2d 31, 35 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976)); *see also* Zicherman v. Korean Air Lines Co., 516 U.S. 217, 223 (1996).

traditional "exhaustion of local remedies" analysis that is the norm in international law.[71]

As described in detail by Gary Born, "[h]ost states have a variety of defenses available to claims by investors in investment arbitrations . . . . [T]hese defenses are virtually always governed principally by international law (not national law), in the form of either the provisions of the applicable investment treaty or customary international law."[72]

One such traditional investor–state arbitration defense is "permitted regulation," where a host state denies "either that [its] regulatory actions constitute an (indirect) expropriation or amount to a denial of fair and equitable treatment or a breach of the international minimum standard of treatment of aliens."[73] In *Methanex Corp. v. United States*,[74] Methanex, a Canadian corporation submitted a claim to arbitration under the UNCITRAL rules for alleged injuries resulting from a California ban on the gasoline additive methyl tertiary-butyl ether ("MTBE").[75] Methanex distributed methanol, which is used to manufacture MTBE. Methanex contended that the regulation denied Methanex fair and equitable treatment in accordance with international law since the regulatory measures had the effect of harming the expectancy interests of foreign methanol producers such as Methanex.[76] Methanex's contention was similar to BG's in that it claimed that the purpose of its contract under the trade agreement was frustrated by the host country's regulatory actions.[77] The *Methanex* tribunal cited a lack of conclusive evidence justifying California's ban of MTBE in favor of ethanol; nevertheless, it found the sovereign state's regulatory response warranted under the circumstances.[78] Like BG, Methanex appealed to Article 32 of the Vienna Convention in an attempt to cast California's actions as either "unfair and inequitable" or "discriminatory" in a sense that lay outside of the

71. *See* BORN, *supra* note 1, at 433.

72. *See id*. at 433-36 (describing the following as recognized defenses in investor-state arbitration: permitted regulation, exceptions, investor's unlawful conduct, necessity, exhaustion of local remedies, international obligation, and time bar).

73. *See id.* at 434 ("States frequently cite concepts of national sovereignty and regulatory prerogatives in asserting such defenses.").

74. Methanex Corp. v. United States, 44 I.L.M. 1345, pt. I, preface, ¶ 1 (NAFTA Ch. 11 Arb. Trib. 2005) (Veeder et al., Arb.), http://www.state.gov/documents/organization/51052.pdf.

75. *See id*.

76. *Id*. at pt. II, ch. D, ¶ 27.

77. *Id*. at pt. II, ch. E, ¶ 5.

78. *See id*. at pt. III, ch. A, ¶ 65.

ordinary meaning of the terms as set forth in NAFTA Article 1105.[79] The *Methanex* tribunal rejected the attempt, stating that the "approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties [and] its elucidation, rather than wide ranging searches for the supposed intentions of the parties, is the proper object of interpretation."[80]

Even if Argentina's regulation of its court system could not pass muster as a "permitted regulation," the *BG Group* tribunal and reviewing courts could have recognized Argentina's actions under the customary international law doctrine of "necessity."[81] Under Article 25 of the International Law Commission's Articles on State Responsibility, necessity may "be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State" if the act "is the only way for the State to safeguard an essential interest against a grave and imminent peril."[82] Thus, in the context of an investor dispute that arose under a BIT between Argentina and the U.S., an ICSID tribunal held Argentina to be in breach of its obligations under the BIT with respect to the standard of fair and equitable treatment and prohibition of discriminatory

79. *See* North American Free Trade Agreement, U.S.-Can.-Mex., art. 1105, Dec. 8–Dec. 17, 1992, 32 I.L.M. 289, (1993) ("Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security . . . [and] each Party shall accord to investors of another Party, and to investments of investors of another Party, non–discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.").

80. Methanex Corp. v. United States, 44 I.L.M. 1345, pt. II, ch. B, ¶ 22 (NAFTA Ch. 11 Arb. Trib. 2005) (Veeder et al., Arb.), http://www.state.gov/documents/organization/51052.pdf (citing Int'l Law Comm'n, Rep. on the Work of its 18th Sess., May 4 – July 19, 1966, U.N. Doc. A/6309/Rev/1, 2 Y.B Int'l L. Comm'n 173, 223, ¶18; GAOR, 21st Sess., Supp. No. 9 (1966), http://legal.un.org/ilc/documentation/english/reports/a_cn4_191.pdf ("[T]he Commission's approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation.")); *see also* Vienna Convention, *supra* note 47, at art. 31.

81. *See* BORN, *supra* note 1, at 435 ("Host states sometimes raise a defense of 'necessity' under customary international law or 'essential security' under the text of some BITs. These defenses typically claim that a governmental act was either unavoidable or justified because of pressing and essential state interests.").

82. *See, e.g.*, *Rep. of the Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, art. 25 and commentary, U.N. Doc. A/56/10, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

measures provisions.[83] However, the tribunal recognized Argentina's "necessity" defense as legitimate under the provisions of the BIT and "general international law."[84] Accepting Argentina's proposition that the "conditions as of December 2001 constituted the highest degree of public disorder and threatened Argentina's essential security interests," the Tribunal rejected the Kentucky corporation's contention that the pertinent BIT necessity provision was "only applicable in circumstances amounting to military action and war,"[85] finding, on the contrary, that "the conditions in Argentina . . . called for immediate, decisive action to restore civil order and stop the economic decline."[86] Central to the tribunal's reasoning was the recognition that Argentina was not a party to a commercial contract but a sovereign state:

> To conclude that such a severe economic crisis could not constitute an essential security interest is to diminish the havoc that the economy can wreak on the lives of an entire population and the ability of the Government to lead. When a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion.[87]

Although Argentina's liability under the BIT was not extinguished entirely, the Tribunal excused Argentina from its duty to perform during the "State of Necessity," which lasted from December 1, 2001 to April 26, 2003.[88]

It is worth noting that the *LG&E* tribunal's rationale in recognizing the legitimacy of the "necessity" defense in the general context of the BIT did not lie exclusively in Argentine law, the BIT, or customary international law;[89] rather, the tribunal determined it would "apply first the Bilateral Treaty; second, *and in the absence of explicit provisions therein*, general international law; and, third, the Argentine domestic law."[90] Significantly, the tribunal explained that this trump order derived directly from international law itself, since there was *no contract* between LG&E and Argentina but rather a binding *treaty*

83. *See generally* LG&E Energy Corp., LG&E Capital Corp., LG&E Int'l, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1 (Oct. 3, 2006), http://www.italaw.com/sites/default/files/case-documents/ita0460.pdf.

84. *See id*. ¶ 206.

85. *Id*. ¶ 238.

86. *Id*.

87. *Id*. ¶ 238.

88. *See id*. ¶ 245.

89. *See id*. ¶ 206.

90. *Id*. ¶ 99 (emphasis added).

between the two states.[91] As in *BG Group*, the relevant provision existed within the plain meaning of the BIT. The tribunal made clear that this obviated the need for recourse to Articles 31 and 32 of the Vienna Convention, as deference to customary international law as an "instrument for the interpretation of the Treaty" is only triggered "where a term is ambiguous, or where further interpretation of a Treaty provision is required."[92]

Like "permitted regulation" and "necessity," exhaustion of local remedies is recognized as both a customary international law principle as well as a valid BIT defense provision.[93] The Argentina–U.K. BIT expressly required the investors to litigate in the host state's courts for eighteen months before they could bring their claims to arbitration.[94] As in *LG&E*, this express provision reflected recognized customary international law principles.[95] Employing the sound logic of the *LG&E* tribunal, the BIT provision would have been controlling in the *BG Group* arbitration decision without need for recourse to the Vienna Convention,[96] and the *BG Group* tribunal could have granted partial relief as did the *LG&E* tribunal before it.[97]

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91. *Id.* ¶ 98 (stating that "[i]n short, one must also recall that between Argentina and LG&E there is no binding contractual agreement. The existence of such relationship would have allowed the parties to agree on stabilization clauses in the event of changes in certain circumstances. But, in the absence of such agreement, one is bound to resort to a legal system regulating those events. *The fact that there is no contract between the Argentine Republic and LG&E favors in the first place, the application of international law, inasmuch as we are dealing with a genuine dispute in matters of investment which is especially subject to the provisions of the Bilateral Treaty complemented by the domestic law*") (emphasis added).

92. *Id.* ¶ 89.

93. *See* BORN, *supra* note 1, at 435 ("[A] few BITs require an investor to exhaust its local remedies in the host state courts before commencing an investment arbitration. In addition, states sometimes argue that no violation of a foreign investor's substantive rights has occurred because the investor failed to exhaust its local remedies – for example, by seeking appellate review of a wrongful first instance judicial decision.").

94. *See* Final Award, *supra* note 18, at 47-48 (citing Arg.–U.K. BIT, *supra* note 19, at art. 8).

95. *See* BORN, *supra* note 1, at 427 (citing the Argentina-U.K. BIT as an example of "BITs [that] contain provisions requiring an investor to pursue relief initially in the host state's courts prior to commencing an investment arbitration.").

96. *See* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, ICSID CONVENTION, art. 26 (Apr., 2006), https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English–final.pdf (providing that, "[c]onsent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy.").

97. Whether arbitral awards create judicial precedent is an unsettled question from a purely theoretical point of view. *But cf.* BORN, *supra* note 1, at 366 ("In practice, awards frequently serve as decisive authority."); s*ee also* W. Mark C. Weidemaier, *Toward A Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895 (2010) ("Much like courts . . . arbitrators can . . . create precedent that guides future behavior and provides a language in which disputants, lawyers, and adjudicators can express and resolve grievances.").

American trade agreement jurisprudence should not have presented any obstacle to obtaining partial relief in an ICSID or UNCITRAL arbitral tribunal, or in the federal court system. NAFTA tribunals, for example, recognize the validity of the traditional defense of exhaustion of local remedies.[98] In *Loewen v. United States*, a NAFTA tribunal adjudicated a Canadian funeral home business's claim for damages against the state of Mississippi for the alleged violation of international standards of due process.[99] A Mississippi state court had rendered a $500 million verdict against Loewen in favor of a local Mississippi state business.[100] Loewen claimed that the company was effectively "foreclosed" from seeking redress from the allegedly discriminatory verdict in the Mississippi judicial system due to the state's onerous bond requirements and brought the dispute to arbitration.[101] The tribunal denied Loewen's claim, resting its decision on "the Claimants' failure to show that Loewen had no reasonably available and adequate remedy under United States municipal law in respect of the matters of which it complains, being matters alleged to be violations of NAFTA."[102] Although far from indifferent to Loewen's plight,[103] the tribunal noted that "the local remedies rule which requires a party complaining of a breach of international law by a State to exhaust the local remedies in that State before the party can raise the complaint at the level of international law is *procedural* in character."[104] The tribunal emphasized the "gatekeeping" function of the exhaustion of local remedies rule, citing Article 44 of the ILC Draft Articles on State Responsibility as proof that "the local remedies rule deals with the *admissibility* of a claim in international law, not whether the claim arises from a violation or breach of international

98. *See* Loewen Grp., Inc. and Raymond L. Loewen v. U.S., ICSID Case No. ARB (AF)/98/3, Award, ¶ 165 (June 26, 2003), 7 ICSID Rep. 442 (2005) [hereinafter Loewen Group] ("There is a body of opinion which supports the view that the complainant is bound to exhaust any remedy which is adequate and effective (*The Finnish Ships Arbitration Award*, May 9, 1934, 3 RIAA, 1480 at 1495; *Nielsen v Denmark* [1958–1959] Yearbook of the European Commission on Human Rights, 412 at 436, 438, 440, 444) so long as the remedy is not 'obviously futile' (*The Finnish Ships Arbitration Award* at 1503–05).").

99. *See id*. ¶¶ 3-4, 87.

100. *See id*. ¶ 4.

101. *See id*. ¶¶ 5-7 (Indicating that Mississippi law required an appeal bond for 125% of the judgment as a condition of staying execution on the judgment. Both the trial court and the Mississippi Supreme Court refused to reduce the appeal bond. Thus, Loewen was required to post a $625 million bond within seven days in order to pursue its appeal).

102. *Id*. ¶ 2.

103. *See id*. ¶ 1 (Acknowledging that the case was "extremely difficult").

104. *Id*. ¶ 149 (emphasis added).

law."[105] In the tribunal's view, this rule was qualified only by the principle that the obligation to exhaust is limited to remedies "which are effective and adequate and are reasonably available to the complainant in the circumstances in which it is situated."[106]

Unlike BG Group, Loewen made a good faith effort to seek redress in the investor state, but ultimately elected to settle with the Mississippi litigant rather than pay the bond required to pursue the local judicial remedy or apply to the Fifth Circuit for a stay of execution pending the filing of a petition for *writ of certiorari* to the U.S. Supreme Court.[107] The tribunal acknowledged Loewen's efforts, but rested its decision on the logical implications of its effective/adequate/reasonably available exhaustion rule:[108]

> If, in all the circumstances, entry into the settlement agreement was the *only* course which Loewen could reasonably be expected to take, that would be enough to justify an inference or conclusion that Loewen had no reasonably available and adequate remedy. . . . Although entry into the settlement agreement may well have been a reasonable course for Loewen to take, we are simply left to speculate on the reasons which led to the decision to adopt that course rather than to pursue other options. It is not a case in which it can be said that it was the *only* course which Loewen could reasonably be expected to take. . . . Accordingly, our conclusion is that Loewen failed to pursue its domestic remedies . . . .[109]

Under the logic of the *Loewen* decision, it is clear that an arbitration claimant lacks the discretion to determine whether local remedies are effective, adequate, and reasonably available (this is a matter for a reviewing court or tribunal to decide); rather, a claimant has a *duty* to attempt to exhaust all such remedies to gain "admission" into the jurisdiction of an international tribunal. BG Group's actions did not come close to satisfying the ILC standard as articulated by the *Loewen* tribunal, as it made no attempt to engage, let alone exhaust, the Argentine judicial system, for a mere eighteen months. In fact, courts and tribunals have upheld much longer exhaustion periods than

105. *Id.* (emphasis added).

106. *Id.* ¶ 168.

107. *See id.* ¶ 200.

108. *See id.* ¶ 216; s*ee generally* Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/exhaustion (last visited Mar. 7, 2016) (defining the term "exhaustion" as, inter alia, "[t]he process of establishing a conclusion by eliminating *all the alternatives*.") (emphasis added).

109. Loewen Group, *supra* note 98, ¶ 216.

the "manifestly unreasonable" eighteen–month period of redress available to BG Group in the Argentine judicial system.[110]

IV. The Issue of Sovereignty

The foregoing discussion of customary treaty interpretation and investment treaty defenses brings the implications of the U.S. Supreme Court's *BG Group* decision into sharp relief. The *BG Group* majority held that the BIT's local court litigation requirement could indeed be construed as a procedural condition precedent to arbitration.[111] This is what happened in the *Loewen* case. "Procedural," however, had a very different significance in the *Loewen* context. In *Loewen*, the exhaustion requirement was "procedural" in a due process sense in that it ensured deference to the host party's *domestic* law before a party could raise the complaint at the level of international law.[112] The *BG Group* majority, however, framed the issue as whether "the presence of the term 'consent' in a treaty warrant[ed] abandoning, or increasing the complexity of, [the Court's] ordinary intent–determining framework."[113] With the presumption thus reversed in favor of "ordinary" U.S. arbitration principles, the *BG Group* court acceded not only to the tribunal's arbitrability determination but also to its dubious use of international law to justify that determination.

In an odd sense, Argentina, a sovereign nation, now found itself in a dilemma analogous to that of ordinary consumers who unwittingly consent to binding arbitration when they sign contracts containing boilerplate language they assume will never be given effect.

110. *See* Interhandel (Switz. v. U.S.), Preliminary Objections, 1959 I.C.J. 6, at 26-27 (Mar. 21) (holding that, despite a twelve year delay, remedies had not been exhausted in U.S. courts); *see also* Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 Va. J. Int'l L. 809, 824 (2005) (due to the exhaustion of local remedies requirement in the context of state espousal of traditional international law denial of justice claims, a "state could not intervene diplomatically until its injured citizen had attempted to gain redress locally. This principle respected the sovereign right of a host state to control matters within its borders by allowing it the opportunity to grant redress for wrongs committed within its territory. While an alien did not have to exhaust local remedies if they proved to be futile, waiting to reach the point of futility could be very frustrating, and proving futility is not necessarily straightforward.").

111. *See* BG Grp. PLC v. Republic of Argentina, 134 S. Ct. 1198, 1208 (2014) (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002) ("[W]hether a party filed a notice of arbitration within the time limit provided by the rules of the chosen arbitral forum 'is a matter presumptively for the arbitrator, not for the judge.'")).

112. *See* Loewen Group, *supra* note 98, ¶¶ 149, 161.

113. *See BG Grp. PLC*, 134 S. Ct. at 1209; *see also* Halpin, *supra* note 1, at 2010 (characterizing the Court's reasoning as a declination "to grant the term 'consent' in an international treaty talismanic significance . . . .").

Although the BIT arbitration provision was not "buried in the fine print," it was plainly intended to lay dormant and only become available as an alternative remedy after local remedies had been exhausted. Additionally, like an ordinary consumer, Argentina's consent to the arbitration provision had more to do with lack of a meaningful choice than a preference for "direct investor–State adjudication" over "diplomatic protection."[114] The BIT was entered into at the time of President Menem's aggressive economic policies to stave off inflation and save the country from economic collapse.[115] The BIT provided for tariffs intended to attract foreign investors, the terms to which a wealthy nation would never so slavishly consent. BG claimed that Argentina "damage[d] . . . the value of its shares . . . [by] measures adopted by Argentina which had a negative impact on the activities of MetroGAS and, hence, on the value of its shareholding in GASA and in MetroGAS."[116] Argentina's efforts to restructure its debt, according to BG, caused "a substantial deprivation of the value and economic benefit of an investment;" the tribunal agreed that this "qualifie[d] as an expropriation . . . even without any alteration of formal ownership rights."[117] The Section 8 exhaustion prerequisites were Argentina's only protection against arbitral tribunals leery of "diplomatic protection" and more inclined to be sympathetic to the economic interests of rich investor nations.

Despite these precautions, Argentina could not foresee the force that the U.S. Supreme Court would give to the arbitrator's power to decide arbitrability in the United States—a force that the Court has interpreted to extend to class action certification,[118] and which determined the Court's deferential review of the arbitration tribunal's questionable interpretation of international treaty law. In so doing, the Court flouted the basic principles of sovereignty that ought to guide all interpretation of treaty law. This is true in several respects. First, the *Howsam* presumption emanates from considerations that are not germane to international treaty law. Second, international treaty law, whether commercial or not, is grounded in the irreducible authority of a state to govern itself.[119] Third, BITs are often negotiated in economic contexts that are no longer valid at the time of presumed breach and that entail social, economic and political consequences

114. *See* Final Award, *supra* note 18, at 50.
115. *See supra* note 40.
116. *See* Final Award, *supra* note 18, at 64.
117. *See id.* at 80.
118. *See* AT&T Mobility v. Concepcion, 563 U.S. 333, 343-44 (2011).
119. *See*, *e.g.*, Vienna Convention, *supra* note 47.

that are qualitatively different from those that befall private interests.[120]

A. The Howsam Rationale in Commercial Transactions

Essential to the *BG Group* holding was the Court's reluctance to depart from what it considered a workable legal standard to decide arbitrability.[121] The *First Options/Howsam* framework provides a neat "two-step" analysis, which requires determining, based on very liberal standards, whether the parties agreed to arbitrate; if so, the arbitrator has the primary power to arbitrate the merits of the dispute and to determine arbitrability itself.[122] The *Howsam* element of the rule arose in the context of a brokerage firm's suit to enjoin a customer from arbitrating an allegedly time–barred dispute.[123] The Court held that interpretation of the arbitration regime's rule imposing a six–year time limit for arbitration was a matter presumptively for the arbitrator, not for the court.[124] The Court relied on the principle that "procedural" questions, which grow out of the dispute and bear on its final disposition, are presumptively not for a judge to decide; rather, "the presumption is that the arbitrator should decide allegation[s] of *waiver, delay, or a like defense* to arbitrability."[125] The *BG Group* Court relied expressly on the *Howsam* procedural/substantive distinction, finding the UK–Argentina "local litigation requirement . . . highly analogous to procedural provisions that both this Court and

120. *See* Maíra de Melo Vieira, *The Regulation of Tax Matters in Bilateral Investment Treaties: A Dispute Resolution Perspective*, 8 DISP. RESOL. INT'L NO. 1, 63, 67 (May 2014).

121. *See* Transcript of Oral Argument at 37, BG Grp. PLC v. Republic of Argentina, 134 S. Ct. 1198 (2013) (No. 12–138), http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-138_8l9c.pdf (Breyer, J.) ("I thought [Howsam] said there's a presumption about that procedural rule, and I thought important language was the language that the Court has found the phrase, i.e., for the judge, applicable in the narrow circumstance where contracting parties would likely have expected a Court to have decided the gateway matter. Now, that, it seems to me, *a little bit easier to work with* than this notion of whether a state gave consent or didn't give consent or it doesn't mention it in the treaty.") (emphasis added).

122. *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 940 (1995) (whether arbitrators or courts have primary power to decide if parties agreed to arbitrate merits of dispute depends on whether parties agreed to submit question to arbitration); *see also* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002) ("procedural" questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide).

123. *See Howsam*, 537 U.S. at 81.

124. *See id*. at 82-83.

125. *Id*. at 84 (quoting Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 25 (1983)) (emphasis added).

others have found are for arbitrators, not courts, primarily to interpret and to apply."[126]

B. The Primacy of Sovereignty

Yet the facts of any dispute involving a treaty between nations are readily distinguishable from those in *Howsam*. *Howsam* involved a consumer commercial transaction contract containing a typical boilerplate arbitration provision.[127] Jurisdiction was not the basis of the bargain. Investment treaties, by contrast, are designed to address jurisdictional issues.[128] Developing countries know that opening up their borders may invite a fox into the henhouse. Hence the BITs' balance between institutional arbitration remedies and host country litigation requirements. Thus, arbitrability in investor-state disputes is not a mere procedural question, but entails *the* key question of consent.

Just as the Eleventh Amendment grants immunity to states from suit without their consent, local remedies clauses prevent a nation from being commandeered by its trade commitments. In *Loewen*, such a clause served as a safeguard against a NAFTA trade party from using an international law claim (denial of justice) to escape an international trade agreement provision (exhaustion) executed by sovereign nations.[129] In keeping with the "procedural" nature of the exhaustion requirement, the *Loewen* tribunal applied a "procedural" legal standard, finding against Loewen because it failed to exhaust *all* available remedies. The *Loewen* approach embodies the "procedural" rigors dictated by sovereignty and supported by international law. This stands in stark contrast to the *BG Group* rationale, which was guided by a competing notion of "procedural" that could only take root in international law thanks to a suspicious application of customary treaty interpretation.

C. State Considerations

The *BG Group* decision violates basic principles of sovereignty that ought to guide all international treaty interpretation. An arbitration agreement can implicate a nation's sovereign interests and entail

126. *BG Grp. PLC*, 134 S. Ct. at 1207-08 (2014) (citing *Howsam*, 537 U.S. at 85).

127. *Howsam*, 537 U.S. at 81.

128. *Id.* at 81-82, 84.

129. *See* Loewen Group, ICSID Case No. ARB (AF)/98/3, Award, ¶ 145, 189, (June 26, 2003), 7 ICSID Rep. 442 (2005) http://www.state.gov/documents/organization/22094.pdf.

large financial stakes.[130] The United States is a signatory to no less than 48 BITs,[131] yet it has never ratified the Vienna Convention. The United States federal judiciary has decided at least two cases against these signatory nations.[132] Comity itself should require U.S. courts to treat traditional international law conditions on consent, absent express terms that provide otherwise, as conditions precedent to consent to arbitration.

V. Conclusion

Governing international law treaty principles, deference to traditional investor–state arbitration defenses, and principles of sovereignty all weigh in favor of an international approach to international investment treaty arbitration based upon governing international law principles. This comports with the grounding principle of the Vienna Convention, 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"[133] – the very principle, of course, which should have determined arbitrability in the first instance.

130. *See BG Grp. PLC*, 134 S. Ct. at 1219 (Roberts, C.J., dissenting) ("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." (internal citation omitted)).

131. *See* United States Bilateral Investment Treaties, U.S. Dep't of St., http://www.state.gov/e/eb/ifd/bit/117402.htm (last visited Mar. 8, 2016).

132. *See* Chevron Corp. v. Ecuador, 795 F.3d 200, 205–06 (D.C. Cir. 2015) (quoting *BG Grp. PLC*, 134 S. Ct. at 1219 ("FSIA . . . allows federal courts to exercise jurisdiction over Ecuador in order to consider an action to confirm or enforce the award.")).

133. *See* Vienna Convention, *supra* note 47, at art. 31(1); *see also supra* text accompanying note 48.