The International Front:

ICSID Tribunal Dismisses Indonesia’s Objections to Jurisdiction Based on Lack of Consent to Arbitrate by Host State

On 24 February 2014 an ICSID Tribunal comprising of Prof. Gabrielle Kauffmann-Kohler (President), Mr. Michael Hwang, S.C., and Prof. Albert Jan van den Berg issued two unanimous decisions upholding jurisdiction in claims brought against the Republic of Indonesia by Churchill Mining PLC, a British mining company, and Planet Mining Pty Ltd, its Australian subsidiary. The claims were brought under the UK-Indonesia and Australia-Indonesia bilateral investment treaties respectively. The decisions have significant implications, in particular with respect to the interpretation of treaty language evidencing a state party’s consent to investor-state arbitration. Quinn Emanuel was counsel for the Claimants.

The claims arose out of the revocation of certain coal mining concessions over the East Kutai region of Indonesia awarded to Churchill and Planet by the Regent of East Kutai. The Claimants’ investments, made in Indonesia via a locally-incorporated investment vehicle, were approved by the Indonesian Investment Coordinating Board (BKPM). Exploratory work revealed the mining concessions to be extremely valuable. In May 2010, the Indonesian authorities issued decrees purporting to revoke the licenses.

Indonesia challenged the Tribunal’s jurisdiction on two main grounds. First, it argued that Indonesia had...
not consented to ICSID arbitration. It argued that Article 7(1) of the UK BIT requires a further affirmative act in order for consent to be perfected since it uses the language “shall assent,” and that Article XI of the Australian treaty also required a further act since it provides that the states party “shall consent in writing” to ICSID arbitration. It argued that to the extent that consent to ICSID arbitration is not automatic under these treaties, the BKPM’s approval of the Claimants’ investment was not a sufficient additional act to provide consent. Second, Indonesia argued that the Claimants’ investments were not protected under the UK and Australian treaties since they did not fulfill the treaties’ requirements that the investments be admitted in accordance with host state law, because they did not comply with Indonesia’s 1967 Foreign Investment Law.

The Tribunal found that the language “shall assent” contained in the UK-Indonesia BIT provides automatic consent to ICSID arbitration on the part of the host state. In accordance with Article 31 of the Vienna Convention on the Law of Treaties (VCLT), the Tribunal first considered the ordinary meaning Article 7(1), the context surrounding the words “shall assent”, and the object and purpose of the BIT. Having found the parties’ arguments on these points to be inconclusive, the Tribunal employed supplementary means of interpretation under Article 32 VCLT. Having considered scholarly writings, ICSID case law, and prior treaty practice of the UK and Indonesia on the issue, the Tribunal ultimately based its decision on a close analysis of the travaux préparatoires of the treaty, ruling that the language used was in fact intended to convey consent to arbitration. For the sake of completeness, the Tribunal found that in any case the BKPM’s approval of the Churchill’s investment would have constituted consent if, indeed, the UK treaty required a further affirmative act on the part of the host state in order for consent to be perfected.

With respect to the Australian treaty, the Tribunal, following the same interpretive approach, found differently. It held that the specific language of Article XI did not provide automatic consent. However, the Tribunal found that the further affirmative act required under the treaty was provided by the BKPM’s approval of Planet’s investment. With respect to Indonesia’s second objection to jurisdiction, the Tribunal found in both cases that the BKPM’s approval of the Claimants’ investments sufficed to satisfy the admission requirements contained in Articles 2(1) and III(1)(a) of the UK and Australian treaties, respectively.

A significant implication of the Churchill decision is that where a treaty uses the language “shall assent,” this may be interpreted as a standing offer to arbitrate on the part of a host state. Prior scholarly writings which have reached the opposite conclusion should now be reconsidered. Such “conventional wisdom” was based on a citation-chain of scholarly works, originally emanating in an era of little actual investment arbitration practice. Although the findings of the Churchill tribunal are limited to the UK-Indonesia BIT, a correct application of the VCLT may lead to similar results in future cases brought under different treaties.

The decision opens the door for UK investors seeking a forum to enforce their rights against the Republic of Indonesia. UK investors and their counsel should be encouraged by the Churchill decision, to the extent that jurisdictional objections on the basis of a lack of consent to arbitrate by the host state have been rejected by a unanimous tribunal comprised of highly-respected arbitrators. In addition, investors from all states that have concluded investment treaties with Indonesia should be encouraged that persuasive jurisprudence now exists to the effect that investments will qualify for protection under Indonesia’s investment treaties where they have received approval from the BKPM.

**Update on CIETAC Post-Split Developments**

The well-known secession of certain sub-commissions of the China International Economic and Trade Arbitration Commission (“CIETAC”) has caused considerable uncertainty among companies holding contracts with an arbitration clause providing for administration by CIETAC. That confusion arising from the sudden independence of the organizations formerly known as CIETAC Shanghai and CIETAC South China relates primarily to where to bring an arbitration when a clause references one of those sub-commissions, as well as whether an award issued by the organizations is enforceable. This confusion is reflected in inconsistent orders by Chinese courts, and has been deepened by CIETAC’s establishment of
replacement sub-commissions. The Supreme People's Court of China (the “SPC”) has finally stepped in to help provide guidance by imposing mandatory supervision by itself of Chinese court decisions that relate to a former CIETAC sub-commission.

Some background is necessary to appreciating this situation. On 1 March 2012, CIETAC announced the implementation of a revised set of their Arbitration Rules. Conflict arose, however, regarding Article 2(6) of the new Rules, which provided that CIETAC Beijing be appointed as the default administrator of all cases submitted to CIETAC unless explicitly nominated otherwise. The CIETAC Shanghai and South China sub-commissions disagreed with this implementation.

On the day the revised Rules came into effect, CIETAC Shanghai declared independence from CIETAC and registered anew as a separate entity. CIETAC South China soon followed suit, and the two institutions renamed themselves, respectively, the Shanghai International Arbitration Centre (“SHIAC”) and the Shenzhen Court of International Arbitration (“SCIA”).

CIETAC Beijing responded to the breakaway by announcing the suspension of its authorisation to the Shanghai and South China commissions, making clear its belief that neither SHIAC nor SCIA had the right to accept or administer arbitration cases. SHIAC and SCIA responded by claiming that the announcement had no binding effect, and continued to administer arbitrations.

As independent arbitration institutions, SHIAC and SCIA each have their own arbitration rules and arbitrator panels. Each entity is accepted by their respective local governments and their awards are enforced in local courts. Inconsistent decisions in courts located outside these regions, however, brings doubt upon the validity of awards issued by either institution.

In December 2012, the Shenzhen Intermediate People's Court confirmed an award issued from an arbitration administered by SCIA. Recognition of the validity of the award was based upon the fact that CIETAC Shenzhen was, in all respects, the body chosen for arbitration in the case under dispute. The court ruled that jurisdiction carried forward despite the institute’s change of name.

In contrast, in May 2013, the Suzhou Intermediate People's Court refused to enforce an arbitration award issued by SHIAC. The Court's justification was that SHIAC had no jurisdiction over the case as the parties involved had specified CIETAC Shanghai as the arbitration institution; SHIAC had failed to inform the parties of its independence, which meant that the award did not reflect the true intention of the parties.

Decisions made by different courts illustrate the uncertainty pertaining to the validity of arbitration administered by the newly independent institutions. Complicating the situation is that SHIAC accepts cases submitted to CIETAC Shanghai as well as cases submitted to CIETAC that are based in Shenzhen. Similarly, SCIA accepts cases submitted to CIETAC Shenzhen as well as cases submitted to CIETAC that are based in Shanghai. But CIETAC Beijing also accepts cases submitted to CIETAC Shanghai and Shenzhen as well as cases submitted to CIETAC that are based in Shanghai or Shenzhen.

Heaping fuel on the fire is the fact CIETAC has now established (or re-established) sub-commissions in Shanghai and Shenzhen, which throws yet another wrench in interpreting an arbitration clause that references either sub-commission.

The SPC took steps to address this issue in September 2013. In the Notice on Certain Issues Relating to Correct Handling of Judicial Review of Arbitration Matters (Fa [2013] No. 194), the SPC ordered that each lower court hearing a case related to the former CIETAC sub-commissions must report their case, level by level, to the SPC. Rulings on those cases may only be made after the SPC has given its opinion on the matter.

This decision opens the door for potential consistency. It is still advisable, however, for parties to be wary of potential confusion and to take immediate steps to prevent any delays or complications.

In cases of existing arbitration agreements, we advise parties to make modifications to relevant arbitration clauses before any dispute arises, until there is more clarity on this issue. Should the parties elect to remain with a former CIETAC sub-commission, they should redefine the institution to administer any dispute (including by making reference to the secession) and the rules to govern any arbitration.

Quinn Emanuel's Hong Kong office serves as the focal point for our Asian arbitration practice. We are perfectly placed to advise clients through this enormous growth in the use of arbitral institutions based in Asia like HKIAC, CIETAC, and SIAC as well as the use of Hong Kong, Beijing, and Singapore as the seat of arbitration.
Australia’s Investor-State Arbitrations

Australia’s short-lived but high-profile opposition to investor-state arbitration appears to be over, following the election of its current conservative government in 2013.

Background: Australia’s BITs and its Domestic Law

Australia has firmly adopted the dualist approach to international law preferred by the common law tradition. That is, international law—including binding obligations in treaties properly ratified by Australia—has no status in its domestic law. Only international obligations which have been separately enacted by Parliament have direct application domestically. Thus, the Australian Federal and State governments may violate their treaty obligations, and occasionally do. There is no recourse to the domestic courts in that event.

Nonetheless, beginning with its investment treaty with China, ratified in 1988, Australia participated in the worldwide proliferation of BITs. Over the following twenty years, it concluded treaties with states in Europe, Asia, and South America, all with relatively standard investor-state arbitration clauses.

The AUSFTA

The Australia-United States Free Trade Agreement (AUSFTA) was heralded as one of the most significant developments in Australia’s trade relations in decades when it came into effect in 2005. Public attention was drawn to its effect in reducing barriers to trade, particularly in respect of Australia’s all-important primary industries.

The AUSFTA also contained provisions for the protection of investments, including a prohibition on expropriation without adequate compensation and the minimum fair and equitable treatment standard. However, uniquely among BITs between developed countries, the AUSFTA contains no direct recourse to international dispute resolution for investors aggrieved by the actions of the states-parties. Instead, Article 11.16 provides for the states-parties to “consult” on such a mechanism should there be a “change in circumstances.”

Whether the AUSFTA was an early warning sign as to Australia’s increasing skepticism of the investor-state arbitration mechanism, as some have argued (http://www.commonfrontiers.ca/Single_Page_Docs/PDF_Docs/Jan08_14-AUSFTA-paper.pdf), or a sui generis regime for a unique trading partnership, is a matter of debate. The Australian government, at least, justified the absence of direct recourse to international arbitration for investors on the basis of the well established and sophisticated legal systems in both countries (http://archive.treasury.gov.au/documents/958/PDF/06_Foreign_investment_policy_AUSFTA.pdf).

Subsequent BITs entered into by Australia did incorporate arbitration provisions. See, for example, the treaty with Mexico (in force 21 July 2007) and, more significantly, the ASEAN-Australia-New Zealand Free Trade Agreement (in force for Australia and seven other parties from 1 January 2010).

Drugs and Cigarettes

The Australian government heavily regulates access to and pricing of foreign drugs under the Pharmaceuticals Benefits Scheme (the PBS), one of the centerpieces of its national healthcare policy. Second, Australia has been regulating tobacco companies, particularly through its packaging laws (http://www.unswlawjournal.unsw.edu.au/sites/all/themes/unsw/images/Leon-E-Trakman.pdf). Both issues are controversial with foreign states and companies. In December 2010, the Australian Productivity Commission published a research report on BITs (http://www.pc.gov.au/__data/assets/pdf_file/0010/104203/trade-agreements-report.pdf).

It warned of the risk posed by unfettered arbitration clauses to “regulation aimed at public-good outcomes,” such as the PBS and cigarette packaging restrictions, and highlighted Phillip Morris’ claim against Uruguay under the Switzerland-Uruguay BIT filed earlier that year. That warning was to prove prescient when Phillip Morris filed a claim against Australia in 2010.

Backlash

It was against this background that the Australian government issued a policy statement in April 2011 (http://www.acci.asn.au/getattachment/b9d3e5fe6c-4c2a-a3df-3f58228da6fd/Gillard-Government-Trade-Policy-Statement.aspx) announcing that it will “discontinue [the] practice” of incorporating investor-state arbitration clauses in its trade treaties. It explained that it could not tolerate “confer[r]ing greater legal rights on foreign businesses than those available to domestic businesses” or restrictions on its ability to make laws on “social, environmental and economic matters”—particularly drugs and cigarettes.
On the one hand, investor-state arbitration grants foreign investors remedies that would not be available to domestic investors on the basis of the same treatment. This gives treaty obligations force of law “by the back door” and in contradiction to one of the core tenets of the Australian legal system—namely, that international law has no effect unless specifically enacted by Parliament.

On the other hand, the idea that Australia could violate its treaty obligations with impunity offends the growing sense of an international form of the rule of law. Nor would arbitration clauses amount to a violation of sovereignty: agreeing to this form of dispute resolution is just as much an act of sovereign power as the passage of domestic legislation.

**Backflip**

In December 2013, the newly elected Abbott government announced the conclusion of a Free Trade Agreement with South Korea, which contained a detailed investor-state arbitration mechanism (http://www.dfat.gov.au/fta/kafta/downloads/KAFTA-chapter-11.pdf). It is widely believed that the negotiation of this agreement is “as good as stopped” (http://www.smh.com.au/business/robb-to-tackle-trans-pacific-partnership-20131205-2yttu.html) following the April 2011 policy statement.

**The Future**

It is clear that arbitration clauses are back on the table for Australia. That is particularly significant as the negotiation for the Australia-Japan BIT and the Trans-Pacific Partnership (TPP) come to a head. Japan is one of Australia’s major trading partners, and the sheer breadth of the TPP—a multilateral treaty currently being negotiated between, among others, Australia, Canada, Chile and the US—has potentially far-reaching consequences. Its members (and potential members) make up some 40% of the world’s aggregate GDP (http://www.washingtonpost.com/blogs/wonkblog/wp/2013/12/11/everything-you-need-to-know-about-the-trans-pacific-partnership/). In addition, this change of policy may well be the first step towards revisiting the disputes mechanism available under the AUSFTA. At the very least, if particular circumstances justified it, Australia may be more willing than it has been in the past to agree to ad hoc arbitrations pursuant to AUSFTA as a precursor to allowing more widely available remedies. Another development worth noting is this firm’s recent victory on behalf of Planet Mining Pty Ltd (a subsidiary of Churchill Mining Plc) against Indonesia. On 24 February 2014, an ICSID Tribunal concluded that it did have jurisdiction to hear the dispute (http://www.italaw.com/sites/default/files/case-documents/italaw3104.pdf), brought pursuant to the Australia-Indonesia BIT. It is the first investor-state claim brought under that treaty, and paves the way for more in the future.

**Quinn Emanuel: Local Presence and International Expertise**

Quinn Emanuel is well-placed to take advantage of Australia’s burgeoning treaty obligations, both on behalf of international investors in Australia, and Australian individuals and companies with investments in foreign jurisdictions. The firm has a deep bench of highly-regarded public international law practitioners (including Stephen Jagusch and Anthony Sinclair in London; Tai-Heng Cheng and David Orta in the US; and John Rhie in Hong Kong). In addition, our recently-opened Sydney office is building strength. Partners Michael Mills and Michelle Mills were recently joined by a senior associate from our London office, Duncan Watson, who has extensive commercial and treaty arbitration experience. Beau Deleuil, formerly head of disputes at King & Wood Mallesons, joined the office in April 2014.

**The 2014 LCIA Arbitration Rules: Improvements to an Already Very Successful Set of Rules**

Following the promulgation of new versions of the UNCITRAL Arbitration Rules in 2010, and the ICC Arbitration Rules in 2012, the London Court of International Arbitration (LCIA) is set to revise its arbitration rules, which have been in force since 1998 (LCIA Rules). The current LCIA Rules have been used widely, with hundreds of cases being registered with the LCIA each year.

The revisions, which the LCIA first made available for comment in May 2013, and which are expected to be enacted soon, extend beyond linguistic and technical fine-tuning. They aim to foster and support the expediency of LCIA proceedings, the authority of the arbitral tribunal, and ethical
behaviour by the parties and their representatives. A summary of the key changes appears below.

**I. Procedural Effectiveness and Efficiency**

- The declaration to be signed by an arbitrator prior to his or her appointment now includes a statement to the effect that the arbitrator will ensure an expeditious conduct of the arbitration (Article 5.4 (ii)).

- Parties cannot protract the formation of the Arbitral Tribunal by alleging insufficiencies of the Request and the Response (Article 5.1).

- The 2014 rules introduce an “emergency arbitrator” procedure (Articles 9.4 – 9.12) as an alternative to the accelerated formation of the tribunal (Articles 9.1 – 9.3), which remains available with minor amendments. Under this procedure a sole emergency arbitrator may decide, within 20 days or less from his or her appointment, on a claim for emergency relief by either party in cases of “exceptional urgency.”

- The parties and the tribunal must make contact to discuss the conduct of the proceedings no later than 21 days from the formation of the tribunal (Article 14.1). The default mode of communication is now direct contact between the parties and the tribunal (Article 13.1).

- As with the 1998 LCIA Rules, the Claimant can elect to treat the Request as its Statement of the Case. The 2014 Rules have been amended to grant a reciprocal right to the Respondent (Article 15.4). The 2014 rules no longer require all written statements be accompanied by copies “of all essential documents, and … any relevant samples and exhibits.”

- Article 24.3 of the LCIA Rules has been amended to provide that failing actual payment of deposits, the tribunal “should not” rather than “shall not” proceed.

- The tribunal must avoid “unnecessary delay and expense” (Article 14.4 (ii)), and shall seek to make its final award “as soon as reasonably possible” (Article 15.10). Under the new Article 28.4, delays and unnecessary expense caused by party conduct may be reflected in the cost decision.

- Where a change or addition by a party to its legal representatives would result in wasted costs or loss of time, the tribunal can effectively block such change (Articles 18.3 and 18.4).

- The 2014 Rules also allow for a more expeditious initiation of the arbitration. Confirmations that the registration fee is being paid (Article 1.1 (vi)), and that copies of the Request are being delivered (Article 1.1 (vii)) are sufficient. Formal proof of delivery or service is no longer required to initiate the proceedings.

- If it becomes apparent that the arbitration is no longer being pursued by the parties, Article 22.1 (xi) enables the tribunal to order the discontinuance of the arbitration upon expiry of a reasonable grace period.

**II. Authority of the Arbitral Tribunal**

Several provisions of the 2014 LCIA Rules safeguard the authority of the arbitral tribunal and the integrity of the proceedings before it. Specifically:

- Upon formation of the arbitral tribunal, no member of the tribunal or the LCIA Court involved in the arbitration may be approached unilaterally by a party, unless such unilateral contact is disclosed in writing and to all involved (Article 13.4).

- The provisions on the “Additional Powers of the Arbitral Tribunal” (Article 22) and its discretion to take “Interim and Conservatory Measures” (Article 25), as well as the general principle of confidentiality (Article 30.1) can no longer be waived by party agreement.

- A party may apply for interim measures from a court only with the tribunal’s authorization (Article 25.3 (ii)).

**III. The Arbitration Agreement and Costs**

- The LCIA Rules currently in force provide that the default seat of the arbitration is London. Article 16.2 of the 2014 Rules provides that in the absence of agreement, the default seat will apply until the tribunal is formed. Thereafter, the tribunal (and not the LCIA Court) may order that a different seat is more appropriate following written input from the parties.

- Article 32.3 provides that if the tribunal or a judicial authority decides that part of the arbitration agreement is defective, “such
decision shall not of itself adversely affect any award, the appointment of any arbitrator or the Arbitral Tribunal or any other part of the Arbitration Agreement.”

• Any agreement between the parties as to cost sharing is effective only if confirmed by the parties after the commencement of the arbitration (Article 28.5). Article 28.3, moreover, clarifies that the tribunal is not bound by national rules on the apportionment of “Legal Costs.”

• The spectrum of agreements deemed to provide for LCIA arbitration has been expanded to include agreements to arbitrate “under rules of or by the LCIA, the London Court of International Arbitration or the London Court.”

IV. Ethical Obligations of Arbitrators and Counsel

The 2014 LCIA Rules include an Annex on “General Guidelines for the Parties’ Legal Representatives” and confer upon the arbitral tribunal the authority to sanction a party’s legal representative acting in contravention to these principles (Article 18.6). Notably, the parties themselves will be responsible for ensuring that their legal representatives have agreed to comply with the Annex (Article 18.5).

For example, legal representatives should not engage in activities intended unfairly to obstruct the arbitration or jeopardise the finality of any award; and they should not knowingly make any false statements to the tribunal, procure false evidence to the tribunal, or conceal (or assist the concealment of) documents ordered to be produced by the tribunal.

V. Additional Procedural Changes

• New provisions regulate multi-party proceedings (Articles 1.5 and 2.5) and allow for consolidation of multiple proceedings by the arbitral tribunal (Article 22.1 (ix), (x)) and the LCIA Court (Article 22.6). Article 22.1 (viii) on joinder is identical in substance to Article 22.1 (h) currently in force.

• The tribunal can make additional awards on claims/cross-claims presented, but not decided ex officio (Article 27.4).

• Time periods under the new LCIA Rules are multiples of a 7-day week (21, 28, 35 or 56 days—with the sole exception of the deadline for an emergency arbitrator’s decision, to be given 20 days following his or her appointment).

• The new Rules reflect the increased significance of electronic communication and provide for delivery in electronic form, in paper form, or in both forms.

• The LCIA Court now has the authority (exceptionally) to appoint a tribunal of more than three members (Article 5.8). C

THE DOMESTIC FRONT

U.S. Supreme Court Defers to Arbitrators and Reinstates $185 Million Arbitral Award Against Argentina in First Supreme Court Case Addressing a Bilateral Investment Treaty

The United States Supreme Court, in a landmark 7-2 ruling on March 5, reinstated a $185 million arbitration award a British company, BG Group PLC, won against Argentina under the Argentina-United Kingdom Bilateral Investment Treaty (“BIT”) and answered an important question in international arbitration law: who—court or arbitrator—is to bear the primary responsibility for interpreting and applying a provision in an investment treaty that requires the parties to submit a dispute to local courts before initiating arbitration? In BG Group PLC v. Republic of Argentina, the Court, siding with the arbitrators, reversed a decision of the United States Court of Appeals for the D.C. Circuit, and held that the D.C. Circuit improperly substituted its judgment for that of the arbitrators as to whether BG Group was required to exhaust the treaty’s “local litigation requirement” by bringing suit against Argentina in Argentine courts prior to commencing arbitration. The arbitrators had concluded that BG Group’s compliance with the BIT’s local litigation requirement was excused because Argentina had enacted measures
vastly restricting access to its local courts, and the Supreme Court deferred to that decision. The BG Group decision—which is widely regarded as strongly “pro-arbitration”—is significant in its own right as it is the first international investment treaty arbitration case to come before the U.S. Supreme Court, and potentially the first of several resulting out of efforts to enforce awards stemming from Argentina’s early 2000’s economic crisis. It will likely also have broad-ranging implications for other domestic and international commercial arbitrations by reinforcing the deference U.S. courts ordinarily extend to arbitral decisions, and helping to further clarify the judicial framework for determining the proper allocation of responsibility as between courts and arbitrators for determining threshold questions involving arbitrability and procedure.

The dispute at issue in BG Group arose out of emergency measures Argentina had taken in 2001-2002 in response to its economic crisis. In the early 1990s, BG Group invested in a consortium that bought a majority interest in an Argentine entity, MetroGAS, which held an exclusive license to distribute national gas in Buenos Aires. In December 2001, shortly after Argentina announced its sovereign debt default, it enacted emergency legislation providing that gas tariffs—previously calculated in dollars—would now be calculated in pesos. With the collapse of the peso, the result of these measures was that MetroGAS’s profits were “quickly transformed into losses.” Id. at 1204.

BG Group initiated international arbitration under the United Nations Commission on International Trade Law (UNCITRAL Rules), alleging that Argentina, in enacting the emergency measures, had violated certain investor protections in the UK-Argentine BIT, resulting in an unlawful “expropriation” of BG Group’s investment in MetroGAS and the denial of the “fair and equitable treatment.” Argentina denied these claims, while also arguing that the tribunal lacked jurisdiction to hear the dispute, because BG Group had initiated arbitration without first litigating its claims in Argentina’s courts. The treaty contained a “local litigation requirement,” a feature common to many BITs, in this case providing that a foreign investor asserting a claim under the treaty must first litigate its claims in the host state’s local courts for at least 18 months before commencing international arbitration.

In 2007, the arbitral tribunal reached a final decision in which it held that it had jurisdiction to rule on the parties’ substantive dispute. In the wake of its economic crisis, Argentina had enacted a series of measures designed to restrict private parties’ access to local courts. Specifically, Argentina had suspended enforcement of all court judgments relating to the emergency economic measures for 180 days and conditioned the ability of companies like MetroGAS to renegotiate their contracts with Argentina on their agreement not to sue the state. The Tribunal concluded that these measures, while not making litigation in Argentina’s courts literally impossible, nonetheless “hindered” recourse to local courts to such an extent as to implicitly excuse compliance with the local litigation requirement in the treaty. Id. at 1205. Requiring a private party in such circumstances to pursue relief in Argentine courts for 18 months before seeking arbitration would, in the panel’s view, lead to “absurd and unreasonable result[s].” Id. On the merits, the tribunal awarded BG Group $185 million in damages, plus interest, fees and costs, finding that Argentina had denied BG Group “fair and equitable treatment,” although it had not “expropriated” BG Group’s investment.

In 2010, the District Court for the District of Columbia granted BG Group’s application to confirm the arbitration award under the New York Convention and the Federal Arbitration Act. Argentina appealed, and the D.C. Circuit reversed, determining that the BIT’s local litigation requirement was a matter for courts to decide de novo, without deference to the views of the arbitrators, and concluding that the circumstances did not warrant waiving compliance with this “gateway” local litigation requirement. Republic of Argentina v. BG Group PLC, 665 F.3d 1363, 1370-71 (D.C. Cir. 2012).

The Supreme Court reversed in the 7-2 decision, with Justice Breyer writing for the majority. The Court held that the D.C. Circuit erred in reviewing the arbitrators’ jurisdiction decision de novo, concluding that interpreting compliance with this sort of local litigation requirement presented the type of threshold procedural question upon which courts ordinarily defer to arbitrators.

Justice Breyer’s majority opinion began its analysis treating the investment treaty as if it were an ordinary contract between private parties. Under the Supreme Court’s precedent in Howsam v. Dean Witter Reynolds, Inc. 537 US 79 (2002), where a contract is silent on the matter of who—court or arbitrator—is to decide threshold questions about arbitration, courts employ a set of standard presumptions. That is, courts
presume that the parties intended courts to decide disputes about “arbitrability,” such as whether parties are bound by a given arbitration clause, or whether an arbitration clause is broad enough in scope to cover a particular controversy. On the other hand, courts presume that parties intend for arbitrators, not courts, to decide disputes about the meaning and application of procedural preconditions to arbitration, including claims of waiver or delay, or whether other contractual prerequisites, such as time limits, have been satisfied. The Court concluded that the local litigation requirement at issue in BG Group was of a procedural variety—regulating when the contractual duty to arbitrate arises, not whether there is a contractual duty to arbitrate at all. Therefore, under the *Howsam* framework, the local litigation requirement presented a matter for the arbitrators primarily to interpret and apply, and the tribunal’s decision was to be accorded deference, and disturbed only if the arbitrator’s exceeded their powers under the FAA in excusing BG Group’s compliance with the local litigation requirement. Significantly, the Court also concluded that the fact that the document was a treaty, rather than an ordinary contract between private parties, did “not make a critical difference” to its analysis: “[a] treaty is a contract between nations, and its interpretation normally is a matter of determining the parties’ intent.” *Id.* at 1202. Concluding that the arbitrators’ properly exercised their powers in asserting jurisdiction, the Court thus reversed the D.C. Circuit, and reinstated the $185 million arbitral award.

Justice Sotomayor wrote a concurring opinion, agreeing with most of the majority opinion, but emphasizing that if the treaty had expressly defined the local litigation requirement as a condition of the contracting states’ “consent” to arbitrate, the case might have been decided differently. *Id.* at 1213.

Chief Justice Roberts, joined by Justice Kennedy, issued a dissenting opinion, attacking the majority’s treatment of the BIT as an ordinary contract between parties: “[t]he Treaty is not such an agreement, since BG Group is of course not a party to the Treaty.” *BG Group*, 134 S. Ct. at 1219. The dissent then argued that the local court exhaustion provision was a condition of consent and thus, a court was entitled to review the issue without deference to the arbitration tribunal. Notably, the dissent did not take issue with the majority opinion’s general articulation of the distinction between questions of substantive arbitrability (which are presumptively for a court to decide) and threshold procedural questions (which are presumptively for the arbitrators). Instead, the dissent argued that this investment treaty did not contain an “agreement to arbitrate” in the ordinary sense—but rather a “standing offer to arbitrate,” which could only be accepted by BG Group by complying with the treaty’s local litigation requirement. Because BG Group did not do so, in the dissent’s view, there was a question as to whether the parties had actually formed an agreement to arbitrate, which is the type of jurisdictional question that is ordinarily for a court, not an arbitrator, to decide.

The *BG Group* case—the first by the Supreme Court to address international investment treaty arbitration—has been closely followed by the international arbitration community. Both sides attracted significant support in the form of amicus curiae briefs from a wide spectrum of governmental bodies, academics and practitioners. *BG Group* is also the first in a line of cases the Supreme Court may hear that stem from Argentina’s financial crisis in the early 2000s. Earlier this year on January 10, the Court indicated that it would decide a dispute over subpoenas from a litigation regarding Argentina’s obligations to bond investors, as a result of its default on its sovereign debt. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 895 (2014). And in February 2014, a petition for writ of certiorari was filed, seeking Supreme Court review of a decision of the Second Circuit Court of Appeals upholding a district court’s decision ordering Argentina to pay $1.33 billion dollars to holdout creditors. *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir. 2013).

*BG Group* is likely to prove highly significant in that, among other things, together with *Howsam* (whose majority opinion was also authored by Justice Breyer), it establishes a coherent framework for allocating responsibility between courts and arbitrators for interpreting threshold questions concerning arbitration in the context of both ordinary contracts and bilateral investment treaties. Under this precedent, questions concerning satisfaction of conditions precedent to arbitration are presumptively to be treated as questions for arbitral resolution, with only limited and deferential judicial review, whether arising in commercial or investor-state arbitrations. This specific guidance will undoubtedly aid the interpretation of similar clauses in other investment treaties and commercial contracts. The Supreme Court’s detailed articulation of the considerable deference ordinarily afforded to arbitral awards is also likely to enhance the United State’s reputation as a jurisdiction hospitable to international commercial and investor-state arbitration.
An Interview with Professor Pablo T. Spiller

**Professor Pablo T. Spiller** is a Senior Consultant at Compass Lexecon; the Jeffrey A. Jacobs Distinguished Professor Emeritus of Business and Technology and Professor of Graduate Studies at the Haas School of Business, University of California, Berkeley; research associate at the National Bureau of Economic Research; and a former president of the International Society for New Institutional Economics. He holds a Ph.D. in Economics from the University of Chicago. Professor Spiller was previously a Director at LECG; has written extensively on regulatory, antitrust, and institutional issues; and has extensive consulting and expert testimony experience. He has contributed to the design and implementation of regulatory reforms, and consulted extensively with the World Bank, United Nations, the Inter-American Development Bank as well as governments and private companies on business valuation, damage analysis, and regulatory analysis of infrastructure projects in multiple countries. As a valuation expert he has participated in multiple international arbitration cases involving both treaty and contractual disputes. Professor Spiller is the editor-in-chief of the Journal of Law, Economics, and Organization and associate editor of the Journal of Applied Economics, the Regulation Magazine, and the Journal of Comparative Economics. He has also been the chair of the Business and Public Policy group at the University of California, Berkeley. Pablo Spiller has been a special advisor to the director at the Bureau of Economics of the Federal Trade Bureau and also an elected member of the board of directors of the American Law & Economics Association.

Q: How did you become involved as a damages expert in international arbitration?

**PS:** Although I had done work in US litigation before, my first involvement in arbitration was in 1999 in an ICC electricity case involving the cancellation of a PPA in a Central American country. The counsel who retained me was Mark C. Baker, and the arbitrators were Doak Bishop and Stefan Frommel. As you can imagine, the novelty of the procedure and the personalities involved made my week in Geneva particularly exhilarating. Prior to this engagement, I was involved, aside from my normal academic career, mostly in regulatory and antitrust issues. Since then, I have concentrated all my consulting, and some of my academic research, on damages assessments in international arbitration.

Q: In your opinion, what characteristics do Tribunals value most from economic experts in their determination of the quantum of damages in order to issue an award?

**PS:** It seems to me that the most critical issues are independence, the capacity to translate complex economic analyses into simple terms and the presentation of solid evidence to support the quantification and conclusions. An economic expert must be able to explain in concrete and simple terms the economic reasoning applied for the damages assessment and describe clearly the economic assumptions used and the grounds for those choices. Because the economic expert must prove his or her valuation to be an impartial assessment, the quality of the supporting evidence plays a central role.

Q: In your experience, what are the most valuable set of skills and the support sought from quantum experts by clients and counsel?

**PS:** Clients find fluid communication a very valuable skill; as it makes the back and forth of information easier. The expert often has to acquire knowledge that only the client (as operator of the business) has, and thus must seek to learn, while maintaining his or her critical objectivity. Here's where the importance of being a good listener comes in, as well as having the ability to know what is and what is not relevant in building an independent opinion. My approach here is to learn as much as I can from the client technical team, but to use as little as I need from them. On the other hand, apart from testifying skills, what counsel values most is an expert's ability to prepare strong reports that can resist the counterpart's criticisms. This, at the end, implies independence, objectivity, high quality analysis, and a robust back-up.

Q: What types of tools are used to communicate and explain complex economic issues to Tribunals who, in general, do not have an economic background?

**PS:** It’s partly about the tools, but largely about pinpointing the critical issues in a way that gives Tribunals comfort that their decision, if based on a few critical factors, has considered most of what really matters. While reports can have details on dozens of issues, ultimately most valuations are determined by a few critical parameters, assumptions, or instructions, and Tribunals need to be able to transparently understand what those are. My approach to testimony...
is to make it simple and visually appealing. Successful testimony requires translating the complex financial and economic concepts into simple ideas that can be expressed in visually appealing charts. Not that different than teaching an MBA class.

Q: Could you provide some insights into how Tribunals might be able to gauge the independence of an expert relative to his or her client?

PS: To a large extent that’s the task of the opposing party’s expert and counsel. The battle of the experts should provide a good sense to the Tribunal of which expert is obfuscating the issues, and which expert is making particularly non-conventional or ad hoc modelling choices. The role of opposing counsel is to highlight all that via cross-examination. As a consequence, the arbitration procedure by itself provides substantial information to the Tribunal to be able to assess who is independent and who is not, as well as who is right and who is wrong.

Q: Do you think Tribunals are better prepared to deal with quantum aspects nowadays than they were in the past? In what ways is the practice evolving?

PS: Absolutely! More and more you see highly reasoned awards on a quantum perspective, taking into account modern economic science and literature, such as the prevalent use of the capital asset pricing model for cost of capital calculation, or the standard reliance on discounted cash flows models, often with specific assumptions selected by the Tribunals. Another proof that Tribunals are becoming more sophisticated is the increased reliance on compound interest as the norm in the international arbitration practice (which is consistent with how the financial world works). In addition, the increased expertise of counsel on quantum issues is spilling over naturally into arbitrators as well.

Q: What would you say are the most common and frequent errors and pitfalls that quantum experts’ work suffers from?

PS: There are a number of errors that you commonly see in valuation experts in international arbitration. A common error (coming from both claimant and respondent experts) is not properly defining the claim from an economic perspective. I have often been confronted with damage assessments that have gone beyond the legal claim itself. Thus, if the link between the legal claim and their impact is mischaracterized, then it leads to a “but-for” scenario, representing Claimant’s position in the absence of the alleged breach, which would not be built accurately. This will likely lead to a gross over or underestimation of damages, adding another dimension to what would naturally be discrepancies among experts. Another error that quantum experts frequently incur is not subjecting their damage assessment to sensitivity and reasonability tests. A quantum expert should be able to identify which are the main advantages and disadvantages of the valuation method selected and, when possible, to test the damage assessment with alternative valuation methods. Another usual error quantum experts should be cautious of is opining on issues outside their scope of expertise (for example, legal, and engineering, etc). Finally, quantum experts should be cautious not to follow counsel or client’s wishes too closely without the appropriate due diligence. A case in point is the legal instructions. Although experts should perform their analysis under clearly specified legal instructions, not all instructions are acceptable. For example, instructions on issues, which are directly within the expertise of the experts, should not be accepted without proper due diligence.

Q: How do you perceive Tribunals tackle the issue of future damages (i.e. those that have not materialized yet), and how do you address this in your practice?

PS: Tribunals should not be afraid of granting future damages. In a sense, “future damages” as a concept is the same as assessing the impact of a particular measure on the value of a firm. Tribunals should be able to ascertain, as much as investors do on a daily basis, how different factors, including regulations, taxes or breach of a contract, may impact on the value of a firm based on its expected impact on the firm’s earnings. Future damages arising from a current measure means that the value of the asset has been reduced. As a consequence, a third party interested in buying that asset will be willing to pay less for it than absent the measure. Thus, heavily discounting future damages because these have not been realized yet would fail to compensate for the loss, as future damages have in fact been realized by the reduction in the market value of the asset. Hence, not compensating for such losses would be equal to under compensating.

Q:
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