BG Group and "Conditions" to Arbitral Jurisdiction

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Our initial goal had been to write jointly, with the hope that we could bridge our differences to find, if not common, at least neighboring, ground. On some points we did so, but ultimately our divergent appreciations of the proper way to interpret the condition precedent in the investment treaty in *BG Group* overcame the idealism with which we commenced the project. Nonetheless we have decided to present the two papers together to emphasize the dichotomous approaches to treaty interpretation that two moderately sensible people, who inhabit overlapping but non-congruent interpretive communities, can have.

I. CROSSING THE THRESHOLD: ARBITRAL JURISDICTION AFTER BG GROUP

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A. The Allocation of Decision-Making Power

The subject I have chosen for this paper—really, the ultimate question in all of our law of arbitration—is the allocation of responsibility between state courts and arbitrators. If arbitrators as private individuals assume the power to adjudicate the affairs of others—that is, if they presume to bind others with definitive judgments—where does this authority come from? And who makes the decision with respect to the existence or scope of that power?

A familiar and useful analytical framework for approaching this problem asks us to begin by differentiating between three separate levels of inquiry.[1] All three will recur in connection with any arbitration, and it is critical to keep them distinct. They are:

1. How should a particular substantive issue be decided? This is a matter of deciding how the substantive law should be applied to any contested question, which of course includes any merits-based defense, such as an allegation that a contract is invalid for fraud.
2. "Who is to decide the level #1 issue?" This asks who—court or arbitrator—has decision-making power over that issue? For example, in the paradigm case of "separability," who is to determine the merits of a claim of fraudulent inducement? ("Did the parties agree to arbitrate it?") Or, if an arbitration clause is drafted to encompass disputes over the shipment of "fruit," did the parties agree to submit to the arbitration of disputes over the sale of tomatoes or pecans?[2] To the extent that a decision at this level is entrusted to arbitrators, courts would be expected not only to defer prospectively (by refusing to rule), but after the fact as well (by limiting review to narrow statutory grounds).
3. And finally, *just who is to decide the level #2 issue*? Does a "level

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1. See Alan Scott Rau, Everything You Really Need to Know About "Separability" in Seventeen Simple Propositions, 14 AM. REV. INT'L ARB. 1, 92–94 (2003).

2. *See* William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 TUL. L. REV. 647, 675 (1989).

#2" question truly implicate what is usually referred to as the "jurisdiction" of the arbitral tribunal—so that (as one might expect) the decision necessarily falls to a court? Or by contrast, are there circumstances where the arbitral tribunal itself may have the power to pass with finality on its own authority?[3] To the extent a party's challenge is persuasively framed as one that indeed goes to the "jurisdiction" of the tribunal, the underlying premise is that this is simply not the sort of process to which he had ever been willing to subject himself.[4] So a challenge framed in this way is thus little more than shorthand or label for an assertion that the ultimate question of power (at least in the paradigm New York Convention case) is necessarily for a court. And so, if the arbitrators presumed to decide it, then—barring some alchemy in the form of a contractual re-allocation[5]—a court will at some point review their exercise of power de novo.

This third level of analysis is by far the most arcane and esoteric, and naturally therefore it has attracted the most scholarly interest. It is the subject of this essay. Just like the inquiry at "level #2," the inquiry at "level #3" must, in the end, turn on the scope of consent—everything rests on an assessment of the parties' contractual understanding. And in this regard:

1. When faced with textual "silence," we are expected to do the usual work of ferreting out the parties' presumed intent with respect to the appropriate decision maker. The choice of an appropriate default rule, as always, proceeds by attempting to find the solution that "will 'most closely mimic the hypothetical bargain that the parties themselves would have chosen in a completely spelled-out agreement'—or perhaps, the bargain that most similarly situated parties would have chosen—or at least, the bargain that it would be rational for such parties to have chosen ex ante."[6] One tactic is to

3. The "gateway"/"threshold" meme is fraught and has become subject to much misunderstanding. I trust it will be understood that I am not at all talking here about the question of timing—that is, the question of who, between court and arbitrator, has the mere chronological priority in decision making. For this distinction, see Alan Scott Rau, *Arbitrating "Arbitrability,"* 7 WORLD ARB. & MEDIATION REV. 487, 488–92 (2013).

4. *See* Rau, *supra* note 1, at 94–97.

5. *See infra* Part I.E.

6. *See* Alan Scott Rau, *"Consent" to Arbitral Jurisdiction: Disputes with Non-Signatories*, *in* MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 69, 96 (Permanent Court of Arbitration ed., 2009).

> align presumed intent with "comparative competence";[7] another heuristic is "to presume intent on the basis of what will reduce overall costs"—both transaction costs (e.g., in the interest of avoiding multiple proceedings) and error costs (e.g., in the interest of trying to identify comparative decision-making competence)—thereby "maximizing a joint surplus that the parties can in bargaining divide among themselves."[8]

Choosing the proper default rule does not really require us "to read the minds of parties who assuredly had not been thinking about this matter at all."[9] On the contrary: it merely requires us to attribute to them, in the absence of evidence to the contrary—as a rough guess—a mere starting point—the intention to act efficiently in the interest of maximizing mutual gains.[10] *Precisely these same considerations* ought to inform our choice whether to characterize a particular objection to arbitration as one of

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7. *See generally* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002) ("The NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it," and "it is reasonable to infer that the parties intended the agreement to reflect that understanding.").

The *Howsam* inquiry was conducted at "level #3." Were arbitrators empowered to adjudicate allegedly stale claims where a contract provision purported to make such claims no longer "eligible" for arbitration? For the Court, an analysis of presumed intent suggested that such concerns of "eligibility"—although they may in some sense have stood at the "gateway" to final disposition of the dispute—did not implicate arbitral jurisdiction; since the "parties would likely expect that an arbitrator would decide the gateway matter," it was "a matter presumptively for the arbitrator, not for the judge." *Id.* at 84–85. "In other words, the parties may well have agreed explicitly not to arbitrate untimely claims—but that is not at all the same thing as saying 'that they have agreed not to arbitrate disputes over timeliness.'" Alan Scott Rau, *"The Arbitrability Question Itself,"* 10 AM. REV. INT'L ARB. 287, 330 (1999) [hereinafter Rau, *Arbitrability Question*].

Also conducted at "level #3" was the inquiry in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452–53 (2003) (arbitral order for class-wide proceedings; arbitrators are "well situated" to answer the question of "what *kind of arbitration proceeding* the parties agreed to"). The present currency of the plurality decision in *Bazzle* remains in some doubt. *But cf.* Blue Cross Blue Shield of Mass., Inc. v. BCS Ins. Co., 671 F.3d 635, 639–40 (7th Cir. 2011) (noting post-*Bazzle* authority leaves it to arbitrators to order consolidation remains "in place"; it is for the tribunal to "both interpret the contract and exercise any discretion that the contract allows"); Alan Scott Rau, *"Gap Filling" by Arbitrators*, *in* ICCA CONGRESS SERIES VOLUME 18: LEGITIMACY: MYTHS, REALITIES, CHALLENGES 935, 990 n.185 (Albert Jan van den Berg ed., 2015) (*Bazzle* may be "left intact" with respect to arbitral orders for the consolidation of related arbitrations).

8. Rau, *supra* note 6, at 96–97.

9. *Cf.* Jan Paulsson, *Jurisdiction and Admissibility*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION 601, 612 (Gerald Aksen et al. eds., 2005).

10. *See* Rau, *supra* note 6, at 96–97.

"jurisdiction" or alternatively as something else, like "admissibility."

2. Contractual "silence" is a curious notion, one that can mean everything and nothing.[11] An alternative approach is one that would set out to worry the text of the agreement itself—or the text of some body of institutional rules—and end by finding an *express* re-allocation by the parties of the "level #2" question to the *arbitrators themselves* for a final decision.[12]

Both of these approaches are implicated in a recent decision of the United States Supreme Court, the culmination of litigation that had attracted substantial interest and concern on the part of the international arbitral community.

B. BG Group v. Argentina

> "This case goes to the heart of whether it is the arbitral tribunal that has the exclusive say on its own competence or whether national courts have a limited role in ensuring that arbitral tribunals cannot egregiously depart from the consent of the parties."[13]

Many bilateral investment treaties impose preliminary hurdles to the assertion of a claim by an investor. Those of Argentina tend to be somewhat unusual. The Argentina-U.K. BIT—and to similar effect in agreements with some other states, notably Canada, Italy, Korea, the Netherlands, and Switzerland, but most rarely otherwise—provides that:

- "Disputes with regard to an investment . . . which have not been amicably settled shall be submitted at the request" of an investor to the courts of the host state;[14] but then,
- "The aforementioned disputes" may be submitted to arbitration "where, after a period of eighteen months has elapsed" from the time the dispute was submitted to the host-state courts, "the said

11. *See generally* Rau, *Arbitrability Question*, *supra* note 7.

12. *See infra* Part I.E.

13. Michael Waibel, *Investment Arbitration: Jurisdiction and Admissibility* 24 (Univ. of Cambridge Legal Studies Research Paper Series, No. 9/2014, 2014), http://www.academia.edu/8680141/Investment_Arbitration_Jurisdiction_and_Admissibility.

14. Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, U.K.-Arg., art. 8(1), Dec. 11, 1990, 1765 U.N.T.S. 34 [hereinafter U.K.-Arg. BIT].

> tribunal has not given its final decision," or "the final decision . . . has been made but the Parties are still in dispute."[15]

It is hard to make much sense of these muddled provisions, which may not have been thought through coherently—an ill-considered amalgam of "cooling off" periods,[16] requirements to exhaust local remedies, and simple choice-of-forum clauses[17]—and in reality, of course, not quite amounting to any of these.

The British BG Group had acquired a majority stake in a newly privatized Argentine company given an exclusive license to distribute natural gas in Buenos Aires.[18] It suffered considerable losses when Argentine legislation converted the original dollar-based tariffs into peso-based tariffs; Argentina also barred from any "renegotiation process" any companies that were engaged in litigation or arbitration against Argentina.

Under these circumstances—and despite the provisions of the BIT—BG Group saw no point in seizing the Argentine courts and directly sought arbitration. By default under the treaty, the arbitration was to proceed under the UNCITRAL Rules, and the parties chose Washington, D.C. as the seat. The arbitral tribunal—finding that "recourse to the domestic judiciary" had

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15. *Id.* at art. 8(2). *See generally* José Alvarez & Gustavo Topalian, *The Paradoxical Argentina Cases*, 6 WORLD ARB. & MEDIATION REV. 491, 510 (2012) ("recurrent jurisdictional issues in Argentine cases").

16. *E.g.*, CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 117–19 (2008); Christoph Schreuer, *Consent to Arbitration*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 830, 843–46 (Peter Muchlinski et al. eds., 2008).

17. *E.g.*, Kiliç Inşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Republic of Turkm., ICSID No. ARB/10/1, Award (July 2, 2013), http://www.italaw.com/sites/default/files/case-documents/italaw1515_0.pdf. As construed by this tribunal, a Turkish investor under the Turkey-Turkmenistan BIT was required (a) to first bring a dispute before local courts, and could institute arbitration proceedings *only if (b) it had not "received a final award within one year"* (and presumably not at all if it had). *Id.* ¶ 6.1.6 (emphasis added). These steps were held to constitute a "condition precedent" to the State's "offer to arbitrate" so that "the failure to meet these conditions goes to the existence of the tribunal's jurisdiction." *Id.* ¶¶ 6.2.9, 6.3.15. In a separate opinion, Professor Park cogently objected that thus to preclude arbitral authority would necessarily imply that an "unfair judgment" by the host courts would permanently "insulate a potentially discriminatory taking from arbitration" as long as the local courts had acted swiftly. *Id*. ¶ 6.5.4; *see infra* notes 46−49 and accompanying text (on the notion of "condition precedent"). That the tribunal's construction of the BIT here was indeed contestable is confirmed by the later contrary award—reached after exhaustive consideration of linguistic expert testimony—in *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. v. Turkmenistan*, ICSID No. ARB/12/6, Decision on Objection to Jurisdiction (Feb. 13, 2015), http://www.italaw.com/sites/default/files/case-documents/italaw4163.pdf.

18. *See* BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1204 (2014).

been "unilaterally prevented or hindered by the host state" so that a literal reading of the Treaty would "lead to [an] absurd and unreasonable result"—affirmed its jurisdiction; it rendered an award of damages against Argentina of more than $185 million, plus interest and costs.[19]

Note that this was a conventional Convention award, and thus subject to judicial review at the seat. The first-level district court declined to overturn the award,[20] but the Court of Appeals for the D.C. Circuit reversed and ordered vacatur.[21] The arbitrators had "exceeded their power."[22] While the decision concluded by asserting in a perfunctory and peremptory fashion that "there can be only one possible outcome" on the actual question of arbitral jurisdiction—the text of the bilateral investment treaty (BIT) provision was after all "explicit"—almost all of the court's opinion was written instead at our "level #3." So the principal point was not really that arbitral "jurisdiction" was in fact lacking—but rather that no deference at all was due to the tribunal's conclusion that it was *present*. Since the "jurisdictional" question is "an independent question of law," this was thus a matter that had to be decided by a court de novo.[23]

This decision was vigorously criticized, with virtual unanimity, by those with close ties to the world of arbitration. Review was sought in the Supreme Court, and an amicus curiae brief was written by concerned "professors and practitioners of arbitration law" arguing that the Court of Appeals' judgment would upset the expectations of the international community (by which was apparently meant, the expectations of the

19. *See id.* at 1205.

20. The New York Convention primarily applies to "foreign awards," but the U.S. is highly unusual in having expanded the reach of the Convention to arbitrations that are *locally sited*, albeit with some "international" connection. Why this was done—and what this was intended to mean as a practical matter—no one really seems to know. My own opinion is that this has very limited effect indeed. *See* Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT'L ARB. 213, 214–18, 234–42 (1996).

In the face of continuing confusion, the district court never seemed quite sure whether the appropriate standard for assessing the validity of such "non-domestic" awards was to be found in the 1925 U.S. statute or in the Convention itself—but then in the end seemed to correctly recognize that it didn't really matter one way or the other. *See* Republic of Argentina v. BG Grp. PLC, 764 F. Supp. 2d 21, 29–31 (D.D.C. 2011), *rev'd*, 665 F.3d 1363 (D.C. Cir. 2012), *overruled by* 134 S. Ct. 1198 (2014).

21. *See* Republic of Argentina v. BG Grp. PLC, 665 F.3d 1363, 1366 (D.C. Cir. 2012), *overruled by* 134 S. Ct. 1198 (2014).

22. *Id.* at 1368.

23. *See id.* at 1371.

investing community). The claim was that the lower court decision would set the U.S. on a "collision course" with the international arbitral regime—at the same time discouraging foreign users from choosing the U.S. as arbitral seat because of the failure of local courts to give proper "deference" to "arbitrators' rulings on threshold issues."[24]

I note parenthetically that this is hardly the first occasion on which the "community of international arbitration practitioners" has attempted in this way to leverage its prestige to mesmerize, overawe, or bully, national courts into keeping their hands off the institution of international arbitration—in order to forestall "meddling" by local courts.[25] Observe the rhetoric of self-regulation harnessed to the wider agenda of delocalization—the notion of an "autonomous" arbitral mechanism being critical to the establishment bar in its attempt to ensure that any dependence on "parochial" state tribunals remains attenuated.[26]

To the surprise of most observers—and against the advice of the United States Solicitor General[27]—the Supreme Court agreed to review the case; it

24. *See generally* Brief of Professors and Practitioners of Arbitration Law as Amici Curiae Supporting Reversal, BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014) (No. 12-138), 2013 WL 4769419.

25. The *locus classicus* is YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 156–61 (1996) (calling attention to the "symbolic value" of the ICC's brief in *Mitsubishi* and painting an "elite image of private justice," the "essence of the ICC argument was, 'look at who we are'").

In the *BG Group* litigation, the amicus brief filed by the American Arbitration Association went even further in this direction. It stressed that the Court of Appeals' decision had "been unanimously condemned by international arbitration users, including some of the most experienced practitioners, who often decide where to seat arbitration proceedings"—citing polemical blog entries written by members of the establishment bar and the members of the arbitral tribunal had all been "eminent"—indeed the president "teaches international investment law at Yale Law School." Brief of the American Arbitration Association as Amicus Curiae Supporting Petitioner at *20–25, BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014) (No. 12-138), 2013 WL 4781545. *Quaere* whether argument of this kind does not begin to verge on the unseemly. *Quaere* whether it is even legal argument at all.

26. *Cf.* MICHAEL WAIBEL & YANHUI WU, ARE ARBITRATORS POLITICAL? 36 (2011) (cited with author permission) (empirical study of ICSID arbitrations provides support for hypothesis that "arbitrators in full time private practice are more likely to affirm jurisdiction," a result "significant for the jurisdictional stage alone").

"*Les vertus se perdent dans l'intérêt comme les fleuves se perdent dans la mer."* La Rochefoucauld, *Maximes* CLXXI.

27. Brief for the United States as Amicus Curiae Supporting Respondent at *13, BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014) (No. 12-138), 2013 WL 1945157 ("[T]he court of

ultimately reversed the Court of Appeals and ordered that the award be reinstated.[28]

Justice Breyer, the author of some of the Court's most important and insightful arbitration opinions (such as *Howsam* and *First Options*), seemed content with channeling the learning of those cases—his excessive familiarity with the subject doubtless leading him to feel exempt from the need to think things through from scratch. So the opinion has a "paint by the numbers" feel—betraying perhaps what Henry James wonderfully called an "anxious excess of simplicity."[29] For Justice Breyer, to relegate claimants in the first instance to the Argentine courts was nothing more than a banal "claims processing requirement"—a "purely procedural" "condition precedent"[30]—and thus, essentially identical to those familiar cases where it is alleged that there is no longer,[31] or not yet,[32] any right to trigger arbitration—all questions traditionally left for final determination by the arbitrators themselves.

But I wonder. Can one, for example, be satisfied that in light of the conduct of the Government of Argentina, the arbitration should have been allowed to proceed[33] without completely abandoning a preference for clear thinking? The decision calls on us to ask a number of uncomfortable questions about which I can speculate here only briefly.

C. "Consent," Contract Formation, and "Conditions Precedent"

The need for assurance that someone purporting to act as an "arbitrator" is not merely an officious intermeddler is a "point so banal, so commonplace, so formulaic, that readers justifiably wince when they see it

appeals' application of settled principles to the particular treaty provision at issue in this case [is a] narrow issue [that] does not warrant this Court's review.").

28. BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1213 (2014).

29. LEON EDEL, HENRY JAMES: A LIFE 404 (1985).

30. *BG Grp.*, 134 S. Ct. at 1207.

31. *E.g.*, Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 81–82 (2002) (No dispute "shall be eligible for submission" after six years have elapsed.).

32. *E.g.*, John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 553–59 (1964) (multi-stage grievance procedure).

33. The claimant's argument did not fail to recount the history of Argentina's "abusive" conduct and its "legendary" "disdain for the U.S. judiciary." Brief for Petitioner at *28–30, BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014) (No. 12-138), 2013 WL 4587966.

repeated."[34] Arbitration's "Prime Directive" thus requires that the arbitral process, as a "matter of contract," must rest on a core finding of "consent," a necessary corollary being that this question—whether the parties have agreed to arbitrate anything at all—is undeniably an issue for judicial determination.[35] Is it really the case that there was, under these circumstances, "consent" on the part of Argentina to submit to arbitration?

A BIT is often conceptualized not as an agreement with an investor—who is after all not a party to it—but as an "offer" by the state, "accepted" by the investor upon filing a claim.[36] In an effort to fit the case within this framework, Argentina naturally asserted that by bypassing the local courts, the claimant had failed to "accept" the state's offer on the offered terms—so that seizing the arbitral tribunal could only amount to a "counter offer"—with the corollary that the entire process of contract formation had been aborted.[37] Much of the argument before the Court seemed to turn on these half-remembered fragments of elementary Contracts learning.[38]

It was obviously not in the cards, though, that a case of this magnitude

34. Rau, *supra* note 1, at 71.

35. Insistence on this "Prime Directive" means that evidence of the parties' consent to a final arbitral determination "must be rigorous indeed." And "within the gravitational field of this principle are the cases where the objecting party has in some sense agreed to 'arbitration' *in the abstract*, but has not necessarily agreed to be bound by a decision of *the particular tribunal* that the proponent is seeking to invoke"—e.g., "putative arbitrators have no power whatever to determine whether the parties wanted to submit to decision-makers chosen from the roster of the AAA, or alternatively, from the roster of the NASD." Rau, *supra* note 3, at 518. *Compare* Garanti Koza LLP v. Turkm., ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction for Lack of Consent, ¶¶ 26, 29 (July 3, 2013) ("The answer to whether Turkmenistan has consented to participate in *any* kind of arbitration" is yes; "the *ratione voluntatis* is thus established."), *with* Garanti Koza LLP v. Turkm., ICSID Case No. ARB/11/20, Dissenting Opinion of Laurence Boisson de Chazournes, ¶ 26 ("[A] mutual agreement is needed for ICSID arbitration to be initiated by the foreign investor," and absent such agreement "*only*" an ad hoc arbitration under UNCITRAL Rules "can be used by the foreign investor.").

36. *See generally* Waibel, *supra* note 13, at 15 ("[I]nvestment treaties rely on the offer-and-acceptance model inspired by similar models in domestic contract law.").

37. Brief for Respondent at *31–32, BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014) (No. 12-138), 2013 WL 5819691.

38. *Id.*; *see also* Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. v. Turkm., ICSID No. ARB/12/6, Decision on Objection to Jurisdiction, ¶ 6.2.1 (Feb. 13, 2015) ("It is a fundamental principle that an agreement is formed by offer and acceptance," and "there must be acceptance of the offer *as made*.")*; cf.* Transcript of Oral Argument at *21, BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014) (No. 12-138), 2013 WL 6229864 (Counsel for BG Group: Argentina says this case is analogous to someone posting "a sign on a pole [that] says . . . if you find my dog I will give you $100. . . . [By the same token] it says we have to perform an act here."). But, counsel was quick to respond, "[a]rbitration is not a dog."

would ultimately turn on little more than a point of first-year Contracts law. Perhaps that way of framing things might seem more compelling where the state's "offer" to arbitrate is to be found only in a local statute or investment code—but surely it is at least equally plausible to characterize a BIT somewhat differently? Suppose, for example, that initiating arbitration was seen not as a purported "acceptance" of an offer, but served instead to claim rights under *an already-concluded prior agreement* between the U.K. and Argentina—of which U.K. investors are deemed to be third-party beneficiaries.[39] The rights of a third-party beneficiary may not, of course, rise higher than those of the named parties, but as a general matter no particular "assent" on his part is necessary at all to give him a right of action on the underlying contract.[40]

The Court's simple assumption (accompanied by neither discussion nor apparent doubt) that the claimant was a party to an agreement with Argentina[41] led directly to its treatment of the local-litigation requirement as

39. Either frame is intended to help us understand investment arbitration "in terms of an agreement to arbitrate between the parties to the dispute." *See* ANDREA MARCO STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION 61–65 (2012) (discusses and compares the literature on the "offer-acceptance mechanism" and the contrasting "juridical concept of *stipulation pour autrui*").

With particular reference to the latter, see also Republic of Argentina v. BG Group, PLC, 764 F. Supp. 2d 21, 35 (D.D.C. 2011) (To create duties to a third-party beneficiary, "the parties' intent to benefit a third-party [must] be shown on the face of the contract."), *rev'd*, 665 F.3d 1363 (D.C. Cir. 2012), *overruled by* 134 S. Ct. 1198 (2014); compare W. Laurence Craig, *The Arbitrator's Mission and the Application of Law*, 21 AM. REV. INT'L ARB. 243, 257 (2010) ("The beneficiary of an arbitration clause in a bilateral investment treaty may be likened to the assignee of a contractual right to arbitrate."*)*. Some years ago, Professor Bjorklund discussed the relevance of the "third-party-beneficiary" frame to such issues as treaty withdrawal and pre- and post-dispute waiver of rights. *See* Andrea K. Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working*, 59 HASTINGS L.J. 241, 265–73 (2007).

This is an approach that, if sustained, would enable analysis to avoid entirely the canonical offer-and-acceptance model. Where a brokerage firm as part of its membership agreement with the New York Stock Exchange commits to the arbitration of disputes with investors, no court has any difficulty in characterizing as a "third-party beneficiary" an investor who later asserts a claim. *E.g.*, Spears, Leeds & Kellogg v. Cent. Life Assurance Co., 85 F.3d 21, 26, 27 (2d Cir. 1996) ("No agreement is required between the parties to the arbitration before a non-member may invoke [the Exchange Rules]"; "[the claimants'] lack of direct contact with [the broker] does not prevent them from asserting their rights as third party beneficiaries"; and "a beneficiary need not be identified prior to seeking enforcement of its rights under a contract.").

40. *See* RESTATEMENT (SECOND) OF CONTRACTS § 306 cmt. a (AM. LAW INST. 1981).

41. BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1206, 1208 (2014) ("we shall initially treat the document before us as if it were an ordinary contract between private parties"; "relax[ing] our ordinary contract assumption" changes nothing since "a treaty is a contract").

nothing more than a "condition precedent."[42] This unthoughtful repetition of the "condition" trope is commonplace[43] but unconscionably lazy; however much we cling to it for its reassuring familiarity, it is "confusing and misleading."[44] Justice Roberts raised this objection in his dissenting opinion, but I would fondly like to believe that I made essentially the same point a long time ago.[45]

Note that a "condition precedent" may, in ordinary usage, invoke:

- Something that must occur before one can say that any agreement of any sort whatsoever has been entered into;[46] or
- Something that must occur before any "separable" arbitration

42. *Id.* at 1210.

43. *E.g.*, REVISED UNIF. ARBITRATION ACT § 6 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2000) ("an arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled"); RESTATEMENT (THIRD) OF THE U.S. LAW OF INT'L COMMERCIAL ARBITRATION § 2-15 (AM. LAW INST., Preliminary Draft No. 6, 2013) ("a court ordinarily declines to decide whether [an agreement] should be denied enforcement [because of a failure] to comply with a condition precedent"); *id.* § 2-7 & cmt. b; *id.* § 2-15 cmt. b (using "condition precedent defense" and "precondition to arbitration" interchangeably).

44. ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 30.7 (rev. ed. 1999); *see also* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 40, § 224 cmt. e ("This terminology is not followed here.").

45. *BG Grp.*, 134 S. Ct. at 1216 (Roberts, C.J., dissenting); *cf.* Alan Scott Rau, *Federal Common Law and Arbitral Power*, 8 NEV. L.J. 169, 170–74 (2007).

46. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 40, § 217 illus. 2 ("A and B sign a written agreement for an exchange of real property and leave it with C, an attorney, on the oral understanding that it is not to take effect until each has consulted his wife and notified C that he still wishes to close the exchange. There is no contract until each has notified C.").

Commentators have suggested that this distinction between a conditional duty to perform and a condition precedent to the very "formation of a contract" is properly viewed as "highly artificial." JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS 415 (5th ed. 2003). Courts certainly experience considerable difficulty in making the distinction operational, and when it does rear its head, the explanation is most likely to be a court's desire to avoid the constraints of the Parol Evidence Rule, a largely irrelevant anomaly of Anglo-American jurisprudence. *See id.* at 144–45 ("contract subject to an express condition"); *see also* Hicks v. Bush, 180 N.E.2d 425, 428 (N.Y. 1962) ("no operative or binding contract ever came into existence[;] . . . it was their desire and understanding that the merger was to be one of proposal only and that, even though the formal preliminary steps were to be taken, the writing was not to become operative as a contract or the merger effective until $672,500 was raised"). Still such holdings arise with some frequency. *See also* Rapid Settlements, Ltd. v. BHG Structured Settlements, Inc., 202 S.W.3d 456, 461–62 (Tex. App. 2006) (a state statute required prior judicial approval of the transfer of rights to structured settlement payments; since judicial approval is "a condition precedent to the formation of an enforceable contract," it follows that in the absence of such approval, "none of its provisions, including the arbitration clause, can be enforced").

agreement comes into existence;[47] or

- Something that must occur before some present duty of performance under a contract is triggered;[48] and, in particular,
- Something that must occur before one becomes bound to engage in arbitration—for example, a claimant's initial resort to consultation or mediation.[49]

It must be a given that the first two will always be matters for judicial determination. By contrast, I suppose the latter two may be deemed to have been entrusted to arbitrators. And that is in fact the subject of the following section. I note here simply that the Court's reliance on a vague and obsolete taxonomy sheds little light on the matter, hiding these critical distinctions under a thick glaze of formalism. Presumably the premise from which it proceeded was that the BIT's litigation requirement constituted a "condition precedent" only in the final sense—but that's the whole question underlying the case, isn't it? To label is not the same thing as to justify.

D. The "Purely Procedural"

That Argentina had in the abstract given its "consent" to arbitrate hardly

47. *See, e.g.*, Empresa Generadora de Electricidad Itabo, S.A. v. Corporacion Dominicana de Empresas Electricas Estatales, No. 05 CIV 5004 RMB, 2005 WL 1705080, at *3 (S.D.N.Y. July 18, 2005) (contract provided that "[i]n the event that the Dominican Republic should ratify the New York Convention . . . the parties agree to settle their disputes via international arbitration"); L & R Farm P'ship v. Cargill Inc., 963 F. Supp. 2d 798 (W.D. Tenn. 2013) (federal statute required commodity traders under options contracts to make certain pre-dispute arbitration disclosures; compliance "is a question to be decided by the court and not an arbitrator because it concerns the validity of the arbitration agreement itself").

In *BG Group* itself, the proper lawyerly argument would have started with the structure of the BIT itself—which first requires that "disputes with regard to an investment" "shall be submitted" to the local courts—and only in a *later* section imposes an obligation to arbitrate "*the aforementioned disputes*" after the passage of eighteen months. *See BG Grp.*, 134 S. Ct. at 1220 (Roberts, C.J., dissenting) (emphasis added). Might the italicized phrase refer only to *those disputes that, as required, had first been submitted to the Argentina courts*? (Or more broadly to any "disputes with regard to an investment?")

48. *E.g.*, Obering v. Swain-Roach Lumber Co., 155 N.E. 712, 713 (Ind. Ct. App. 1927) ("[I]n the event [Seller] buys Tract No. 1," Seller "agrees to sell [it]" to the Buyer. The court didn't say this, but the proper inference is that Buyer has no right to repudiate or withdraw within the specified time, although of course he need not go through with the sale unless the "condition" is triggered.).

49. This is conventionally distinguished from a duty that is triggered by the simple lapse of time—not a "condition" in the usual sense if only because, dependent on the laws of the universe and not on party behavior or even human will, it is certain to happen eventually.

resolves in itself the question of decision-making authority. How far did that consent extend? If the agreement imposes some sort of "condition," who decides whether it has been fulfilled or excused? Does this amount to a question of arbitral "jurisdiction"?

Justice Breyer wrote as if it were sufficient merely to characterize local-litigation as a "purely procedural" "claims processing" requirement. For, he said, the requirement "determines *when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all."[50] But his belief in the adequacy of this tendentious and manipulable terminology—which is hardly self-defining—must seem quaint.[51] It should not require too strong an infusion of "Legal Realism" for us to perceive that the "procedural" catchword is devoid of any explanatory power whatsoever.[52]

For surely it is a familiar point that just about every conceivable objection to arbitration can be framed as implicating arbitral "jurisdiction," *in the sense that it potentially qualifies the nature and extent of party agreement*.

- Claiming that a given dispute is not "covered" by an arbitration clause is conventionally treated as a challenge to be resolved by a

50. *BG Grp.*, 134 S. Ct. at 1207. The "claims processing" trope was repeated by the Court three times in the course of its short opinion—the term "procedural," *a total of 13 times.*

51. The variant formula of "procedural arbitrability" is often invoked to explain cases like *Howsam*—and *BG Group*—to the point indeed of seeing it as the key to unlocking all these decisions. *See* John James Barceló III, *Substantive and Procedural Arbitrability in Ad Hoc Investor-State Arbitration*—BG Group v. Argentina, *in* CONTEMPORARY ISSUES IN INTERNATIONAL AND MEDIATION: THE FORDHAM PAPERS 355, 360, 362 (Arthur W. Rovine ed., 2015) ("All these and similar preconditions represent 'claims selecting rules' not preconditions to the formation or validity or scope of the arbitration agreement[;] . . . [t]hese issues thus have a 'procedural' cast.").

But as I have asked with respect to the "procedural arbitrability" formula: "Who could possibly think that linking together these two words—each with a troubled history and each notoriously manipulatable and vague—is calculated to increase intelligibility?" Rau, *Arbitrability Question*, *supra* note 7, at 322.

52. Another illustration: Article III of the New York Convention subjects the duty to enforce foreign awards to a state's "rules of procedure." Does this permit a court to dismiss a motion to confirm on the ground of *forum non conveniens*? The Restatement assumes the answer must be "no," for, in language strikingly anticipating Justice Breyer's formulation, forum non conveniens is not a "rule of procedure" because it "does not address *how* litigation shall proceed, but *whether* it shall proceed." RESTATEMENT (THIRD) OF THE U.S. LAW OF INT'L COMMERCIAL ARBITRATION, *supra* note 43, § 4-29. For a more skeptical view, see Alan Scott Rau, *The Errors of Comity: Forum Non Conveniens Returns to the Second Circuit*, 23 AM. REV. INT'L ARB. 1, 7–9 (2012) (But after all, access to *any* forum may permanently be foreclosed "*by any number* of 'minor matters' or 'enforcement modalities' that live in the vicinity of the fraught boundary between 'substance' and 'procedure.'").

court—despite an undoubted existing agreement to arbitrate something.[53]

- Similarly, challenges concerning the appropriate parties to the proceeding—"just who" is one obligated to arbitrate with?—are typically treated in the same fashion.[54]
- Could a party to an agreement really have agreed to arbitrate a dispute that had already been the subject of a prior and binding judgment? Or a prior and binding arbitration?[55]
- Does an agreement purporting to eliminate a claimant's right to recover consequential or punitive damages act as a limit on the decision-making authority of the arbitrators—or as a mere instruction to them as to how they should go about doing their job?[56]
- A BIT may condition treaty protection on the claimant's having "made and carried out" the investment "in accordance with the laws of the host state": Do allegations of a claimant's "irregular and fraudulent behavior" then impair the very "jurisdiction" of the tribunal?[57]
- Then there is the familiar case where a contract requires claims to

53. *See, e.g.*, Arbitration Act 1996, c. 23, § 30 (Eng.) ("arbitral tribunal may rule on its own substantive jurisdiction, that is, as to . . . what matters have been submitted to arbitration in accordance with the arbitration agreement"—subject to "challenge" "in accordance with the provision of this Part"). *See generally* Rau, *supra* note 6, at 95–102 (with an extended argument to the contrary).

So yes, the received wisdom universally and dogmatically repeats that "the coverage of the arbitration clause is presumptively a matter for final determination by the court." Still, I have never quite understood how that notion could satisfactorily be squared with the Court's decision in *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 401 (2003). *See id.* at 407 n.2 ("[W]e think the preliminary question whether [the contract prohibits an award of RICO treble damages] does not even amount to a question of arbitrability."). *See generally* Rau, *supra* note 3, at 537–39 nn.107–10.

54. *See* Rau, *supra* note 6, at 108–35 (with an extended argument to the contrary).

55. The Restatement suggests that the answer is "no." RESTATEMENT (THIRD) OF THE U.S. LAW OF INT'L COMMERCIAL ARBITRATION, *supra* note 43, § 2-19 cmt. c ("allowing *courts* to determine that a new claim for which arbitration is sought is precluded by an existing award" (emphasis added)).

56. *See id.* § 4-14 cmt. c ("as a default interpretation, . . . a contractual limitation on remedies but not a specific restriction on the tribunal's authority").

57. Teinver S.A. v. Argentine Republic, ICSID ARB/09/1, Decision on Jurisdiction, ¶ 330 (Dec. 21, 2012) (rejecting challenge, in a "decision on jurisdiction," on the ground that the respondent had "as a factual matter" "failed to demonstrate" that claimants had committed illegalities in "acquiring their investment").

be brought within certain time limits: A party may undoubtedly have "agreed" to arbitrate timely claims, but does it follow that he has "agreed" to arbitrate stale ones?

- And what of the cases where a contract has interposed certain steps to the assertion of a claim—in the form, say, of mediation or a grievance procedure?[58]

"In short, even an otherwise unexceptional arbitration agreement can be cabined about with limitations and conditions that may well be thought to go to the power of the arbitrator to act."[59] When do any of these limitations become "merely procedural?" This inquiry differs from the superficially similar problem posed by "claim processing" limitations on statutory causes of action, for our goal here—when faced with an agreement's inevitable silence—is to find the appropriate default rule with respect to the *probable ex ante understanding of contracting parties*.[60]

From this perspective, the last three or four of these imagined cases are fairly straightforward—but they are straightforward for reasons that have little or no purchase with respect to our present concerns. In those cases, for example:

- To determine whether a claimant has complied with the prerequisite of a grievance or conciliation procedure means—if the requirement is to have any practical effect—that a tribunal will be called on to assess both the nature and dimensions of the claim and the conduct of the disputing parties.[61]
- Similarly, to assess whether a claim is "stale" will inevitably require an inquiry into the underlying facts or legal theories underpinning a

58. *See, e.g.*, Cour d'appel [CA] [regional court of appeal] Paris, March 4, 2004, 2005 REV. ARB. 143 *(*a mandatory conciliation procedure does not affect "*le principe de compétence du tribunal arbitral*" and is thus a "*question de fond*").

59. Rau, *supra* note 45, at 207.

60. *E.g.*, Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1241, 1243 (2010) ("no civil action for infringement of [a] copyright . . . shall be instituted" until the work has been registered; "[w]hile perhaps clear in theory, the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice").

61. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964) (whether grievance procedures "apply to a particular dispute" and whether they "have been followed or excused . . . cannot ordinarily be answered without consideration of the merits of the dispute"); Dialysis Access Ctr., LLC v. RMS Lifeline, Inc., 638 F.3d 367, 383 (1st Cir. 2011) (arbitrators must decide whether the parties "engaged in good faith negotiations").

claim.[62]

- An arbitral tribunal may for its own purposes deem the existence of a "lawful investment" to be "jurisdictional" *in the limited sense* that disposing of it as a "gateway issue," at a preliminary stage, seems a rational way to proceed. For the tribunal itself, the term need not have much more significance than that.[63] But it hardly follows that, on review, a court must treat the question as "jurisdictional" *in the more interesting sense*—that is, that it may refuse deference to the tribunal's findings, reviewing de novo an issue that might well be thought to be an element of the claim or defense.[64]

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62. To apply an "eligibility" rule to a customer's claim against a broker for "churning" of an account will require a determination as to the first transaction that allegedly "rendered the overall trading activity . . . excessive." *See* Rau, *supra* note 7, at 327–29. The values of congruence suggest that in this respect, contractual "time limits" should be treated consistently with other matters clearly understood to be within arbitral competence, such as the claims-extinguishing effect of statutes of limitation. *Id.* at 330.

63. *See* Teinver S.A. v. Argentine Republic, ICSID ARB/09/1, Decision on Jurisdiction, ¶ 330 (Dec. 21, 2012); *cf.* Ambiente Ufficio S.p.A v. Argentine Republic, ICSID ARB/08/9, Decision on Jurisdiction and Admissibility, ¶ 572 (Feb. 8, 2013) (from the tribunal's perspective there is really "no a priori reason" even to enter into the "doctrinal intricacies" of the distinction between challenges to "jurisdiction" and to "admissibility"; both serve the threshold function of deciding whether "the dispute could proceed to the merits phase").

64. Arguably to the contrary is *Chevron Corp. v. Republic of Ecuador*, 795 F.3d 200, 206 (D.C. Cir. 2015). Here the court did treat the existence of a qualified "investment" as a question of "arbitrability"—essentially, a question of "jurisdiction"—but in any event it was able to assume, following the familiar line of U.S. jurisprudence, that incorporation of the UNCITRAL Rules constituted a "delegation" of decision-making authority over this issue to the tribunal itself. *Id.* at 207–08. But this routine reading of commonly used international "rules" is of course just one alternative doctrinal device for achieving the same desired effect of deference to presumed arbitral competence. *See* Rau, *supra* note 3, at 570 (Courts will "pile on," treating as cumulative and mutually reinforcing:

- the effect of institutional rules;
- the generic "broad" arbitration clause; and
- the claim that the matter in dispute "was presumptively a matter for the arbitrator in any event."

"It is hard to avoid the conclusion that in a case where U.S. arbitration law appropriately governs the agreement, the rules of arbitral institutions—however they are construed—are as likely as not to amount to a makeweight," and "may be properly treated in the end as tangential to any actual decision.").

Cf. Christoph Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration,* 1 MCGILL J. DISP. RESOL. 1, 4–5 (2014). Here Professor Schreuer points out that arbitration provisions in BITs "typically refer to investments as defined in the treaty" and that the consequence of such a definition may be "that an investment . . . not in compliance with host State law is not covered by the definition of 'investment' and will not benefit from" treaty protection. This is clearly

Framed in this way, all these questions begin very much to look as if they belonged to *the realms of interpretation and appreciation of context and commercial reality*—questions that arbitrators are thought particularly well placed to answer and which are routinely entrusted to them.[65] And in

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true. *See also supra* text accompanying note 57. He then goes on to write "*therefore*, failure to comply with host State law has the consequence that there is no valid consent to arbitration under the treaty." Schreuer, *supra*, at 4–5. As should be evident, in the context of the New York Convention this second sentence strikes me as a simple nonsequitur.

65. The principal argument of this Article is that the considerations canvassed in the text just above—and which explain so many of the so-called "procedural arbitrability" cases—are largely orthogonal to the precise problem posed in *BG Group*. Nevertheless, such an assertion does need to be qualified, and footnotes are the place to which scruples, hesitations, and the splitting of hairs are naturally relegated.

- It does seem clear enough—and this is in distinction to the canonical cases like *Wiley* and *Howsam*—that for a court simply to determine *whether local litigation has in fact been filed* would in itself have been a reasonably straightforward and unproblematic matter. *See* BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1223 (2014) (Roberts, C.J., dissenting) ("A court can assess compliance with the requirement at least as well as an arbitrator can.").
- Also, by contrast to *Wiley* and *Howsam*, it does not appear to be the case that the entire "arbitrability" inquiry would necessarily *hinge on—would indeed logically depend on—* the very underlying substantive issues of the dispute. *See supra* notes 26–27 and accompanying text; *cf.* Thomas Stipanowich, *Of "Procedural Arbitrability": The Effect of Noncompliance with Contract Claims Procedures*, 40 S.C. L. REV. 847, 861–64 (1989).
- However, there was nevertheless the potential at the very least for substantial overlap. A "level #3" inquiry in *BG Group* would still call on the appropriate decision maker—whether court or arbitrator—to consider whether the conduct of the Argentine state in restricting access to its judiciary had served to excuse or render "futile" the BIT's local-litigation requirement. *See infra* notes 83–86 and accompanying text. And to embark on this task might call on him to understand and to assess some of the very same regulatory measures that had been separately challenged in the complaint as a violation of the substantive provisions of the BIT. *See* BG Grp., PLC v. Republic of Argentina, Final Award, ¶¶ 156, 309 (UNCITRAL Arbitral Trib. 2007), http://www.italaw.com/documents/BG-award_000.pdf (Argentina "restrict[ed] the effectiveness of domestic judicial remedies *as a means to achieve* the full implementation of the Emergency Law" converting dollar-denominated tariffs into pesos; also, "Argentina *enhanced the violation of the standard of fair and equitable treatment* under the BIT by [excluding] from the imposed renegotiation process any licensee that sought redress in an arbitral or other forum" (emphasis added)). So in this oblique way, the concerns expressed in the text above may perhaps become relevant—although at best this must be considered relevance "with an embarrassed look," being not entirely "able to explain how it got there." (The reference here is to Mark Twain's delightful pillorying of the "literary offenses of James Fenimore Cooper"; his essay is reproduced in Mark Twain, *Fenimore Cooper's Literary Offenses*, *in* THE COMIC TRADITION IN AMERICA: AN ANTHOLOGY OF AMERICAN HUMOR 328, 338 (Kenneth S. Lynn ed., 1958).)

the same vein—in the same effort to identify matters as to which arbitral tribunals have some comparative advantage—we might include "conditions" imposed for the purpose of ensuring rational fact-finding and efficient organization—"conditions," for example, requiring a claim to be set out "in reasonable detail" or argument to be preceded by an exchange of documents.[66]

A more elegant route to the same destination might start by asking why these "conditions" were inserted into the contract in the first place. For example, could it have been thought that when a contractual time limit has passed, or a claimant has failed to trigger a grievance procedure, the dispute then suddenly and automatically becomes suitable for litigation? No, the term was presumably intended to ensure that the claim would be barred "in *whatever forum* it may be asserted, arbitral or judicial."[67] And the parties

66. *E.g.*, JPD, Inc. v. Chronimed Holdings, Inc., 539 F.3d 388, 392 (6th Cir. 2008) (unsuccessful attempt to argue that the failure to "thoroughly document" a claim was a failure to satisfy a contractual precondition to arbitration); Humitech Dev. Corp. v. Perlman, 424 S.W.3d 782, 793 (Tex. App. 2014) (unsuccessful attempt to argue that the tribunal's failure to follow institutional rules for the exchange of documents deprived it of "authority to hear the case").

To the same effect is Alexis Mourre et Priscille Pedone, *Compétence et recevabilité: vers la révision au fond?*, 3 LES CAHIERS DE L'ARBITRAGE 579 (criticizing the decision of the Cour d'appel of Paris in Jnah Development v. Marriott International Hotels from December 17, 2013). Here, the question posed to the arbitral tribunal was whether a party "was duly represented in the arbitration," an award to the effect that the tribunal lacked jurisdiction was annulled by the Cour d'appel; however, despite the way that both the tribunal and the court had treated the question, this "clearly posed a question of admissibility" that should thus "have remained out of [the] control" of the court. The argument in the text disposes of BG Group's rhetorical flight of fancy that Argentina's position would logically give power to courts to monitor compliance with a contractual requirement for filings to be made on "blue paper." *See* Transcript of Oral Argument, *supra* note 38, at *21, *24.

67. Rau, *supra* note 45, at 173. Unless the provision itself can be challenged and overturned by a court on conventional "contract-law" grounds, for example by relying on interpretation, estoppel, or a preference against forfeiture. *Cf.* Arbitration Act 1996, c. 23, § 12(3) (Eng.).

Recall that the contract in *Howsam* had made "eligible" for arbitration only disputes that had arisen during the previous six years. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 81 (2002). Justice Breyer in *BG Group* relied heavily on *Howsam*. *See BG Grp.*, 134 S. Ct. at 1207 (like *Howsam,* this is a provision of the "procedural variety," determining "*when* the contractual duty to arbitrate arises, not *whether* there is a contractual duty to arbitrate at all"). But this seems fatally inapt. For if one asks the critical question, "*just what was this supposed condition supposed to qualify, anyway*?," the answer in *Howsam* would have to be, "it was a condition to the defendant's ultimate liability"—a very different question indeed from anything "forum related." The staleness of the claim did not indeed go "to the merits" in the limited sense that it would call for an *assessment of the wrongful nature of the defendant's conduct*, but it certainly did in the sense that a finding to the effect that the stipulated time had passed would *bar the claim with res judicata effect* for the future.

For this reason, the Court in *Howsam* correctly held that the six-year period was not to be

presumably preferred that "whether the claim survives at all" would be a matter for their tribunal to decide.[68] This is the thrust of Jan Paulsson's powerful and seminal essays on the subject: that a term qualifies the "jurisdiction" of a tribunal if the intended effect of a successful challenge would be to send the dispute to *some alternative competent forum*, such as a court—in that sense, the challenge is "forum dependent."[69] But if the intended effect is instead that the claim "*should not be heard at all (or at least not yet*)," it is not forum dependent.[70]

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deemed "jurisdictional." 537 U.S. at 81. For the same reason, by the way, the suggestion that "a finding of inadmissibility"—unlike one with respect to jurisdiction—may "not become *res judicata"* because such defects "usually involve more transient circumstances"—that is, that they "are often temporary and may be cured"—is simply wrong. *Cf.* Waibel, *supra* note 13, at 65, 70. At least the argument here, and the teaching of *Howsam*, is precisely to the contrary.

68. With particular respect to a requirement of mediation, see Anne Véronique Schlaepfer, *Jurisdiction and Admissibility: A Subtle Distinction, Not Always Easy to Make in International Arbitration*, 2 LES CAHIERS DE L'ARBITRAGE 327, 331 (2013). This rather misses the point too. A respondent's objection will not be that mediation is itself an "alternative forum" with "jurisdictional power"—of course it's not. The objection is instead that:

- since mediation "conditioned" the parties' willingness to submit to arbitral jurisdiction in the first place, then
- they should now be placed in the same position *they would have been in from the very beginning*—that is, able to seize a competent state tribunal (which is an alternative forum).

This would at least be a logically coherent position. But it seems highly implausible—that is, it seems unlikely that the parties' intention was that a failure to mediate would open the doors to immediate litigation. (At least not in the absence of some particularly explicit drafting—we are always after all in the domain of default rules informed by common intuition.) That such a reading is unlikely is precisely the reason why in the case posited, the respondent's "level #3" argument will fail at the outset as frivolous. *N-Tron Corp. v. Rockwell Automation, Inc.*, reminds us that a contractual obligation to engage in mediation *prior to litigation* presents no choice between alternative fora and does not call on us to make a choice between alternative decision makers. N-Tron Corp. v. Rockwell Automation, Inc., No. 09-0733-WS-C, 2010 WL 653760, at *3–5 (S.D. Ala. Feb. 18, 2010) (the parties had an obligation to "attempt in good faith to settle the dispute by non-binding third-party mediation," and "[a]ny dispute not so resolved by negotiation or mediation may then be submitted to a court of competent jurisdiction"; the failure to comply with this provision is not "an omission of jurisdictional proportions").

69. *See generally* JAN PAULSSON, THE IDEA OF ARBITRATION (2013).

70. *Id.* at 82–90 ("[T]he success of the objection does not necessarily negate consent to the forum.").

A telling recent illustration is *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887 (2d. Cir. 2015). In a dispute arising from the termination of a license, the licensor asked for a preliminary injunction to preserve the status quo pending arbitration—and also a preliminary injunction to prevent the licensee from "arguing to the arbitral panel" for an extended period in which it could cure any breach. The district court granted the injunction, noting that the agreement gives the licensee only a "30-day cure period," and went on to find no "basis" in it "for a court or an

This approach is not, perhaps, a universal solvent[71]—although it does readily explain the results in the hypothetical cases posed previously. But note that *none of these functional considerations* apply, or apply with anything like their original force, to our present case. In *BG Group*, litigation in the judicial forum that would normally otherwise be competent was not only contemplated, but *required*; this suggests—all the obligatory cackle about "procedure" aside—that the challenge should be deemed "jurisdictional" in *the accepted sense that it was forum-dependent*.[72] At least the primacy of the alternative judicial forum was mandated for the first eighteen months.[73] The whole point of giving priority to "courts otherwise competent" would be eluded if an arbitrator may rule definitively that the

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arbitrator to extend that period"—the licensor would be "irreparably harmed" if the licensee "somehow wrongly convinced the arbitrators to grant it a further cure period despite its material breach warranting termination." This was obviously a reversible error. For the licensor's argument that "the issue of an extended cure period is outside the scope of the agreement to arbitrate" concerns "the proper interpretation of the Agreement—not who may reach it"; as an assertion "that the remedy cannot be granted by *either a court or an arbitrator*" it was at bottom just "a merits argument masked as a jurisdictional one." *Id.* at 899.

71. For example, arguments of "waiver" are regularly left to arbitrators—even though the "underlying assumption must be that a party who has 'waived' the right to arbitrate—who is found to have acted in a manner inconsistent with the desire to pursue arbitration—is not entirely without a remedy, but is merely forced back into the [alternative forum of the] courtroom." Rau, *supra* note 6, at 138–39.

Conversely, the analysis in *supra* notes 67–70 and accompanying text would suggest that questions of the scope or coverage of the arbitration agreement—"I agreed to arbitrate disputes over the sale of apples, but not over the sale of tomatoes"—are properly "jurisdictional" since the challenge assumes that the claim should be heard instead by an alternative competent forum—by the court rather than the tribunal. This does indeed seem to be the effect of most of the positive law. *But see* PAULSSON, *supra* note 69, at 81 (proposing an "overarching presumption" to the effect that "arbitrators' determinations as to the scope and timeliness of arbitrable claims should be presumed to be final"); *supra* note 53 and accompanying text.

72. Again, what distinguishes a case like *Howsam* is that there would be no plausible alternative competent forum. *See supra* note 32 and accompanying text.

73. In judging the presence of "consent" to any forum, surely the assessment is not to be simply made in the abstract—as a matter of "principle"—on an all-or-nothing basis—and without admitting the possibility that a party's very consent to arbitration might be *temporarily limited*? That would seem an unnecessarily partial and simplistic view of the question. *But cf.* Solomon Ebere & Blerina Xheraj, *Who Decides Arbitrability Where a Precondition to Arbitration Has Not Been Satisfied?: A Comment on the U.S. Supreme Court's Decision to Hear the Appeal in* BG Group v. Argentina, 31 J. INT'L ARB. 101–09 (2014) ("[P]reconditions to arbitration do not speak to the consent of the parties to arbitrate"—they "pertain to the arbitral process, not the fundamental question of the existence or validity of an arbitration agreement."). But the canonical tests of "existence or validity" *are only ever important in the first place* because they test (but not with any exhaustiveness) whether the parties have ever agreed to submit to an arbitral determination.

duty to seize those courts had been excused.[74]

The preceding discussion will be met with a predictable objection:

> But you are treating the BIT's local-litigation requirement as equivalent to an ordinary choice of forum. And this is clearly incorrect: For under the terms of the treaty, the Argentine courts had no "power to do anything at all." Since "going and sitting can't have any effect on the case whatsoever," then whatever happens, there are no circumstances in which the parties would not end up in arbitration anyway.[75]

One problem with this objection is that it treats the local-litigation requirement in an unnecessarily reductive and binary fashion. The enterprise we are engaged in is not, remember, the search for an accurate definition, but the search for an appropriate default rule to reflect hypothetical intention.[76] Before a sovereign state is willing to subject itself

74. Of course, the treaty reference is to the courts of Argentina, while the "level #3" question poses a choice between the decision-making authority of the arbitral tribunal *and the courts of the seat*. So it may be overreaching to blandly assert—as did the Court of Appeals—that since "the gateway provision *itself* is resort to a court, the parties [should not] have been surprised to have a court, [rather than] an arbitrator, decide" whether it should be applied. *See* Republic of Argentina v. BG Grp. PLC, 665 F.3d 1363, 1371 (D.C. Cir. 2012), *overruled by* 134 S. Ct. 1198 (2014). For this does obviously elide the fact that we are after all talking about *two different judicial systems*. And so the court's formulation certainly lends itself to misunderstanding. *Cf.* Andrea K. Bjorklund, *Case Comment:* Republic of Argentina v. BG Group PLC, 27 ICSID REV. 4, 6 (2012) ("This sentence has resulted in a good bit of mischief."). But the BIT at least suggests a party preference that any future disputes not be entirely severed from the normal litigation process—the contracting parties themselves "specifically desired the delay attendant upon judicial proceedings preliminary to arbitration." *BG Grp.*, 665 F.3d at 1372 (citing Wiley v. Livingston, 376 U.S. 543, 558 (1964)). And so the fault, if there is one, seems venial.

75. *See* Transcript of Oral Argument, *supra* note 38, at *10–11, *18 ("whatever [the local courts] do, it makes no difference"); *see also* BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1211 (2014) ("the something [claimant] must do has no direct impact on the resolution of their dispute"). Recall that under the treaty, arbitration is possible even if the courts have rendered a "final decision" but "the Parties are still in dispute." *See* U.K.-Arg. BIT, *supra* note 14, at art. 2(a)(ii).

76. In general, on the "search for hypothetical intention," see *supra* notes 6–12 and accompanying text.

I have been struck by the uniform and relentless assumption throughout the investment community to the effect that, somehow, the sole key to the murky mystery of proper treaty construction must be found in the Vienna Convention (VCLT). *See, e.g.*, David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT'L L. 565 (2010). I find this syndrome disconcerting. The manipulable truisms of articles 31 and 32 of the Convention are certainly inoffensive enough. *See* MICHAEL WAIBEL, UNIFORMITY

VERSUS SPECIALISATION: A UNIFORM REGIME OF TREATY INTERPRETATION? 4–5 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2353833 (referring to the VCLT standards as a "lowest common denominator," operating "at a high level of generality" and containing "obvious" "principles of logic and good sense").

But I may perhaps be forgiven, as an erstwhile teacher of Contracts, for thinking that everything is already present in the familiar corpus of private law. Every "bargain," after all, poses a problem of the coordination of possibly adverse interests in the view of achieving an integrative solution. At a later point, however, *A* may allege that *B* has limited his freedom of action in a particular way, an allegation that *B* vigorously denies. The methodology is familiar: the principal route to a solution is to ask *whether*, *in light of the situation of the parties at the time of contracting, A would be reasonable in so believing, and whether B should reasonably have appreciated A's expectations.* The inquiry is of course always fact-intensive—but if this is the well-trodden path down which the Convention directs us, the trail has been marked with equal clarity by the Restatement of Contracts. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 40, § 201 cmt. b *(*"the context relevant to interpretation of a bargain is the context common to both parties"); *id.* § 202(1)–(2) & cmt. e ("if the principal purpose of the parties is ascertainable it is given great weight"; "where language has a generally prevailing meaning it is interpreted" accordingly; but "general usage" may "yield to internal indications such as inconsistency [or] absurdity"). The meaning of the BIT is thus "to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts." *Cf.* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 174 (Jon Roland ed., 2002). In both cases, the work of construction is to attribute "meaning" to a given text—although strictly speaking, of course, words themselves have no "meaning"—only people do.

Naturally, no claim is being made that these instruments, the VCLT and Restatement, operate in an identical fashion. While "the interpretation tools are comparable and so are the approaches," it is concededly true that in investment cases (unlike contract cases) "only one of the drafters [will be] present" in the arbitration "to explain" his understanding and intentions. Gabrielle Kaufmann-Kohler, *Interpretation of Treaties: How Do Arbitral Tribunals Interpret Dispute Settlement Provisions Embodied in Investment Treaties*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 257, 260–61 (Loukas Mistelis & Juliam D.M. Lew eds., 2006). But there seems to be little significance in this fact since in any event, and in either case, any purely subjective element in interpretation will be necessarily minimized. And while both instruments appeal to the need to understand "context," the term is concededly used in different senses. In ordinary contract law, after all, "everything is context." "A sentence is never not in a context. We are never not in a situation . . . [where a] sentence that seems to need no interpretation is already the product of one." Stanley E. Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases*, 4 CRITICAL INQUIRY 625, 634, 637 (1978). By contrast, reference to "context" assumes a different significance in the VCLT. *See* Hrvatska Elektroprivreda D.D. v. Republic of Slovn., ICSID No. ARB/05/24, Individual Opinion of Jan Paulsson, ¶ 44 (June 12, 2009); J. ROMESH WEERAMANTRY, TREATY INTERPRETATION IN INVESTMENT ARBITRATION 62 (2012). But again, the fact that one is at the same time encouraged to invoke a treaty's "object and purposes" or the "circumstances of [its] conclusion" can go a long way towards bridging any gap. *See* Thomas W. Wälde, *Interpreting Investment Treaties: Experiences and Examples*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 724, 754 n.106 (Christina Binder et al. eds., 2009).

The claim that *is* being made here, though, is that any such differences do not as a practical matter affect the concrete question posed in *BG Group*—and thus that to privilege the Convention as some sort of touchstone uniquely leading us to an answer seems unnecessary and misguided. *See,*

to a binding award by private individuals, might it not have plausibly insisted on reserving an opportunity—if only briefly and in the first instance—for its local tribunals to consider and address challenges to the regulatory regime?[77] Whatever importance Argentina may have attributed to this eighteen-month hiatus,[78] the state would certainly have found it paradoxical that the critical question—whether the requirement had been satisfied—should be submitted for a final determination by the very tribunal whose decision it was attempting to defer to.

More fundamentally, it does not seem fair to treat the BIT's local-litigation requirement entirely as an empty, formal ritual without operative significance:

- If the Argentine courts had been seized, they were likely to have grappled with any number of municipal law issues on which final resolution of an investment dispute might turn. Imagine, for example, the relevance of the authority of an agent, the proper observance of corporate formalities, the duration of a license, or the

e.g., Republic of Ecuador v. Occidental Exploration & Prod. Co., [2005] EWHC (QB) 774 [62]–[63] (Eng.) (as "there is no doubt" that the BIT is "governed by public international law," "[i]t would be logical" that the jurisdiction of the arbitrators ["i.e., the scope of the arbitration agreement"], was "governed by the same law"), *aff'd*, [2005] EWCA (Civ) 1116 [¶ 13] ("although neither side suggests that the answer is crucial to its own case").

77. The mandate to consider "object and purpose" should presumably be read to refer to the "object and purpose" *of the contested provision being litigated*. *See, e.g.*, Ambiente Ufficio S.p.A v. Argentine Republic, ICSID ARB/08/9, Decision on Jurisdiction and Admissibility, ¶ 602 (Feb. 8, 2013) ("serv[ing] the purpose of honoring the host State's sovereignty" by providing it "the opportunity to review—and if appropriate, to correct—government acts before setting in motion the intricacies and consequences associated with international investment arbitration"). Compare the highly nuanced discussion of Wälde, *supra* note 76, at 764 & n.135 ("the reference to the overall purpose(s) of a treaty needs to be complemented by an investigation of the specific purpose of a particular treaty mechanism and concept"; "the focus on specific provisions, their function, and interaction is much more 'technical' and thus less problematic"). To stress, by contrast, *the "protective purpose of the treaty" as a whole*—the global "promotion" of investments—seems tendentious and calculated to lead ineluctably to a decision in favor of the claimant. *Cf. infra* notes 159, 210 and accompanying text; Jason Webb Yackee, *Do States Bargain over Investor-State Dispute Settlement?*, 12 SANTA CLARA J. INT'L L. 277, 290–91 (2013) (dispute-settlement clauses "can be controversial, and States can, and sometimes do, specifically negotiate over" them, for example by "marginally weakening model" texts). This further suggests that, given our limited task—that of creating a presumption to identify the appropriate decisionmaker—a view of the local-litigation requirement as merely "trivial," a "historical vestige" "serv[ing] virtually no purpose," may be somewhat superficial. *Cf.* Transcript of Oral Argument, *supra* note 38, at *34–35 (Alito, J.).

78. See Transcript of Oral Argument, *supra* note 38, at *11 (counsel for BG Group stating, "I'll give them that it's important; they negotiated for it").

construction of Argentine legislation. Their judgment—even if denied actual preclusive effect—must at the very least inform any later award by an arbitral tribunal; it would, if only as a source of "data" with regard to mixed questions of fact and law, properly command considerable deference.[79]

- If the Argentine courts had been seized, they might conceivably have gone on to render a judgment in favor of the claimant (either on the basis of local law or, if they could, for violation of the BIT itself). In such a case it seems implausible to imagine a scenario in which it is now *the state* that seeks to convene an arbitral tribunal for the purpose of having the decision of its own courts reversed.[80]
- Chief Justice Roberts in his dissenting opinion made the further point that if the Argentine courts had been seized, any decision on their part would at the least "help to narrow the range of issues that remain in controversy," perhaps even serving to "induce" a

79. *E.g.*, Emmis Int'l Holdings, B.V. v. Hungary, ICSID No. ARB/12/2, Award, ¶¶ 174–75 (Apr. 16, 2014) ("Where the Tribunal is presented with a question of municipal law essential . . . [to establish jurisdiction, such as the existence or ownership of a covered investment], the Tribunal, whilst retaining its independent powers of assessment and decision, must seek to determine the content of the applicable law in accordance with evidence presented to it as to the content of the law and the manner in which the law would be understood and applied by municipal courts."); Soufraki v. United Arab Emirates, ICSID No. ARB/02/7, Decision of the *Ad Hoc* Committee On the Application For Annulment of Mr. Soufraki, ¶ 96 (June 5, 2007) ("[W]hen applying national law, an international tribunal must strive to apply the legal provisions as interpreted by the competent judicial authorities[;] . . . it is Italian law, as applied in Italy, that really constitutes Italian law."); *cf.* Occidental Exploration & Prod. Co. v. Ecuador, LCIA No. UN 3467, ¶ 58 (July 1, 2004) ("[T]he decisions adopted thus far by Ecuadorian courts on matters of interpretation of the Ecuadorian Tax Law have been of great help to this Tribunal in its own interpretation" of the Treaty); *id.* ¶ 137 (perhaps not "precedent having either binding or mandatory force as regards the instant case," but as "useful guidance in understanding Ecuadorian legislation").

In the *BG Group* case itself, see BG Group, PLC v. Republic of Argentina, Final Award, ¶¶ 119–20 (UNCITRAL Arbitral Tribunal, 2007) (question whether claimant's rights, including the license granted to its subsidiary, constituted a protected "asset" or "*active*"; "in the absence of a statutory definition, the Tribunal must turn to the interpretive work of the [Argentine] courts").

80. *See BG Grp.*, 134 S. Ct. at 1221 (Roberts, C.J., dissenting) (if the claimant prevailed, this "could . . . obviate the need for arbitration"); *cf. Ambiente Ufficio S.p.A*, Decision on Jurisdiction and Admissibility, ¶ 605 (eighteen months "may indeed be sufficient . . . for the national courts to render a first-instance judgment in the investor's favour which the host State does not appeal"). At oral argument, counsel for BG Group gamely suggested that in the event of an adverse judgment, Argentina too could initiate arbitration. *See* Transcript of Oral Argument, *supra* note 38, at *19. This rhetorical move was unlikely to have been made seriously. *Cf.* Brief for Petitioner, *supra* note 33, at *48 (litigation has no "legal significance . . . if the aggrieved investor in any way disagrees with the conclusions of the local courts").

> settlement short of a protracted arbitral proceeding—yet another reason to treat the BIT requirement as meaningful.[81]

Concededly, precisely the same thing might be said with regard to any number of "procedural conditions" such as mediation. But just as some settlement devices that are stipulated to be non-binding may nevertheless come within the gravitational pull of the Federal Arbitration Act—and thus permit a party to invoke the statute[82]—so too will litigation that does not in all circumstances lead to a binding judgment may, for some purposes, fall within our understanding of what a forum selection clause may be. That the award or judgment may not be universally preclusive is not the question—nor is the question whether this satisfies some ideal a priori definition of what a particular forum "must look like." The question, rather, is whether there is sufficient similarity to the modal case to implicate some of the same policies and to justify equivalent treatment.

Assume an agreement calls for arbitration in Freedonia, but specifies "there shall be no right to arbitrate until the Supreme Judicial Court of Freedonia has ruled [one way or the other] on the question whether the dispute is capable of being arbitrated under local law." Should the arbitrators assume jurisdiction without waiting for such a ruling, I doubt their award should be confirmed. A ruling by Freedonian courts that the dispute is (as we say in the U.S.) "inarbitrable" would, here also, not be universally binding—it would not necessarily bar an arbitration from proceeding nor an award being rendered that could be enforced elsewhere. But that a local judgment *would not be conclusive for all purposes* does not prevent us from appreciating that the parties might still have preferred—as a matter of efficiency or to enable them to orient their conduct—that the case nevertheless be heard there before the expense of arbitration is incurred. If one can imagine a possible scenario in which the parties did in fact make this defensible choice, how much more explicit does the language have to be?

In summary, then: Despite the ultimate outcome, there seems much to be said in favor of the original "level #3" decision of the Court of Appeals. That approach would still leave us well short of all the imaginary horribles,

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81. *BG Grp.*, 134 S. Ct. at 1221 (Roberts, C.J., dissenting).

82. Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 467–68 (2005) ("non-binding arbitration" as within the Federal Arbitration Act (FAA)); *see id.* at 503 (treating the arbitration statute "as subject to a process of dynamic growth," asking in particular cases "to what extent the goals of the statutory mechanism are being served").

such as the "disruption of the established" arbitral system, raised by amici—for the case would not have ended there.[83]

Having decided at "level #3" that compliance with the local-litigation requirement was a matter of "jurisdiction"—as to which the tribunal's determination was entitled to no deference at all—the court would then normally have proceeded at "level #2" to decide *de novo the actual existence of arbitral authority.*[84] Here is really where the Court of Appeals went astray. The court—rather than summarily dismissing jurisdiction on the basis of some naïve notion of the text's "plain meaning"—could have conducted (or remanded to the trial court to conduct) an inquiry into whether the requirement should be deemed excused. I suspect a proper analysis—parallel to that of the tribunal itself—would have reached the same result, either on ordinary contract grounds or by invoking the notion of "futility."[85] If it had, the arbitral award *on the merits* would still be confirmed. After all, an argument about whether the requirement is still in place does not necessarily implicate *the identity of the appropriate decision maker.* This is a distinction that, however frequently people miss it, is a fault line that runs through all of our law of arbitration.[86]

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83. Brief of Professors and Practitioners, *supra* note 24, at *1.

84. Nothing in the argument in *supra* note 83 and *infra* notes 85–86 and accompanying text is in the slightest degree inconsistent with the notion that the jurisdictional point could—and indeed should—nevertheless have been argued as a preliminary matter before the arbitral tribunal itself once it had been constituted. This was an unremarkable point made by counsel for Argentina in oral argument ("if there was a judge's strike, so none of the courts were operating," then "there would be a very strong case to be made to the arbitrators")—and so Justice Kennedy's attempt at ridicule ("your whole argument gives me intellectual whiplash. . . . (Laughter.)")—while eminently quotable—was unfair and, what is worse, completely beside the point. Transcript of Oral Argument, *supra* note 38, at *52–53. In *First Options*, Mr. Kaplan, too, had urged the tribunal to find that he was not a party to an enforceable arbitration agreement, but the teaching of the case is that, at the end of the day, the definitive decision would still be made by a court.

For the same reason, BG Group's argument that Argentina should have been expected to forestall the whole problem, by attempting as soon as possible to enjoin the ongoing arbitral proceeding, was a clear non-starter—precisely the same thing having been futilely argued in *First Options*. *See* Rau, *Arbitrability Question*, *supra* note 7, at 300 ("claimant First Options had repeatedly asserted that this was the course Kaplan should have been expected to take—and the Court seemed appalled by the implications"). These are hardly the incentives that one would wish to create. *But cf*. Brief for Petitioner, *supra* note 33, at *56–57.

85. For the arbitral award in this case, see *supra* note 19 and accompanying text. For ordinary Contract learning, see CORBIN, *supra* note 44, § 40.17 ("elimination of a condition" when defendant "unjustly prevents [its] fulfillment").

86. *See* Tribunal fédérale [TF] [federal tribunal] July 7, 2014, 4A_124/2014 (Switz.). The dispute resolution scheme designed by the parties for this private contract actually seems closely

If that's all there is, then one would be tempted to sum up the *BG Group* case by saying, after La Fontaine, that "*de loin, c'est quelque chose; et de près, ce n'est rien.*"[87] Granted, the performance of the Court of Appeals gives little reason to be uniformly sanguine about the consequences of trusting the federal judiciary. But then that is what hierarchically superior courts are for.[88]

E. Allocating Authority by Contract and the Dilemma of Institutional Rules

There is one final point. Given the perspective from which the Court viewed the case, it turned out to be unnecessary to actually address this point in *BG Group* itself—but since things could well (and should) have turned out somewhat differently, a brief discussion seems warranted.

Assume that the alternative analysis I have suggested in Part D above

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analogous to what is mandated by the U.K.-Argentina BIT. As provided in the FIDIC's "Red Book" for standard engineering contracts, disputes between the contracting parties "shall be adjudicated" by a "dispute adjudication board"—whose "decision shall be binding"—except that "if either Party is dissatisfied" with it, an arbitration may be initiated. The court first found this "precondition" to be "mandatory"—which seemed to imply that the party seeking annulment had raised a "jurisdictional defense" which would be reviewed de novo by the court (since noncompliance with the condition "must . . . be sanctioned one way or the other"). *Id.* ¶ 3.2. Note that under the contract, the board's decision was *to be effective and bind the parties* unless and until the arbitrators overturned it—it would not be a completely empty dead letter. Nevertheless the court went on to make—*by itself*—the determination that the condition had been excused. The parties were "irreconcilable," so that going through the procedure would have served no purpose; the respondent, who had filed the request for arbitration, could hardly be "blame[d] . . . for losing patience and finally skipping the DAB phase." *Id.* ¶ 3.5. So on that ground, the court was able to refuse annulment even without extending any deference to the tribunal's decision. That, one might think, is an approach that might well have served as a template for the Court in *BG Group*.

For another illustration, see Tribunal fédérale [TF] [federal tribunal] June 6, 2007, 4A_18/2007 (Switz.) ("even if" a contractual provision with respect to mediation was intended to be binding, the failure of settlement efforts "clearly show" (*démontrent*) that there was "no longer any hope of reconciling the parties," so that any mediation procedure would have been "doomed to failure"; therefore, since the claimant was thus justified in directly initiating arbitration, the motion to annul the award was denied). Here too, as in the later case, the interest from our perspective is that *it is the State court*, not the arbitral tribunal, which has made this determination with regard to pointlessness.

87. JEAN DE LA FONTAINE, *Le Chameau et les Bâtons flottants*, *in* IV LES FABLES DE LA FONTAINE (1668) ("by far, this is something; and near, it's nothing").

88. In oral argument, Justice Kennedy, while agreeing with the Court of Appeals "as to the authority of the court to decide the issue," went on to add that "[he] also think[s] that they are probably wrong on the merits, but [he] cannot reach that second question." Transcript of Oral Argument, *supra* note 38, at *13.

proves convincing—that is, that compliance with the local-litigation requirement is something properly reserved in the normal run of things for a court. But as I've said, everything always reduces itself ultimately to "agreement"—and since the allocation of power responds to the choice of the appropriate default rule, it is hard to see the objection to allowing the parties to vary the assumed baseline presumption by contract.

This possibility of contractual re-allocation is usually thought to have originated in the *First Options* decision of the U.S. Supreme Court—where the Court said that the question, "who has the primary power" to decide questions of arbitral jurisdiction "turns"—*precisely like any other discrete issue in dispute between the parties*—on what they "agreed about *that* matter." If the parties "submitted" it to arbitration, "a court must defer" to the arbitrator's determination.[89] In later cases this principle has been extended even to awards determining the enforceability of the arbitration clause itself—if the parties have made what the Court has called a contractual "delegation" to the arbitrators.[90]

By contrast, the arbitrati of other states are likely to find even the possibility of such a re-allocation illegitimate and heretical—"exorbitant," "neither logical or acceptable"[91]—and indeed, "scientifically false."[92] That

89. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995); Rau, *supra* note 82, at 464 ("but the matter was a commonplace long before, and should always, in any event, have gone without saying").

First Options is often taken to have held that any such contractual re-allocation of the power to decide jurisdictional issues must be "clear and unmistakable." *E.g.*, RESTATEMENT (THIRD) OF THE U.S. LAW OF INT'L COMMERCIAL ARBITRATION, *supra* note 43, § 2-13(a) & cmt. c (Council Draft No. 4, 2014). But I have argued earlier and at length that this whole trope of the "clear and unmistakable" was nothing but "one overblown latke"—with "very little purchase beyond the particular factual pattern faced by the Court." *See* Rau, *supra* note 3, at 528–39. "[T]his whole notion of requiring a somehow particularly explicit consent to arbitral jurisdiction was seized on by Justice Breyer largely as an interpretive device, a focused response to a particular dilemma faced by people like Mr. Kaplan who would otherwise have to steer at their peril between the twin dangers of default and of being inadvertently found to have 'submitted.'" *Id.* at 535. In other words, the holding was simply this: that we must be skeptical about a tribunal's presuming to "assume jurisdiction over any issue merely by virtue of the fact a party has argued the matter before it." At the same time I have strenuously doubted the continuing viability of the "clear and unmistakable" trope in light of the Court's later decision in *PacifiCare*. *See* PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401, 406–07 (2003) (whether a contractual provision that bars the award of punitive damages *should be understood as barring the recovery of treble damages under RICO* must be a matter for final determination by the arbitrators).

90. I explain and defend this result at length in Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435, 488–523 (2011).

91. *See, e.g.*, PHILIPPE FOUCHARD ET AL., TRAITÉ DE L'ARBITRAGE COMMERCIAL

an arbitral tribunal could possibly be the exclusive judge of its own jurisdiction may even be a result that is claimed—with characteristic solipsism—to be "accepted nowhere."[93] To the extent I understand it, the objection seems to rest on some a priori notion of a "rule" of judicial review that is:

- either so axiomatic, so taken for granted, so generally accepted, that its origin as a mere presumption—a background rule, a reversible "default rule"—simply does not rise to the level of consciousness; or
- one that is deemed to be so inherently inalienable as to obviate any need even to justify the resulting interference with private autonomy.[94]

In many ways, the central problem in any arbitration regime can be framed as the interplay between a given system of civil procedure and the agreement of the parties. So immediately after *First Options*, the AAA revised its Arbitration Rules in an explicit attempt to take advantage of the space the Court had opened up. Rule 7 now provides that the arbitral tribunal "shall have the power to rule on [its] own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement"—language that we are told by the drafters was expressly "designed to address" the Court's suggestion in *First Options*, and thus "to

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INTERNATIONAL 414–15 (1996).

92. Emmanuel Gaillard, *Note*, 1995 REV. ARB. 618, 621 (1995).

93. *Id.* ("*une telle consequence n'est admise ni dans ce pays, ni ailleurs*").

Professor Mayer has characteristically given us a more nuanced view perceiving that the outcome should not turn on a priori doctrine but on contractual intent. *See* Pierre Mayer, *L'autonomie de l'arbitre international dans l'appréciation de sa propre competence*, 25 R.C.A.D.I. 319, 340–41 (1989).

94. In Johnson's words, this would seem to be nothing more than "destroying a certain portion of liberty, without a good reason, which was always a bad thing." JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON 325 (Percy Fitzgerald ed., 1900).

Concededly, even in the U.S., one does still continue to come across the occasional bluff assertion that such a contractual readjustment of the FAA's default allocation of authority between courts and arbitrators is somehow illegitimate—that within the structure of the statute, the power to determine whether a duty to arbitrate exists remains a "nondelegable judicial function"—but this is an argument that has certainly not improved with age. *See generally* Rau, *supra* note 3, at 497 nn. 214–15. Sure, under section 4 a court must be "satisfied" that some agreement imposes the duty to arbitrate. "But how much in thrall to the 'plain meaning' fallacy does one have to be, in order to deny that a court might be appropriately 'satisfied,' not directly, but at an earlier stage and at one remove—that is, after it has identified an agreement by which the parties were willing to entrust this determination to their agent? Can any conceivable purpose explain such a wooden result?"

constitute party agreement to the arbitrability of [such] 'jurisdictional disputes.'"[95]

American courts have drawn the obvious inference—routinely holding that to arbitrate under these rules is itself a decision to confer on arbitrators final and unreviewable decision-making power with respect to their own jurisdiction. This common way of reading the AAA Rules has now become something of a meta-default rule—treating a contractual reference to the Rules as a simple term of art denoting the choice of a particular scheme for the allocation of power.[96]

And now we get to the real puzzler, which is this: while the intent of the AAA Rules is clear, no one could have had anything like that in mind when the facially identical rules of other arbitral institutions were drafted. (I say "facially identical," for whatever differences one can point to between the text of the AAA Rules and that of other familiar sets of rules, such as those of the ICC and UNCITRAL, are with respect to *compétence-compétence* trivial in the extreme.)[97]

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95. *See* Rau, *supra* note 3, at 542–43.

96. *See generally* Rau, *supra* note 6, at 92. *But cf.* NASDAQ OMX Grp., Inc. v. UBS Sec., LLC, 770 F.3d 1010, 1031–32 (2d Cir. 2014). Here the arbitration clause contained a "carve out" making inarbitrable certain disputes alleging violations by NASDAQ of its self-regulatory obligations: "Except as may be provided in the NASDAQ OMX Requirements, all . . . matters in question between the Parties . . . shall be settled by final [and] binding arbitration." It was held that in these circumstances the determination of arbitral jurisdiction was for the court itself—and that incorporation of the AAA Rules made no difference: the "carve out" was "a circumstance that . . . *delays application of AAA rules* until a decision is made as to whether a question does or does not fall within the intended scope of arbitration." Now I very much doubt that this is a tenable line. For one thing, it seems to confuse "delegation by virtue of a broad clause" with "delegation by virtue of a reference to institutional rules." *Compare* Rau, *supra* note 6, at 92–95, *with id.* at 90–91. These are different grounds: if the clause contains a "carve out," then the former may indeed have little purchase, but the latter need not be affected. After all, a "carve out" excluding from arbitration anything not dealing with "the sale of fruit" need not bar AAA arbitrators from determining whether disputes over tomatoes or pecans are within their jurisdiction. *See supra* notes 1–5 and accompanying text. For the interaction of the generic "broad" clause, and the reference to institutional rules, compare *Silec Cable S.A.S. v. Alcoa Fjardaal SF*, Civil No. 12-01392, 2012 WL 5906535, at *14 (W.D. Pa. Nov. 26, 2012) (under ICC Rules, it was for the arbitrators to determine whether the "claims set forth in [the] arbitration demand are arbitrable;" and "[i]n addition," the "broad, unlimited and unambiguous language" used in the arbitration clause "convinces [the] Court that the parties intended that the arbitrator decide the scope of any claims"), with *Congress Construction Co. v. Geer Woods, Inc.*, No. 3:05CV1665 (MRK), 2005 WL 3657933, at *3 (D. Conn. Dec. 29, 2005) (incorporation of AAA Rules "gives the arbitrators the power to decide questions of arbitrability," but "[s]econd, and, in any event," the broad language of the arbitration clause "is itself sufficient to permit the Court to conclude that it is for the arbitrators to decide" such questions).

97. However, the occasional arid semantic quibble can be expected. *E.g.*, Telenor Mobile

Of course it would betray considerable linguistic naïveté to assume that words or collocations of words must always carry precisely the same significance without regard to context. Given the patent ambiguity of the words "rule" and "decide," conflation of their very different senses is fatal to intelligent argument. For it seems obvious that the rules of the ICC, for example, deeply rooted as they are in the premises and presuppositions of French procedural law, were merely meant to restate party agreement to the arbitrators' chronological priority in "decision making"—and thus not intended in any way to amount to a final grant of authority.[98] Nevertheless, U.S. courts,

- ignorant of the backstory that properly informs construction of a text,
- seeing arbitration primarily as an emanation of the law of Contracts, and
- indulging their increasingly frequent reticence to venture beyond apparent "plain meaning,"

have regularly tended to view both the rules of the ICC[99] and those of

Comm. AS v. Storm LLC, 524 F. Supp. 2d 332 (S.D.N.Y. 2007), *aff'd*, 584 F.3d 396 (2d Cir. 2009) (while the AAA rules grant arbitrators the authority "to rule on [their] jurisdiction," by contrast, the UNCITRAL rules "only . . . allow arbitrators to rule on *objections* to that authority").

98. *See generally* Richard W. Hulbert, *Institutional Rules and Arbitral Jurisdiction: When Party Intent Is Not "Clear and Unmistakable*," 17 AM. REV. INT'L ARB. 545, 557–60, 570–71 (2006) (demonstrating that these rules could never have been intended to constitute party agreement to any final determination by an arbitral tribunal with respect to its own jurisdiction).

The new LCIA Rules make this clear in what I would have thought was a superfluous abundance of caution. Article 23.1 also confers on the arbitral tribunal the "power to rule upon its own jurisdiction and authority, including any objection to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement." *Arbitration Rules Art. 23.1*, LONDON CT. INT'L ARB. (Oct. 1, 2014), http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%2023. And article 23.5 warns that by agreeing to arbitration, "after the formation of the Arbitral Tribunal the parties shall be treated as having agreed not to apply to any state court or other legal authority for any relief regarding the Arbitral Tribunal's jurisdiction or authority." *Arbitration Rules Art. 23.5*, LONDON CT. OF INT'L ARB. (Oct. 1, 2014), http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%2023. But then article 23.5 is immediately qualified by adding an exception—and this alone, of course, speaks volumes—that admits *the possibility of recourse "following the [tribunal's] award on the objection to its jurisdiction or authority*."

99. *E.g.*, Aluminium Bahrain B.S.C. v. Dahdaleh, 17 F. Supp. 3d 461, 475 (W.D. Pa. 2014) ("incorporation of the ICC Rules into an arbitration agreement left arbitrability to the arbitrators," so that "the scope of what claims may be arbitrated" is an "issue to be resolved by" them); Burnham Enters., LLC v. DACC Co., No. 2:12-CV-111-WKW, 2013 WL 68923, at *2 (M.D. Ala. Jan. 7, 2013) (adoption of the ICC rules clearly and unmistakably evidences the parties' intention that

UNCITRAL[100] as a sufficient grant to arbitrators—similar in effect to the AAA Rules—of the power to make a binding determination of their own jurisdiction.

The nagging problem in our case was that the U.K.-Argentina BIT had by default made the UNCITRAL Rules applicable to the arbitration.

- The Court of Appeals was able to brush aside any possible significance of the Rules, having already found that any contractual duty on the part of the Argentine Republic was subject to the prior "condition" of local litigation. Without any "consent" to arbitrate "yet," it naturally followed that the Rules too (however interpreted) could not yet have been triggered.[101]
- Amicus briefs—from the AAA, from concerned "professors and practitioners," as well as from the U.S. arm of the ICC—urged that the UNCITRAL Rules required deference to arbitral determinations on jurisdiction; they relied on the claim that the "plain meaning" of these rules constituted a "delegation" to the arbitrators and on the remarkably irrelevant claim that all these bodies of rules "espouse the internationally accepted doctrine of competence-competence."[102]
- Given the tack taken in the majority opinion, the Supreme Court thought itself exempt from even having to address the question of "delegation" *at all.*[103] For obviously an explicit re-allocation of

whether "the parties agree[d] to submit this dispute to arbitration" was a question for the arbitrator).

100. *E.g.*, Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069, 1074–75 (9th Cir. 2013) ("consistent with the majority view regarding the effect of incorporating the AAA rules into an agreement"; "it is immaterial . . . that in some countries the arbitrator's jurisdiction may be simultaneously challenged in court"); Republic of Ecuador v. Chevron Corp., 638 F.3d 384, 395 (2d Cir. 2011) (BIT incorporated by reference the UNCITRAL rule "delegating questions of arbitrability to the arbitral panel through language nearly identical to the AAA [Rules]").

101. *See* Republic of Argentina v. BG Grp. PLC, 665 F.3d 1361, 1371 (D.C. Cir. 2012), *overruled by* 134 S. Ct. 1198 (2014).

102. *E.g.*, Brief for the United States Council for International Business as Amicus Curiae Supporting Petitioner at *2, *9, *12, Republic of Argentina v. BG Grp. PLC, 665 F.3d 1363 (D.C. Cir. 2012) (No. 12-138), 2013 WL 4769420; Brief of Professors and Practitioners, *supra* note 24, at *17–18.

103. There is nevertheless a mysterious throwaway reference to the UNCITRAL Rules in the Court's opinion. *See* BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1210 (2014) ("the Treaty itself authorizes the use of international arbitration associations [sic], the rules of which provide that arbitrators shall have the authority to interpret provisions of this kind," referring to ICSID and UNCITRAL). If this is merely intended to acknowledge the "positive" function of *compétence-compétence*, it is a truism. To attribute any greater significance to the Rules would, as explained in the text, seem completely orthogonal to the thrust of the overall argument. Perhaps the

> "jurisdictional" issues would be simply superfluous if the local-litigation requirement wasn't one in the first place, being (as the Court concluded) merely "procedural."[104]

Now for the ICC to take such a view—at least with respect to U.S. law—is not, despite appearances, entirely disingenuous. Our usual working assumption is that the extent of arbitral power falls to be assessed by the law of the seat[105]—and the goal of any arbitral institution is presumably to draft up to the limits permitted by that body of law to ensure that awards benefit

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best account of the reference is to attribute it to the dutiful and obsessively thorough research efforts of a law clerk.

104. *Cf.* Ecopetrol S.A. v. Offshore Exploration & Prod. LLC, 46 F. Supp. 3d 327, 340 (S.D.N.Y. 2014). Here the court characterized the *BG Group* holding as one in which the Court reviewed with "considerable deference" the tribunal's "determination that it had jurisdiction . . . because [the] arbitration provision in [the] treaty committed [the] jurisdictional determination to [the] arbitrators." As should be obvious from the discussion in the text, this totally misstates what *BG Group* was all about. But as we have seen—given the obvious tendency in federal courts to rigorously presume arbitral competence—such a mischaracterization may not perhaps have great ultimate significance. *See supra* note 64.

105. *But cf.* RESTATEMENT (THIRD) OF THE U.S. LAW OF INT'L COMMERCIAL ARBITRATION, *supra* note 43, § 4-14(b) & cmt. b ("[W]hether a Convention award deals with matters that were not submitted to arbitration is determined by the law to which the parties have subjected the arbitration agreement." In the absence of an express choice, however, the default preference turns to the "law identified in the general choice-of-law clause in the underlying contract" rather than the law of the seat.). I criticize this Restatement choice in Alan Scott Rau, *Understanding (and Misunderstanding) "Primary Jurisdiction,"* 21 AM. REV. INT'L ARB. 47, 167–73 (2010) ("rather curious for all sorts of reasons"). So does Gary Born. *See generally* 1 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 500 (2d ed. 2014) ("ill-considered").

Alternatively, perhaps, to the extent that U.S. courts

- inadvertently find themselves channeling the French jurisprudence in *Dalico*, or
- completely misunderstood the implications of *Mastrobuono*,

there may be recourse to some "federal law of arbitrability." On the former point, see François-Xavier Train, *Droit applicable à la convention d'arbitrage international*, *in* JURISDICTIONAL CHOICES IN TIMES OF TROUBLE 145 (2015); on the latter, see Cape Flattery Ltd. v. Titan Maritime, LLC, 647 F.3d 914, 921 (9th Cir. 2011) (agreement called for arbitration in London with "English law and practice to apply," but the court held that the "federal law of arbitrability," not English law, determines "whether a given dispute is arbitrable in the first place"). *See also* Alan Scott Rau, *Out to Sea in the Ninth Circuit: Bungling Questions of Arbitrability,* KLUWER ARB. BLOG (Nov. 21, 2011), http://kluwerarbitrationblog.com/2011/11/21/out-to-sea-in-the-ninth-circuit-bungling-questions-of-arbitrability/ (the court "ma[de] a complete hash" of things, confusing a vertical choice-of-law question—the question raised by *Mastrobuono*—with the applicability of U.S. law in the face of a choice-of-law or choice-of-forum clause that leads to the law of another nation).

Obviously, in the circumstances of the *BG Group* case, both these alternatives will in any event amount to the same thing.

from the maximum possible finality.[106] (In the ICC Rules, for example, the grant of *compétence-compétence* in Rule 6.5 is coupled with the provisions of Rule 34.6 under which the parties, by arbitrating under the Rules, are "deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.")[107]

But I very much doubt that a "waiver of the right to seek annulment" amounts to quite the same thing as an agreement to entrust or "delegate" authority to an arbitral tribunal.[108] And while a state may sometimes require

106. While the seat of the *BG Group* arbitration had not been chosen in the Treaty, the U.K. and Argentina must be taken to have understood that the validity of this New York Convention award would be assessed as a matter of the law of wherever the seat would happen to be—although, of course, *First Options* was at the time far in the future. The later construction by Argentina and the claimant, in choosing to situate the arbitration in Washington, D.C., might have even greater probative value.

107. *ICC Rules of Arbitration,* INT'L CHAMBER OF COM., http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/ (last visited Oct. 17, 2015).

108. Would such a "waiver" really amount to—or would it perhaps subsume—a contractual agreement by which the parties delegate decision-making authority over jurisdiction to an arbitral tribunal?

Cf. 1 BORN, *supra* note 105, at 934 ("this misconceives what is required under *First Options*, which is evidence of an agreement to arbitrate jurisdictional issues, not a waiver of judicial review of arbitral decisions").

- On the one hand, even *First Options*—which in the U.S. appears to authoritatively sanction the latter—has never been thought to command the enforcement of blanket waivers of judicial review. *See, e.g.*, RESTATEMENT (THIRD) OF THE U.S. LAW OF INT'L COMMERCIAL ARBITRATION, *supra* note 43. *Compare id.* § 4-24 cmt. a. (parties may not "agree before, during, or after the arbitral proceedings to refrain from seeking vacatur or resisting confirmation, recognition or enforcement of an award, or otherwise relinquish in advance the right to seek such relief"), *with id.* § 4-24 ill. 3 (although courts will nevertheless extend deference to "a submission agreement that unequivocally submits to the arbitrators all questions regarding the scope of arbitral jurisdiction"); Hoeft v. MVL Grp., Inc., 343 F.3d 57, 64 (2d Cir. 2003) ("Since federal courts are not rubber stamps, parties may not, by private agreement, relieve them of their obligation to review arbitration awards for compliance with § 10(a).").
- And in any event, even a permitted "waiver" of a party's "right of recourse" need not amount to a loss of his right to resist any actual enforcement of an adverse award—or at least, it is most unlikely to be read as extending so far. *Cf.* Decree No. 2011-48 of 13 Jan. 2011, art. 1522 (Fr.) (the parties may by "specific agreement" "expressly waive their right to bring an action" for annulment, but "nonetheless retain their right to appeal an enforcement order" on the usual grounds set out in the statute); THOMAS CLAY, LE NOUVEAU DROIT FRANÇAIS DE L'ARBITRAGE 205 (2011) (the latter provision "preserves the parties' right to effective recourse").
- On the other hand, any waiver of the right of recourse in a given jurisdiction will necessarily be limited in its effects to that jurisdiction alone. By contrast, a finding at the seat to the effect that an arbitration clause—as construed by applicable local law—

expressions of intention to reach a particular level of explicitness before permitting an award to be integrated into the local legal order—in order to avoid doubt and clarify matters for unwary contracting parties and reviewing courts[109]—I also very much doubt that this rule of caution is the equivalent of attributing an intention to parties in the first place.

So all of this returns us ineluctably to the critical inquiry, one into the understandings and expectations of the contracting parties.[110] Of course, as with any other Contracts question, the subjective intentions of the parties are unknowable and inconclusive. It is commonly objected that the declared intentions of some institutional draftsman may not serve as a substitute—

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has validly "delegated" certain matters to the tribunal, may be expected to command deference in other states as well. *Cf.* 3 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3780, 3786–87 (2d ed. 2014). For the U.S. practice, see *AVR Communications, Ltd. v. American Hearing Systems, Inc.*, 793 F.3d 847, 850 (8th Cir. 2015) (it was "impermissible" to allow respondent "to relitigate the issue of the scope of the arbitration clause in an American court" since "that exact issue [had already been] squarely addressed and rejected" by the courts at the arbitral seat). *Accord* George A. Bermann, *Domesticating the New York Convention: The Impact of the Federal Arbitration Act*, 2 J. INT'L DISP. SETTLEMENT 317, 324 (2011) ("considerations of judicial economy suggest" that a foreign court judgment on the "scope of arbitration" "should be given the same preclusive effect that prior judgments generally enjoy under the forum's judgment recognition policies").

With respect to the immediate case, of course, recall that in any event, the UNCITRAL Rules at play in *BG Group* contain no such provision contemplating "waiver." *See* 3 BORN, *supra*, at 3374.

109. *Cf. supra* note 89 and accompanying text (noting the Court's suggestion, as to which I express considerable doubt, to the effect that delegations of jurisdictional authority to arbitrators must be "clear and unmistakable"); Tribunal fédérale [TF] [federal tribunal] July 7, 2014, 4A_124/2014 (Switz.) (showing that under Swiss law, "*renonciation indirecte*" by reference to institutional rules does not satisfy requirement of explicit waiver of annulment).

110. *See, e.g.*, Catherine Kessedjian, *Determination and Application of Relevant National and International Law and Rules*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 71, 83 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006) ("it would be easier to avoid looking at the applicable law . . . if it can be done via only the interpretation of the contract"); *cf.* Horacio A. Grigera Naón, *Choice-of-Law Problems in International Commercial Arbitration*, 289 REC. DES COURS 9, 23–38 (2001) (ICC arbitrators will frequently determine "the meaning of the arbitration clause" by "directly resorting to general or autonomous principles of interpretation and general practices concerning ICC arbitration without identifying any applicable national laws or going through any choice-of-law reasoning to identify the law or rules of law governing the interpretation of the arbitral clause," an autonomous interpretation "premised upon interpretation criteria directly identified and found in general principles of contract or commercial law"); Bernard Hanotiau, *Consent to Arbitration: Do We Share a Common Vision?*, 27 ARB. INT'L 539, 552 (2011) ("nowadays" many arbitrators "tend to consider that the determination of the scope of the arbitration clause does not have to be determined in the first place on the basis of a national law" but should instead simply be "founded upon an analysis of facts").

may not, that is, be automatically imputed to the parties themselves, who may have chosen the rules without full awareness of their subtleties.[111] But the purpose of the rules must at the very least be our starting point.[112] By agreeing to arbitrate under a given body of rules, the parties have consented to make them part of their deal; the question then becomes how they could and should have understood the text, given the framework of their common understanding—that is, their linguistic sophistication, their constructive knowledge of the "surrounding" circumstances, the "legislative history," the context, the jurisprudential back story—and then finally, of course, the preferences we are justified in ascribing to them in light of their presumed overriding desire for an efficient proceeding.

It seems unlikely, then, that either the UNCITRAL Rules involved in *BG Group* or those of the ICC ought to be fairly read as a contractual delegation of decision-making authority to arbitrators—and most unlikely that they would be so perceived outside of the U.S.[113] State law ought not to attribute to contracting parties any intention that has been confected out of a mere reference to a body of rules once it is clear that these rules were designed and assumed to serve a completely different purpose.

Imagine that a naïve or inexperienced U.S. judge looks at the ICC rules, reads that in certain circumstances "the Court" may name an arbitrator, and takes the "plain meaning" to be a preference of the parties for the tribunal to be named by the federal court for the Western District of Pennsylvania. This may be local linguistic usage—the settled jurisprudence of the law of the seat may indeed impose it—but really it is just not what the *drafters* of the

111. *See* PAULSSON, *supra* note 69, at 74; George A. Bermann, *Arbitrability Trouble*, 23 AM. REV. INT'L ARB. 367, 377 (2012) (distinguishing between "clear and unmistakable evidence of the institution's intention" and a "demonstrat[ion] that the parties clearly and unmistakably share that intention").

112. *Cf.* Tribunal fédérale 4A_124/2014 ¶ 3.4.1 ("General Conditions" of the FDIC, incorporated into contract, "are admittedly akin to rules of law, which may sometimes justify objective interpretation and taking into consideration the opinion of their author as to the meaning of the words they contain," although of course "the court in charge of applying them will have the last word and provide individualized interpretation appropriate to the circumstances of the case at hand to the extent possible.").

113. The AAA amicus brief claimed that the decision of the Court of Appeals "[p]uts the U.S. at [o]dds with the international arbitration community." Brief of the American Arbitration Association, *supra* note 25, at *18. Often, appeals to "international consensus" border on chutzpah. *Quaere*: How likely is it that an agreement to arbitrate in France under the Rules of UNCITRAL or the ICC would be given the same effect in French courts as in the U.S., foreclosing any review of "jurisdictional" awards?

rules intended this to *mean*.[114]

I feel compelled to note one final, curious twist. The current draft of the ALI's project on the "Restatement of International Commercial Arbitration"—in opposition to an overwhelming U.S. jurisprudence—flatly "rejects" some of the cases mentioned above[115] and refuses to accept that *even the Rules of the AAA* should be read to require deference to "jurisdictional" determinations by arbitral tribunals.[116] This gives short shrift indeed to the drafting history of the AAA Rules, which were surely revised in order to accomplish *something*. There was, I would assume, no pressing need at the time to act merely to ensure that arbitrators not be obliged to close up shop as soon as a jurisdictional objection is made. (What arbitrator has ever felt so compelled?)

My guess is that the Restatement position must be understood as an attempt to bridge—by fiat if necessary—the wide gap between the quite different preconceptions of U.S. and foreign practice. But, of course, it is in the nature of a bridge that traffic may proceed in either direction: the natural tendency of U.S. courts to strive for symmetry between similar bodies of institutional rules, coupled with considerable linguistic naïveté, suggests that in this respect the Restatement may be on the losing side of history.

Here is where U.S. law, in its relentless privileging of party autonomy, seems to have painted itself into a corner. The conclusion we are left with is that whatever the defects in Justice Breyer's craftsmanship, U.S. courts—

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114. *See, e.g.*, Ansys, Inc. v. LMS Int'l, No. 06-1569, 2007 WL 1231830, at *3, (W.D. Pa. Mar. 28, 2007), *sheepishly amended by* No. 06-1569, 2007 WL 1202998 (W.D. Pa. Apr. 23, 2007).

115. *See supra* notes 91–94, 98–100 and accompanying text.

116. RESTATEMENT (THIRD) OF THE U.S. LAW OF INT'L COMMERCIAL ARBITRATION, *supra* note 43, § 4-14 ("de novo review of tribunal's scope rulings").

Argentina's brief in *BG Group* predictably relied on the Restatement position. *See* Brief for Respondent, *supra* note 37, at *18, *42. By contrast, the amicus brief submitted on behalf of concerned "professors and practitioners"—urging reversal on the ground that the UNCITRAL Rules demonstrated the parties' "intent to submit threshold questions to arbitrators" for a final decision—made no mention of the Restatement at all—and, although poignant, the principal author of the brief was the Reporter for the Restatement project. *See* Brief of Professors and Practitioners, *supra* note 24, at *17.

I hope it is understood that nothing I have said anywhere in this piece detracts from my great admiration of the current state of the Restatement product. Treading carefully among all the various interests, attempting to establish some sort of balance between American positive law and what is considered "international best practice," is an impossible task, and it is one that the drafters have undertaken with immense learning and cheerfulness and good sense. I know that the curate, in the celebrated *Punch* cartoon gamely tasting his egg at the bishop's tea, was too eager to assure his host that "parts of it are excellent." But here, that is really the case.

whether by submitting to his default presumption governing arbitral competence or by misreading institutional rules—are likely in any event to wind up in the same place—the inevitable result, an exaggerated deference to arbitral decision making.

II. THE ART OF TREATY INTERPRETATION IN BG GROUP

Andrea K. Bjorklund**

BG Group v. Republic of Argentina marked the U.S. Supreme Court's first encounter with international investment arbitration.[117] The question before the Court was one of treaty interpretation that would dictate the standard of review to be employed by the Court reviewing the award of the investment tribunal, and the majority of the Court initially likened the investment treaty between the United Kingdom and Argentina to "an ordinary contract between private parties."[118] The majority then asked "whether the fact that the document in question was a treaty made a critical difference, and concluded that it did not."[119] Thus, it held that the requirement in the treaty that an investor seek remedies locally in the host State for eighteen months prior to commencing investment arbitration was a matter of admissibility that was entrusted to the arbitrators whose decision must be given deference.[120] The dissent, on the other hand, emphasized the inter-state nature of the treaty and concluded that the eighteen-month local remedies requirement was a condition of Argentina's consent to arbitrate under the treaty; as such, it was a jurisdictional question subject to de novo review.[121]

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117. BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1198 (2014).

118. *Id.* at 1206.

119. *Id*.

120. *Id.* at 1201–02.

121. *Id.* at 1215 (Roberts, C.J., dissenting). In the United States, it is possible for the parties to an arbitration agreement to submit questions of "arbitrability"—including jurisdictional questions—to the arbitrators for decision, in which case the arbitrators' decisions are given substantial deference.

Nowhere in *BG Group* is there any reference to the Vienna Convention on the Law of Treaties (VCLT).[122] U.S. courts, it is fair to say, have little to no interest in the VCLT,[123] whereas it is the starting point for virtually any international tribunal that engages in treaty interpretation.[124] This is curious given that the U.S. government accepts the VCLT as customary international law even though the United States has not ratified it.[125] In fact, in *BG Group*, the U.S. Solicitor General urged the Court to interpret the Argentina–United Kingdom treaty in light of Vienna Convention principles.[126]

International lawyers invoke the Vienna Convention as a mantra.[127] Most could cite Article 31(1) in their sleep: "[A] treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the

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First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995).

122. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1115 U.N.T.S. 331 [hereinafter VCLT].

123. A Lexis search in the database of all federal and state cases resulted in 143 cases that even mention the Vienna Convention. Four of those are U.S. Supreme Court cases. One of those references cited the VCLT for its definition of treaty. Weinberg v. Rossi, 456 U.S. 25, 29 & n.5 (1982). A dissenting opinion referred to it for the principle that parties may not invoke their domestic laws for failing to conform to their treaty obligations. *See* Sanchez-Llamas v. Johnson, 548 U.S. 331, 391 (2006) (Breyer, J., dissenting). Dissenting opinions in two cases referred to it for principles of interpretation. Abbot v. Abbot, 560 U.S. 1, 40 & n.11 (2010) (Stevens, J., dissenting); Sale v. Haitian Ctrs. Council, 509 U.S. 155, 191 (1993) (Blackmun, J., dissenting).

124. *See* WAIBEL, *supra* note 76, at 6.

125. *See, e.g.*, Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 298 (1988). Despite the Senate's reaction to the Vienna Convention, the executive branch has utilized the Convention provisions on numerous occasions. Robert Dalton, Assistant Legal Adviser for the Treaty Affairs of the Department of State, explained that "[e]ven though the Vienna Convention is not in force for the United States, the Office of the Legal Adviser takes into account many of its provisions in dealing with day-to-day treaty problems." *See generally* Robert E. Dalton, *The Vienna Convention on the Law of Treaties: Consequences for the United States*, 78 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 276 (1984). The rationale for the application of the Convention is based on its representation of existing customary international law. The Secretary of State's letter of submittal described the Vienna Convention to be "generally recognized as the authoritative guide to current treaty law and practice." S. EXEC. DOC. NO. 65-118, at 1 (1971). A similar view was expressed by the U.S. government on the international plane. In a written statement to the International Court of Justice in connection with the advisory proceedings relating to Namibia, the United States pronounced a general evaluation of the Vienna Convention, calling it "a primary source of reference for determining what are the customary principles of treaty law." Written Statements of the Government of the United States of America, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1970 I.C.J. Pleading 843, 855 (Nov. 12, 1970).

126. Brief for the United States as Amicus Curiae, *supra* note 27, at *17 n.4.

127. *See infra* note 129 and accompanying text.

terms of the treaty in their context and in the light of its object and purpose."[128] Yet one has to ask whether it is really the talisman that it seems to be. It can be used as boilerplate—the VCLT's directive on treaty interpretation is included in virtually every World Trade Organization panel and appellate body decision—but paying lip service to the language does not mean it is actually applied.[129] Even if it is applied, it is not necessarily the case that its directives differ markedly from contract or statutory directives regarding interpretation.[130] Furthermore, the identity of the interpreters, rather than the rules of interpretation themselves, might have considerable and even decisive influence on the interpretation exercise.[131]

When the International Law Commission was meeting to devise the treaty interpretation principles that would be included in the Vienna Convention, it submitted a report remarking: "The interpretation of documents is to some extent an art, not an exact science."[132] The artistic nature of treaty interpretation is well illustrated not only by the Supreme Court in *BG Group*, but also by the multiple international tribunals that have been called upon to interpret the same or similar clauses in other Argentine treaties, if "artistic" implies variable approaches and outcomes.[133]

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128. VCLT, *supra* note 122, at art. 31(1).

129. *See* Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21 EUR. J. INT'L L. 605, 621 (2010); *see also* W. Michael Reisman & Mahnoush H. Arsanjani, *Interpreting Treaties for the Benefit of Third Parties: The "*Salvors' *Doctrine" and the Use of Legislative History in Investment Treaties*, 104 AM. J. INT'L L. 597, 598–99 (2010) ("[The provisions of the Vienna Convention] have become something of a *clause de style* in international judgments and arbitral awards; whether routinely and briefly referred to or solemnly reproduced verbatim, they are not always systematically applied."); Michael Waibel, *International Investment Law and Treaty Interpretation*, *in* INTERNATIONAL INVESTMENT LAW AND GENERAL INTERNATIONAL LAW: FROM CLINICAL ISOLATION TO SYSTEMIC INTEGRATION 29 (Reiner Hoffmann & Christian Tams eds., 2011).

130. *See generally* KENNETH J. KEITH, INTERPRETING TREATIES, STATUTES AND CONTRACTS (2009), http://legal.un.org/avl/pdf/ls/Keith_article.pdf. *See also supra* note 76 (Professor Rau noting that, as an erstwhile contracts professor, he thinks "everything is already present in the familiar corpus of private law" and expressing his skepticism that the VCLT is the key to the "murky mystery of proper treaty construction").

131. Michael Waibel, *Interpretive Communities in International Law*, *in* INTERPRETATION IN INTERNATIONAL LAW 147, 147–48 (A. Bianchi, D. Peat & M. Windsor eds., 2015).

132. *Reports of the International Law Commission*, [1966] 2 Y.B. Int'l L. Comm'n 169, 218, U.N. Doc. A/CN.4/SER. A/1966.

133. *See, e.g.*, SAM LUTTRELL, BIAS CHALLENGES IN INTERNATIONAL COMMERCIAL ARBITRATION: THE NEED FOR A "REAL DANGER" TEST 57–58 (2009) (discussing the United Kingdom's treatment of an Argentine treaty).

This Part will first discuss in more detail the decision in *BG Group*. Second, it will lay out the interpretive provisions of the Vienna Convention on the Law of Treaties and explore and offer a few observations about where these might differ from contract interpretation, even if these are differences of degree rather than of kind. It will also introduce the idea of interpretive communities. Third, this Part will discuss how the confluence of interpretive principles and interpretive communities affected the process of decision making in *BG Group*.

A. The BG Group *Decision*

The investment treaty arbitration in *BG Group* was based on the Argentina–United Kingdom bilateral investment treaty (BIT), which contains a provision requiring an investor to seek local remedies for eighteen months prior to commencing investment arbitration under the auspices of the BIT.[134] The investor did not, in fact, seek local remedies but went immediately to arbitration. There might have been good reason for this; BG Group sought relief for measures that Argentina took in response to its financial crisis, but Argentina required an automatic stay of all cases in Argentine courts that challenged Argentina's emergency measures.[135] Furthermore, Argentina precluded licensees who sought judicial redress from participating in the license renegotiation process.[136] While technically it seems possible that BG Group could have formally filed a claim in Argentine courts, which would not have been heard, and then sought redress in arbitration eighteen months later, Argentina might well have challenged the jurisdiction of the tribunal on the grounds that the eighteen-month period could only begin running once the court action itself had re-commenced.[137]

Argentina objected to the jurisdiction of the tribunal on the grounds that BG Group had failed to seek local remedies and thus had failed to trigger a condition necessary to Argentina's consent to arbitration under the treaty, but the BIT tribunal rejected its claim.

> Where recourse to the domestic judiciary is unilaterally prevented

134. U.K.-Arg. BIT, *supra* note 14, at art. 8(2).
135. *See* BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1204–05 (2014).
136. *See id.* at 1212.
137. *Id.* at 1205.

> or hindered by the host State, any such interpretation [that local remedies prevented access to arbitration] would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, 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.[138]

The UNCITRAL tribunal awarded $185 million in damages to Argentina, and Argentina sought to have the award set aside in U.S. District Court for the District of Columbia, the place of arbitration.[139] The U.S. District Court dismissed Argentina's petition, but the D.C. Circuit reversed that decision on appeal.[140] The Federal Arbitration Act provides limited grounds for setting aside an award; one of them is that "the arbitrators [have] exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[141] Whether a tribunal has exceeded its jurisdiction is a fairly common question in set-aside cases, as the arbitral law in most jurisdictions permits set aside on the basis of excess of authority.[142] Yet answering the question requires deciding whether the arbitrators' decision was one of jurisdiction—i.e. did the parties' consent to arbitration hinge on a condition being fulfilled—or one of admissibility. Questions of admissibility are presumptively for the arbitrator to decide, and a domestic court will not revisit the arbitrators' decision in a set-aside proceeding.[143] Questions of jurisdiction, however, involve the very basis for the arbitrators' exercise of authority and will

138. BG Group, PLC v. Republic of Argentina, Final Award, ¶ 147 (UNCITRAL Arbitral Tribunal, 2007).

139. *See* Republic of Argentina v. BG Grp. PLC, 715 F. Supp. 2d 108, 112 (D.D.C. 2010), *rev'd*, 665 F.3d 1363 (D.C. Cir. 2012), *overruled by* 134 S. Ct. 1198 (2014).

140. *See id.*

141. Federal Arbitration Act, 9 U.S.C. § 10(a)(4) (2012).

142. *See, e.g.*, U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, at art. 34(2)(iii), U.N. Sales No. E.08.V.4 (2006) ("An arbitral award may be set aside . . . only if . . . the award deals with a dispute 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 . . . ."). *See generally* JULIAN LEW, LOUKAS MISTELIS & STEFAN KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 533 (2003).

143. *See* Paulsson, *supra* note 9, at 617.

ordinarily be revisited by the reviewing court de novo.[144] Thus, in this case the question was whether the eighteen-month local remedies requirement was a matter of jurisdiction or of admissibility.[145]

In the United States, however, there is a further, complicating question. The United States permits the parties to an arbitral agreement to entrust the jurisdictional decision—the question of arbitrability—to the arbitrators: if the parties have done so, then the reviewing court will give deference to the arbitrators' determination about their own jurisdiction.[146]

A great deal of the D.C. Circuit's decision revolved around this second question. The court asked whether the question of "arbitrability" had been entrusted to the arbitrators, without first ascertaining whether this particular question should be viewed as one of admissibility or jurisdiction (which would establish presumptions about what the parties intended).[147] The court concluded that it had not been entrusted to the arbitrators and remanded to the district court.[148]

The Supreme Court granted BG Group's petition for certiorari and reversed.[149] The initial question answered by the Court was whether the matter in question was one of admissibility, in which case it would be viewed as entrusted to the arbitrators for their decision, or whether it was jurisdictional, in which case the presumption would be that the question was

144. *Id.*

145. The answer to this question is not clear-cut. It has arisen in several cases involving Argentine treaties with the eighteen-month local remedies requirement in them, and arbitral tribunals have themselves been split on this question. *See, e.g.*, Philip Morris Brands SARL v. Oriental Republic of Arg., ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013); Teniver S.A., Transportes de Cercanias S.A. and Autobuses Urbanos del Sur S.A. v. Republic of Argentina, ICSID Case No. ARB/09/1, Decision on Jurisdiction, ¶ 135 (Dec. 21, 2012); ICS Inspection & Control Servs. Ltd. v. Republic of Argentina, PCA Case No. 2010-9 (Perm. Ct. Arb. 2012) (decision on jurisdiction); TSA Spectrum de Arg. SA v. Republic of Argentina, ICSID Case No. ARB/05/5, Award, ¶ 112 (Dec. 19, 2008).

146. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995); *see also supra* pp. 104–05, 112. *See generally* Rau, *supra* note 1, at 93.

147. While the D.C. Circuit presented the "who decides" question as preceding that of whether the condition precedent was a jurisdictional limitation, it is difficult not to conclude that assumptions about the latter colored its decision as to the former and affected its determination as to the "intent of the parties." In other words, the court's conclusion that the eighteen-month period was a jurisdictional matter meant that it viewed it as unlikely the parties would have assigned final authority over its import to the arbitral tribunal. Bjorklund, *supra* note 74, at 6–8.

148. Republic of Argentina v. BG Grp. PLC, 665 F.3d 1363, 1373 (D.C. Cir. 2012), *overruled by* 134 S. Ct. 1198 (2014).

149. BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1213 (2014).

for the court unless the parties had agreed otherwise.[150] Justice Breyer likened the question to those posed by U.S. arbitration cases such as *Howsam v. Dean Witter Reynolds, Inc.* and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp*.[151]

The Court went on to state: "Were [the treaty an ordinary contract], we conclude, the matter would be for the arbitrators. We then ask whether the fact that the document in question is a treaty makes a critical difference. We conclude that it does not."[152] Citing U.S. cases on principles of treaty interpretation, the Court could find nothing in the treaty that would require a contrary conclusion.[153] The Court interpreted the treaty in light of U.S. arbitration law and applied the same presumptions it would apply to an ordinary contract to arbitrate.[154] So, because the court viewed the eighteen-month local remedies requirement as a procedural step similar to the requirements in *Howsam*, the Court viewed the question as one of admissibility entrusted to the arbitrators for determination.[155]

The dissent, on the other hand, emphasized that a treaty is different from a contract.[156] Indeed, it chastised the majority for its failure to appreciate the distinction: "It should come as no surprise that, after starting down the wrong road, the majority ends up at the wrong place."[157] Yet notwithstanding its rhetoric, the dissent's focus seemed to be almost entirely on the subsidiary contract (or lack thereof)—the agreement between BG Group and Argentina about arbitrating the actual dispute—with a great deal of emphasis on Argentina's sovereign nature and the likelihood that Argentina would not have agreed to arbitrate unless the investor had sought relief in local courts for eighteen months.[158] The dissent emphasized repeatedly the intent of the parties and held that Argentina's intent was that there would be no agreement to arbitrate absent resort to local courts for

150. *Id*. at 1203–04.

151. *Id.* at 1202, 1207–08; *see also* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002); Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

152. *BG Grp.*, 134 S. Ct. at 1209.

153. *Id.* at 1208–09 (citing Air Fr. v. Saks, 470 U.S. 392, 399 (1985); Sullivan v. Kidd, 254 U.S. 433, 439 (1921); Wright v. Henkel, 190 U.S. 40, 56 (1903)).

154. *Id.* at 1209.

155. *Id.* at 1207–08.

156. *Id.* at 1215 (Roberts, C.J., dissenting).

157. *Id.*

158. *Id.* at 1216–20.

eighteen months.[159] In the course of its discussion, the dissent ignored the fact that the treaty was concluded between *two* sovereign states for the benefit of their investors and for the promotion of their investments and focused almost exclusively on Argentina's intent, not on the shared intent of Argentina and the United Kingdom.

Once the dissent concluded that the question of the eighteen-month local remedies requirement was in fact an issue of jurisdiction, it then concluded that a court's review of the decision ought to be de novo because the question the tribunal was answering went to whether there was any kind of agreement to arbitrate whatsoever,[160] as opposed to the *Howsam* questions of whether the parties are "bound by a given arbitration clause" or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy."[161] Here again, the dissent focused on the lack of a completed agreement to arbitrate between BG Group and Argentina based on BG Group's failure to satisfy the condition of consent.[162]

The dissent did not stop there. It referred to the possibility (with a glancing reference to the local remedies rule)[163] that should resort to local remedies be futile, it might be possible to conclude that there was an agreement to arbitrate. Here the dissent reverted to a discussion of municipal law contract principles to conclude "that an offeree's failure to comply with an essential condition of the unilateral offer 'will not bar an action, if failure to comply with the condition is due to the offeror's own fault.'"[164] Thus, the dissent would have remanded the case for findings on that question.

Justice Sotomayor, in concurrence, took an intermediate position. She concluded that nothing in this particular treaty indicated that the eighteen-month period was a condition of consent, yet noted that the language and structure of other treaties might lead to a different conclusion should those treaties be subject to interpretation.[165]

159. *Id.* at 1219.
160. *Id.* at 1216, 1221.
161. *Id.* at 1206 (majority opinion).
162. *Id.* at 1222 (Roberts, C.J., dissenting).
163. *Id.* at 1224.
164. *Id.* (citing 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 5:14 (4th ed. 2015)).
165. *Id*. at 1213–15 (Sotomayor, J., concurring).

B. The Vienna Convention on the Law of Treaties and Interpretive Communities

For international lawyers, a discussion of treaty interpretation commences with the Vienna Convention on the Law of Treaties. The Vienna Convention was concluded under the auspices of the International Law Commission in 1969.[166] It entered into force in 1980.[167] Its rules on interpretation are widely accepted as statements of customary international law.[168] Those rules do not exist in a vacuum; a decision maker or decision makers apply them. Those decision makers may affect the interpretive endeavor either by the rules of interpretation they apply, or by their background training, assumptions, experiences, and the like—what one might call their membership in an interpretive community or communities—or both.

1. The Interpretive Principles of the Vienna Convention

The basic interpretation provisions are found in Articles 31 and 32.[169] Article 31 provides that treaties must "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."[170] This directive has three principles–four if you add the admonition to interpret the provisions "in good faith," which is not unimportant.[171]

First, the direction is that the interpretation be objective and focus on the "ordinary meaning" of the terms.[172] Second, the direction is that the interpretation occur in context.[173] Context is defined to encompass not only the remainder of the treaty, but also the preamble and annexes, as well as "[a]ny agreement relating to the treaty which was made between all of the parties in connexion" with the treaty's conclusion, or "[a]ny instrument

166. IAN MCTAGGART SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 1 (2d ed. 1984).
167. *Id*. at ix.
168. *See, e.g.*, Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), Judgment, 1991 ICJ Rep. 53, 70 (Nov. 12).
169. VCLT, *supra* note 122, at arts. 31–32.
170. *Id.* at art. 31(1).
171. SINCLAIR, *supra* note 166, at 119–20.
172. VCLT, *supra* note 122, at art. 31(1).
173. *Id.* at art. 31(2).

which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties."[174] Third, the direction is that the interpretation be teleological—that it occur in light of the "object and purpose" of the treaty.[175] That intent is to be inferred from the text of the treaty, not from unilateral statements made by parties to the treaty.[176] As if this were not enough, this process is supposed to occur in a "crucible"—all three are to be considered simultaneously, and none of them are to be given precedence over the others.[177]

The rest of Article 31 acknowledges the law-making role of the State parties to the treaty in terms of their ability to engage in subsequent agreements about the treaty, subsequent practice about the treaty, and that the treaty should be interpreted in light of international law more generally.[178]

Could you find principles similar to those found in the VCLT in contract interpretation? Absolutely. The objective meaning of a contract has become paramount.[179] A contractual provision should be interpreted in order to give

174. *Id.*

175. *Id.* at art. 31(1).

176. Indeed, this result was part of the battle between professors during the Vienna Convention's negotiation. Herbert W. Briggs, *The Interpretation of Agreements and World Public Order—Principles of Content and Procedure*, 53 CORNELL L. REV. 543 (1968) (reviewing MYRES S. MCDOUGAL, HAROLD D. LASSWELL & JAMES C. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER PRINCIPLES OF CONTENT AND PROCEDURE (1967)).

177. *See Reports of the Commission to the General Assembly*, [1966] 2 Y.B. INT'L L. COMM'N 169, 219–20, U.N. Doc. A/CN.4/SER. A/1966/Add. 1 ("Having regard to certain observations in the comments of Governments the Commission considered it desirable to underline its concept of the relation between the various elements of interpretation in [article 31] and the relation between these elements . . . . Those observations appeared to indicate a possible fear that the successive paragraphs of [article 31] might be taken as laying down a hierarchical order for the application of the various elements of interpretation in the article. The Commission, by heading the article 'General rule of interpretation' in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, article 27 is entitled 'General *rule* of interpretation' in the singular, not 'General *rules*' in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule.").

178. *See generally* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179 (2010).

179. CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 41 (7th ed. 2012) (rejecting the subjective approach); *see also*

other provisions in the agreement meaning.[180] It should be interpreted in light of the circumstances in which it was made.[181] The contract might be interpreted in light of trade usage and the expectations of those versed in the field, thus broadening the context.[182] Relational contract theory even suggests that good faith can be considered.[183] Certainly there are underlying assumptions about the commercial goals likely driving each of the parties and that their intent that the contract be binding.[184]

One of the key features of the VCLT is that no one of the three principles has priority—they are supposed to be applied holistically. In contract interpretation, there is no overarching directive that each of those principles be applied in each case.

2. Interpretive Communities

The U.S. Supreme Court justices' indifference to the Vienna Convention on the Law of Treaties and its overall approach to international law might be

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RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 40, § 21 (rejecting the subjective approach). One still can find a distressing number of references to the "meeting of the minds" in determining whether or not a contract has actually been formed. KNAPP ET AL., *supra*, at 33.

180. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 40, § 202(2); *see also id.* § 203(a) ("In the interpretation of a promise or agreement or a term thereof . . . an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.").

181. *Id.* § 202(1) ("Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.").

182. *Id.* § 222(3) ("Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they known or have reason to know gives meaning to or supplements or qualifies their agreement.").

183. *See* Ian R. MacNeil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neo-Classical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 890 n.112 (1978). For a discussion of relational contract theory and treaty interpretation, see Jared Wessel, *Relational Contract Theory and Treaty Interpretation: End-Game Treaties v. Dynamic Obligations*, 60 N.Y.U. ANN. SURV. AM. L. 149 (2004); Curtis Mahoney, Note, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 YALE L.J. 824 (2007).

184. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 40, § 203 ("The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188."); *see* Brainerd Currie, *Ehrenzqeig and the Statute of Frauds: An Inquiry into the "Rule of Validation,"* 18 OK. L. REV. 243, 252–63 (1965) (discussion on "rule of validation"); *cf.* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 48 (2013).

attributed to the "epistemic community"—one of the most famous in the world—formed by those justices.[185] An epistemic community is "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area."[186] An individual's membership in an epistemic community might affect the interpretive process he or she undertakes.[187] An "interpretive community" is more specific than an epistemic community and refers to those engaged in the process of interpretation.[188] The concept of the interpretive community is usually traced to Stanley Fish and focuses "not so much [on] a group of individuals who share . . . a point of view, but a point of view or way of organizing experience that share[s] individuals."[189]

The idea that the process of interpretation is affected by those who are doing the interpreting, and that those doing the interpreting influence each other, has not escaped international law scholars.[190] As Michael Waibel says: "The meaning of international law norms hinges on background principles shared by interpreters who form part of one or several interpretive communities."[191] Thus, those "who routinely appl[y] the VCLT could be

185. *See generally* Waibel, *supra* note 131, at 149 (defining epistemic community). Scholars argue over the identity of particular communities, and whether certain groups (such as federal judges) truly form part of an interpretive community. *Id.* at 152.

186. *Id.* at 149 (quoting Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992)).

187. *See* Andrea Bianchi, *Epistemic Communities*, *in* FUNDAMENTAL CONCEPTS FOR INTERNATIONAL LAW (Jean d'Aspremont & Sahib Singh eds., forthcoming 2016) ("On an approach to interpretation where meaning is presented as primarily a social construct, which is produced by a complex web of social relations, including the context, the conventional use of words in any given society as well as the cognitive frames that influence perception and determine outcomes, the role of interpretive communities and the strategies deployed by them to attribute meaning is crucial."); Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 MICH. J. INT'L L. 371, 371–72 (1991).

188. Waibel, *supra* note 131, at 151 ("[E]pistemic community is a more generic term [than interpretive community].").

189. *Id.* at 150 (quoting STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 141 (1989)). Jutta Brunné and Stephen Toope have discussed "communities of practice" that explain the formation of shared understandings among international lawyers. *See generally* JUTTA BRUNNÉE & STEPHEN J. TOOPE, LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT (2010).

190. Michael Waibel, *Demystifying the Art of Interpretation*, 22 EUR. J. INT'L L. 571, 586 (2011). *See generally* Waibel, *supra* note 131, at 147 ("Any account of interpretation is incomplete without the sociological dimension of interpretive communities.").

191. Waibel, *supra* note 131, at 147; *see also* Oscar Schachter, *Metaphors and Realism in International Law*, 96 AM. SOC'Y INT'L L. PROC. 268, 269 (2002) ("The construct of interpretive

regarded as forming part of the interpretive community of international lawyers."[192] Yet "[n]o single interpretive community exists in international law, if it ever did."[193]

A member of an interpretive community might be a member of more than one epistemic community and, indeed, more than one interpretive community.[194] In fact, one of the challenges in delineating an interpretive community is that almost everyone belongs to more than one. Above, I have described the U.S. Supreme Court as an interpretive community, but each of its members is part of other interpretive communities as well. The same would hold true for international arbitrators and international judges.

C. National Courts and International Law

It is easy to look at the two primary *BG Group* decisions and be critical of both the majority and the dissent. Interpretation in any context is difficult, and approaches to interpretation in different categories of instruments, such as treaties, contracts, and statutes, overlap in significant aspects, even if that overlap is incomplete.[195] Lord McNair said: "There is no part of the law of treaties which the text-writer approaches with more trepidation than the question of interpretation."[196] Interpretive principles do not always show the way as clearly as one might hope. Karl Llewellyn compiled "opposing canons" of statutory interpretation, which he described as a "technical framework for maneuver."[197]

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community has been invoked as an alternative to the 'invisible college of international law' . . . . Interpretive communities have also been identified as a significant element in specialized areas. Historically, the leading maritime powers have left their imprint on the law of the sea. Even more visible today is the 'community' of the permanent members of the UN Security Council, who collectively are continuously engaged in construing the UN Charter on issues of security.").

192. Waibel, *supra* note 131, at 150; *cf.* Bianchi, *supra* note 187 (noting the influence of the epistemic community of international lawyers in fixing the terms of the discourse about international law and citing the broad agreement that Article 38 of the Statute of the International Court of Justice as establishing the sources of international law, whereas in fact Article 38 is simply a direction to the International Court of Justice as to the sources it might apply when deciding a case).

193. Waibel, *supra* note 131, at 151.

194. *Id.*

195. *See* KEITH, *supra* note 130, at 2.

196. ARNOLD MCNAIR, THE LAW OF TREATIES 364 (1961).

197. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

Thus, whether one is interpreting a treaty, a contract, or a statute,[198] interpretation is more of an art than a science.[199] Analogizing treaties to contracts is natural; "the legal identity of treaties and contracts is almost universally assumed by writers upon International Law . . . . [I]n matter of form, it is undeniably true; the nearest approach in private law to the treaty in point of form is the contract,"[200] yet inappropriate in some cases because not all treaties are similar to contracts. In 1930, Lord McNair wrote an influential article identifying two sorts of treaties: (1) those that are contractual in nature in that they resolve a single issue in dispute between the parties and (2) those that are legislative in nature in that they set out the contours of a regime whose interstices will be filled out later.[201] More recently Lea Brilmayer has equated human rights treaties to pledges–binding unilateral commitments.[202] Others have referred to a "treaty regime"—the development, in part by arbitral tribunals, of a unique ecosystem of investment law.[203]

By approaching the treaty in the first instance as if it were a contract, the majority essentially makes it so. It interpreted the treaty in light of the U.S. Supreme Court's approach to commercial arbitral agreements.[204] Once it had equated the eighteen-month local remedies clause to the procedural hurdles found in some domestic U.S. arbitration agreements, it then

198. I do not mean to suggest that these are the only three areas in which interpretation is at issue, but they are the three where textual meaning is sometimes elusive and often an object of dispute. For a short exposition of interpretation in international law generally, see Duncan B. Hollis, *Interpretation and International Law*, *in* FUNDAMENTAL CONCEPTS FOR INTERNATIONAL LAW: THE CONSTRUCTION OF A DISCIPLINE (Jean d'Aspremont & Sahib Singh eds., 2015).

199. "[T]he rules and principles [of interpretation] are elusive in the extreme. Certainly the interpretation of treaties is an art rather than a science, though it is part of the art that it should have the appearance of a science." Robert Y. Jennings, *General Course on Principles of International Law*, 121 RECUEIL DES COURS 323, 544 (1967).

200. Arnold D. McNair, *The Functions and Differing Legal Character of Treaties*, 11 BRIT. Y.B. INT'L L. 100, 106 (1930).

201. *Id.* at 105–16.

202. Lea Brilmayer, *From 'Contract' to 'Pledge': The Structure of International Human Rights Agreements*, 77 BRIT. Y.B. INT'L L. 163, 166 (2006).

203. Jeswald W. Salacuse, *The Emerging Global Regime for Investment*, 51 HARV. INT'L L.J. 427, 431 (2010). No less an authority than Gary Born has suggested the desirability of developing specialized rules of interpretation for investment treaties, though he is not sanguine about the possibility of that happening any time soon. Gary Born, *Should Investment Treaties Have Their Own Rules of Interpretation?,* KLUWER ARB. BLOG (Feb. 3, 2015), http://kluwerarbitrationblog.com/blog/2015/02/03/should-inverstment-treaties-have-their-own-rules-of-interpretation/.

204. BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1207–08 (2014).

established a presumption that the clause deserved the same treatment.[205] That presumption could, perhaps, be overcome if the treaty language specifically gainsaid it, but in this particular instance the treaty's language was equivocal or even non-existent, which is not surprising given that the treaty drafters had no reason to think they should insert language to affect the interpretation in light of U.S. arbitral law one way or the other.

From a treaty interpretation viewpoint this approach seems backwards, to say the least. The starting point in the interpretation of what the treaty means would be the language of the treaty itself.

The dissent understood this, and indeed, the dissent started with the language of the treaty.[206] Yet the dissent's approach to treaty interpretation departed from the VCLT approach in significant ways. The most prominent feature of this departure was the emphasis on the enormity of a State's consent to waive sovereign immunity in order that disputes with it can be submitted to arbitration.[207] This rhetoric recalls very much the doctrine of restrictive interpretation, under which states argued that treaty provisions imposing limitations to their sovereignty should be read restrictively.[208] But the doctrine of restrictive interpretation has been discredited.[209] According to the VCLT, treaties are to be interpreted according their terms. One might, of course, view the dissent as referring to the "object and purpose" of the treaty by regarding it as unlikely that the State parties to the treaty would have wanted to subject themselves to international arbitration without investors' first "having a go" in local courts. Yet this interpretation fails to consider the protective purpose of the treaty—the goal of affording protections to foreign investors, which they can vindicate in international arbitration.[210] In addition, it ignores the fact that another State party was

205. *Id.* at 1207.

206. *Id.* at 1215 (Roberts, C.J., dissenting).

207. *Id.* at 1216.

208. HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION) 179 (1927). Judge Lauterpacht, writing in 1927, noted that at most the doctrine of restrictive interpretation could be a subsidiary method of interpretation, to be employed if other methods failed. *Id*. at 180.

209. See RICHARD GARDINER, TREATY INTERPRETATION 405–07 (2d ed. 2015).

210. For a more sympathetic view of the dissent, see Anthea Roberts & Christina Trahanas, *Judicial Review of Investment Treaty Awards:* BG Group v. Argentina, 108 AM. J. INT'L L. 750 (2014). Professor Rau has suggested that a focus on the protective purpose of the treaty "seems tendentious and calculated to lead ineluctably to a decision in favor of the claimant." *See supra* note 77. Perhaps this is true, and I do not posit that this is the treaty's only goal, but it was certainly one

involved in the negotiation of the treaty itself but was not party to the arbitral agreement. As Sir Franklin Berman said:

> Every case of the interpretation of a BIT by an ICSID Tribunal shares this unusual feature, namely that the Tribunal has to find the meaning of a bilateral instrument, one of the Parties to which (the Respondent) will be a party before the Tribunal, while the other Treaty Party by definition will not. Or, to put the matter the other way round, one of the parties to the arbitration before the Tribunal (but not the other) will have been a stranger to the treaty negotiation . . . . That circumstance surely imposes a particular duty of caution on the Tribunal: it can clearly not discount assertions put forward in argument by the Respondent as to the intentions behind the BIT and its negotiation (since that is authentic information which may be of importance), but it must at the same time treat them with all due caution, in the interests of its overriding duty to treat the parties to the arbitration on a basis of complete equality (since it is also possible that assertions by the Respondent may be incomplete, misleading or even self-serving). In other words, it must be very rarely indeed that an ICSID Tribunal, confronted with a disputed issue of interpretation of a BIT, will accept at face value the assertions of the Respondent as to its meaning without some sufficient objective evidence to back them up.[211]

Note further that there is no discussion of "intent" as such in the VCLT. In *BG Group*, both the majority and the dissent raised the question of intent on numerous occasions. The Vienna Convention on the Law of Treaties deliberately attempted to emphasize the objective nature of the agreement—intent is relevant only as reflected in the treaty (or in some of the

of them. Ignoring the fact that the United Kingdom, as a capital-exporting country, was likely seeking to protect its investors in Argentina while focusing on Argentina's assertion that requiring recourse to local remedies for a period of time was a condition of its consent seems equally likely to lead to an outcome inevitably favorable to the respondent.

211. Industra Nacional de Alimentos, S.A. v. The Republic of Peru, ICSID Case No. ARB/03/4, Decision on Annulment, ¶ 9 (Sept. 5, 2007) (Franklin Berman, dissenting). Sir Franklin Berman was formerly the Legal Adviser in the United Kingdom's Foreign and Commonwealth Office.

accompanying context), but not in the "minds" of the State parties to the treaty.[212] This was important because of the propensity of States to argue later that treaties did not mean what they seemed to mean because the states had not "intended" that meaning.[213] So intent is supposed to flow from the treaty, including from its object and purpose, but not from what States argue later about what their intent was (unless the two States actually agree in the form of a subsequent agreement).[214]

Another consequence of the majority's approach is that it tends to equate—or even conflate—the two agreements at issue. The first is the treaty and its provisions. The second is the specific agreement to arbitrate—the contract—whose content is informed by the terms of the treaty.[215]

The treaty itself contains no decision about the delegation of authority to an arbitral tribunal to decide matters of arbitrability. Indeed, it would be absurd to construe a treaty between two sovereign governments, neither of which is the United States, in light of a concept peculiar to U.S. arbitration law, particularly when there is nothing in the treaty that indicates any preference for the place of arbitration to be a U.S. venue and when one of the options is ICSID Arbitration.[216] Treaty interpretation vis-à-vis its approach to arbitrability should not vary depending on the venue chosen for the arbitration. The dissent in *BG Group* suggests that the treaty's structure separates the question of the eighteen-month remedies period from other arbitrability questions and implies that that difference might lead to a different answer as to the latter questions.[217] Yet there is no reason to assume that the treaty's drafters contemplated this question at all.[218]

The place where U.S. arbitration law regarding arbitrability might play a

212. *See* VCLT, *supra* note 122, at art. 18.

213. "[T]he text must be presumed to be the authentic expression of the intentions of the parties; and that [is], in consequence, the starting point of interpretation is the elucidation of the meaning of the text, not an investigation ab initio into the intentions of the parties." *Reports of the Commission to the General Assembly*, *supra* note 177, at 220.

214. *See* VCLT, *supra* note 122, art. 31(3)(a), (4).

215. *See supra* pp. 118–20 (discussing the potential usefulness of the "third-party beneficiary" analogy in assessing the existence of a contract between the State and the investor).

216. *See* George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1, 8 (2012). ICSID Convention arbitration is "a-national" and the *lex arbitri* is the Convention itself and the associated arbitration rules; there is no "place" of arbitration.

217. BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1217–18 (2014) (Roberts, C.J., dissenting).

218. In fact, the treaty was concluded in 1991, four years before the *First Options* decision.

role would be in the subsidiary contract to arbitrate formed between Argentina and the U.K. investor. Did those entities, by selecting Washington, D.C. as the place of arbitration, effectively make a determination that they were referring "jurisdictional" decisions to the arbitrators? Simply choosing a U.S. venue as the place of arbitration is insufficient to confer that authority on the arbitrators.[219] Yet nothing in the treaty would seem to preclude the disputing parties from making that determination should they have wished to do so in their subsidiary agreement. Yet there is no evidence that they did so here.[220]

Moreover, Professor Rau reminds us that the core question is the parties' "presumed intention to act efficiently in the interest of maximizing mutual gains."[221] Through that lens, the eighteen-month local remedies period appears most likely to have been a compromise between an exhaustion of local remedies requirement and the possibility of immediate recourse to arbitration. If one accepts that the treaty parties did not confer final authority as to arbitrability on the arbitrators, and that the parties to the arbitration did not do so either, one is still left with the question of whether decisions regarding the condition precedent are jurisdictional (and therefore subject to de novo review) or are matters of admissibility (and therefore within the purview of the arbitrators).

Distinguishing between jurisdiction and admissibility is difficult. Objections going to the existence and validity of the agreement to arbitrate are generally jurisdictional; many of those that might be described as conditions precedent to arbitration are ordinarily treated as matters of

219. A court "should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995). Had the parties agreed to arbitrate under the ICDR Rules of the AAA, the answer might be different. Those rules were explicitly amended to take advantage of the invitation extended in *First Options* to confer the authority to answer questions about arbitrability on the arbitrators. This "bootstrapping" raises discomfort among some commentators and has been rejected by the Restatement (Third) of the U.S. Law on International Commercial Arbitration as insufficiently evidencing a clear intent to confer the final say about arbitrability on the arbitrators. *See* RESTATEMENT (THIRD) OF THE U.S. LAW ON INT'L COMMERCIAL ARBITRATION, *supra* note 43, § 4-14 & reporters' note e. For criticism, see *supra* pp. 166–67.

220. *See supra* pp. 157–65 (noting unlikeliness of parties' agreement to arbitrate under the UNCTRAL arbitration rules as encompassing a conferral of authority on the tribunal as to matters related to arbitrability and especially that the UNCITRAL rules did not contain any specific waiver provision).

221. *See supra* p. 107.

admissibility.[222] Yet almost any objection can be characterized as going to the consent of the parties to arbitrate, which is precisely what Argentina did here. For example, the argument "I consented only to arbitrate claims that had been the object of a bona fide, structured attempt at settlement" might well be an argument going to jurisdiction if the validity of the agreement is deemed to depend on that condition having been met.[223] This is what Jan Paulsson terms the "twilight zone," the difficult cases in which one is "hostage to whatever presumptions individual decision-makers may wish to make about unexpressed intentions."[224]

Professor Rau has suggested that whether the challenge negates consent to the forum itself, or whether it would merely extinguish the claim regardless of the forum in which it is sought,[225] is less helpful in the treaty context. First, as noted above, the challenge negates an agreement to arbitrate *for the time being*; it does not entirely negate the existence of an agreement to arbitrate.[226] Second, challenges to jurisdiction assume there is an alternate forum in which the case would otherwise be brought. Investment arbitration is different in that the claim in front of the arbitral tribunal will be based on the investment treaty, while the claim in Argentine courts would almost certainly be based on municipal law. In addition, even if a court were to decide the case within the eighteen-month period, that decision itself can be challenged in treaty arbitration.[227] Taken together, these provisions suggest that the objection goes to the claim and the time at which the claim can be brought, rather than to the forum itself, and thus should be considered a matter of admissibility.[228]

Turning back to the *BG Group* decision, it is noteworthy that after emphasizing Argentina's status as a sovereign and the condition on consent as a treaty-based obligation that precluded the formation of a subsidiary

222. Paulsson, *supra* note 9, at 616.

223. *Id.* at 613–14.

224. *Id.* at 614.

225. Rau, *supra* note 1, at 70.

226. This is especially true if one accepts the third-party beneficiary theory, whereby an agreement is concluded between the United Kingdom and Argentina for the benefit of subsequent investors. *See supra* pp. 118–20.

227. U.K.-Arg. BIT, *supra* note 14, at art. 8.2(a)(ii).

228. This determination does not render the provision empty. *Cf. supra* p. 143 ("[I]t does not seem fair to treat the BIT's local-litigation requirement entirely as an empty, formal ritual without operative significance."). Arbitrators could presumably find that the conditions for admissibility had not been satisfied and dismiss the case on those grounds.

contract between Argentina and BG Group, the dissent then focused on that hypothetical subsidiary contract as if it were an ordinary contract between two private parties and embraced the safe haven of municipal contract law principles.[229] Thus, arguably the dissent fell into the same trap as the majority in that it assessed the agreement spawned by the treaty in light of questions that it seemed earlier to view as appropriate only in the context of a commercial dispute. Or, to put it another way, if fulfillment of the condition on consent in the treaty was so important to Argentina that the tribunal's jurisdiction was precluded by its failure to come to fruition, could a municipal contract law principle be used to overcome Argentina's objections? Would it not have been more consistent with the dissent's viewpoint to have looked to international law to determine whether Argentina could be allowed to capitalize on its arguable interference with the ability of BG Group to satisfy the condition? Estoppel is a principle of general international law that might be employed to the same effect.[230] Moreover, the argument that "after their entry into domestic legal systems, international rights or obligations are still to be applied as international law rather than domestic law, has a long pedigree in international legal scholarship."[231]

U.S. courts are not the only courts that have problems when they encounter international law.[232] Indeed, one of the goals of having a standard interpretive framework such as the Vienna Convention on the Law of Treaties is to ensure that those engaging in the interpretive exercise at least

229. *BG Grp.*, 134 S. Ct. at 1215–17 (Roberts, C.J., dissenting).

230. *See* Christopher Brown, *A Comparative and Critical Assessment of Estoppel in International Law*, 50 U. MIAMI L. REV. 369, 397–98 (1996); *see also* I.C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT'L. L. 143, 147–48 (1954).

231. ANDRÉ NOLLKAEMPER, GROUNDS FOR THE APPLICATION OF INTERNATIONAL RULES OF INTERPRETATION IN NATIONAL COURTS 9 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2501962; *see also* Fabien Gélinas, *From Harmonized Legislation to Harmonized Law: Hurdles and Tools, Judicial and Arbitral Perspectives*, *in* THE UNCITRAL MODEL LAW AFTER TWENTY-FIVE YEARS: GLOBAL PERSPECTIVE ON INTERNATIONAL COMMERCIAL ARBITRATION 261, 262–64 (Frédéric Bachand & Fabien Gélinas eds., 2013) (noting "best-case" scenario in which "the judge becomes an international judge. She is keenly aware that she is applying a law intended to respond to the needs of a transnational community. She thinks in terms of applying an international instrument; her reference points and sources are global.").

232. *See* NOLLKAEMPER, *supra* note 231, at 1; Jean d'Aspremont, *The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order*, *in* THE PRACTICE OF INTERNATIONAL AND NATIONAL COURTS AND THE (DE-)FRAGMENTATION OF INTERNATIONAL LAW 141 (Fauchald & Nollkaemper eds., 2012).

employ the same rules—that they adopt the same interpretive approach.[233] Another is that there is an essential connection between primary norms and secondary norms, including those of interpretation, such that an international obligation severed from applicable secondary norms risks having its character changed.[234]

Emphasis on interpretive rules should not obscure the underlying goal of the Vienna Convention. The VCLT is utilitarian: "[T]he application of the rules on treaty interpretation is 'not an aim in itself, but only a means to achieve another goal, i.e. the quest for the correct meaning of the terms of a treaty.'"[235] One assumes that the court wants to reach the correct outcome, but the court will not necessarily regard the VCLT as the appropriate means of achieving its goal. Thus, the incentive for national courts to apply the Vienna Convention for the sake of applying it is not strong, unless doing so would lead to the correct outcome. And whether this is true might hinge more on the identity of the interpreters rather than on the rules themselves. The front-line interpreters of investment treaties are arbitral tribunals, and their approach to interpretation is far from uniform, even if their starting point is the Vienna Convention on the Law of Treaties.[236]

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233. NOLLKAEMPER, *supra* note 231, at 3. Professor Nollkaemper reminds us that differences in interpretation are not necessarily bad: "International law may lose some of its uniform meaning in this process, yet may gain domestic relevance." *Id*. In addition, one should be mindful of the tendency of international lawyers (and others) to gain an exaggerated sense of their monopoly on the correct answer; "[epistemic communities] tend to be insular if not completely self-referential, and they often ignore what is going on in other areas, as they tend to believe that the only meaningful practice or the very core business of international law is their own specialization." Bianchi, *supra* note 187 (citation omitted); *see also supra* pp. 112–14 supra (noting the attempt by the "community of international arbitration practitioners" to "leverage its prestige to mesmerize, or overawe, or bully, national courts into keeping their hands off the institution of international arbitration. . .").

234. *See, e.g.*, NOLLKAEMPER, *supra* note 231, at 10. Professor Nollkaemper puts the issue in stronger terms: "The fundamental connection between primary and secondary norms should, so the argument goes, not be broken when a primary norm is transplanted into a domestic legal system. If a court were to give effect to an international obligation disconnected from its secondary context, it does not give effect to that obligation, but to another norm." *Id*. He acknowledges, however, some weaknesses to the proposition, including the argument that once a rule of international law is domesticated, it becomes part of the national legal order and thus could more properly be deemed national rather than international law. *Id*. at 11–12. This argument would not apply to a BIT, but query whether the subsidiary contract between the investor and the host state cannot migrate to and intersect with the domestic legal order.

235. *Id.* at 5 (citing Jan Wouters & Maarten Vidal, *Non-Tax Treaties: Domestic Courts and Treaty Interpretation*, *in* COURTS AND TAX TREATY LAW 11 (Guglielmo Maisto ed., 2007)).

236. For a general discussion, see J. ROMESH WEERAMANTRY, TREATY INTERPRETATION IN INVESTMENT ARBITRATION (2012). For a thoughtful exploration of the effect of different applicable

If one of the goals of a court called upon to interpret an international agreement is to find a construction that has been uniformly or at least widely accepted (which might indicate that it is correct), that court might well refer to the decisions of other courts that have addressed the same or a similar issue. Deciding to which courts or tribunals referral is warranted, however, is likely to depend on matters "such as a common legal system, regional closeness, or political affinity, and so on. These types of criteria may outweigh the role of common interpretive ground."[237] Moreover, whether another court's decision is persuasive on its merits is likely to be the most powerful reason for another court's decision to follow it, regardless of the interpretive method employed (although the interpretive method employed might bolster the persuasiveness of the interpretation).

D. Conclusion

It is inevitable that different tribunals whose members have different backgrounds will approach the process of interpretation in different ways and will likely reach different conclusions even with regard to the same treaty. Even judges who have remarkably similar training and backgrounds can reach remarkably different results, viz. the difference between the majority and the dissent in *BG Group*. The VCLT rules of interpretation, venerable though they might be, are not a "silver bullet" capable of penetrating the morass of meanings that can be attributed to investment treaties, although employment of uniform rules might help to achieve more consistent outcomes. Their use might also help U.S. judges form their own interpretive community vis-à-vis international treaties.[238] Detlev Vagts, writing in 1993, said: "The true difficulty with the practice of United States courts in treaty interpretation arises not from new theory, but from an old preference for reading treaties as fitting into the familiar landscape of American law, rather than facing the reality that treaties in fact change national law."[239]

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laws on contract interpretation, see GIUDITTA CORDERO-MOSS, INTERNATIONAL COMMERCIAL CONTRACTS 210–25 (2014).

237. NOLLKAEMPER, *supra* note 231, at 14.

238. Detlev F. Vagts, *Treaty Interpretation and New American Ways of Law Reading*, 4 EUR. J. INT'L L. 472, 491 (1993).

239. *Id*. at 473.