> By acceding to the [Panama Convention], . . . our country has committed itself to open our courts to the enforcement of international arbitral awards as if they were foreign judicial judgments. This commitment requires us to recognize and enforce international arbitral awards in the vast majority of cases. Today, however, the majority concludes that this commitment may be trumped by a Peruvian statute limiting the portion of its annual budget that an entity of the state may pay towards the satisfaction of a lawfully obtained arbitration award. Neither the majority nor any party argues that this foreign statute operates on our soil of its own force. Nor could they; it is well established that, with few exceptions, none of which are relevant here, forum law governs the enforcement of foreign judgments, even when resolution of the underlying dispute turned on the law of another jurisdiction.
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> . . . The value of international arbitration, especially in contracts involving sovereign states, is that it provides a mechanism by which commercial actors may avoid the "home court advantage" of proceeding in the courts of an adversary state. But this advantage is negated if a party may obtain an independent adjudication on the merits, but is prevented from enforcing any award it obtains anywhere but in the courts of the very country that is to pay the award.
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> [T]he Court holds today, apparently for the first time in its history, that the district court's decision to retain jurisdiction over the case "cannot be located within the range of permissible decisions," *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001). It reaches this result by way of logic that is unprecedented and, I believe, specifically foreclosed by controlling Supreme Court law. Despite recognizing (as do the parties) that Peru's three-percent judgment cap does not apply here as a matter of choice of law, the majority nevertheless concludes that the cap *should* apply to this proceeding and that its inapplicability here renders the United States an inconvenient forum. As a result, the plaintiff is left to seek its remedy in the Peruvian courts—the very forum it entered arbitration to avoid—where the cap undisputedly will apply. The majority . . . achieves this result by a sleight of hand: asserting that although, in the normal course, forum non conveniens is self-consciously blind to how dismissal will affect the substantive law that governs the case, when one of the parties is a sovereign, substantive legal issues may be transformed into public interest factors and considered in the analysis.
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> . . . [T]he doctrine of forum non conveniens is properly a neutral procedural rule that selects a forum based on convenience, not a device for steering parties to the forum that is likely to apply the substantive law that one or the other of them favors (or that judges in the forum court think is desirable).[10]

D.C. Circuit Vacates Investment Arbitration Award Against Argentina

In January 2012, the U.S. Court of Appeals for the D.C. Circuit took the unusual step of vacating an award against Argentina rendered by an arbitral tribunal constituted under the Argentina–United Kingdom bilateral investment treaty (BIT). In *Republic of Argentina v. BG Group PLC*,[1] the D.C. Circuit concluded that the tribunal acted contrary to the BIT parties' intentions by allowing the claimant to bring the arbitration without first seeking redress in Argentina's courts as required by Article 8(2) of the BIT.

[10] *Id.* at 394, 402–03 (Lynch, J., dissenting) (citations omitted).

[1] 665 F.3d 1363 (D.C. Cir, Jan. 17, 2012).

The case grows out of an investment dispute between Argentina and a British firm that invested in a gas transportation and distribution concern that held a thirty-five-year exclusive license to distribute gas in Buenos Aires and nearby areas. The claimant alleged that measures adopted by Argentina in response to its 2001–02 economic crisis resulted in the expropriation of its investment.

As paraphrased by the court, Article 8(2) of the BIT requires that "disputes between an investor and the host State will be resolved in the host State's courts. If, however, no final court ruling is forthcoming within eighteen months or the dispute is unresolved after a court ruling, the Treaty provides that resort may then be had to arbitration."[2] In the arbitration, the clamant argued, and the tribunal agreed, that Argentina's emergency measures restricted the claimant's access to Argentina's courts and to a renegotiation process so that application of Article 8(2) would produce an unacceptable outcome.[3] The court explained that

> the Panel concluded that although BG Group did not seek recourse in Argentine courts for the eighteen month period required by Article 8(2) of the Treaty, that provision could not, "[a]s a matter of Treaty interpretation . . . be construed as an absolute impediment to arbitration." Final Award ¶147. Citing Article 32 of the Vienna Convention, the Panel concluded that because Argentina by emergency decrees had restricted access to its courts and had excluded from the renegotiation process any licensee that sought redress, a literal reading of the Treaty would produce an "absurd and unreasonable result."[4]

In 2007, the arbitrators ruled for the claimant, finding that Argentina violated its BIT obligation to accord fair and equitable treatment to the investor. The panel awarded the claimant over $185 million plus interest, costs, and attorneys' fees.

The arbitration was seated in Washington, D.C., so the U.S. District Court for the District of Columbia had jurisdiction under the U.S. Federal Arbitration Act (FAA) to hear Argentina's action to set aside the award.[5] The district court ruled for the investor, dismissing Argentina's action to vacate and granting the investor's motion to confirm the award.[6] In an opinion by Judge Judith Rogers, the court of appeals disagreed and reversed.

> Although the scope of judicial review of the substance of arbitral awards is exceedingly narrow, it is well settled that an arbitrator cannot ignore the intent of the contracting parties. Where, as here, the result of the arbitral award was to ignore the terms of the Treaty and shift the risk that the Argentine courts might not resolve BG Group's claim within eighteen months pursuant to Article 8(2) of the Treaty, the arbitral panel rendered a decision wholly based on outside legal sources and without regard to the contracting parties' agreement establishing a precondition to arbitration. Accordingly, we reverse the orders denying the motion to vacate and granting the cross-motion to confirm, and we vacate the Final Award.[7]

[2] *Id.* at 1365.

[3] *Id.* at 1368.

[4] *Id.* at 1367–68.

[5] Section 10(a)(4) of the Federal Arbitration Act, 9 U.S.C. §10(a), provides that an arbitration award may be vacated "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

[6] Republic of Argentina v. BG Group PLC, 715 F.Supp.2d 108 (D.D.C. 2010); Republic of Argentina v. BG Group PLC, 764 F.Supp.2d 21 (D.D.C. 2011).

[7] *BG Group*, 665 F.3d at 1365–66 (footnote omitted).

Much of the court's opinion addresses whether the arbitrators or reviewing courts should decide the question of "arbitrability," which the court understood to mean whether the arbitrators could hear the case if the requirements of Article 8 were not met.

> The "gateway" question in this appeal is arbitrability: when the United Kingdom and Argentina executed the Treaty, did they, as contracting parties, intend that an investor under the Treaty could seek arbitration without first fulfilling Article 8(1)'s requirement that recourse initially be sought in a court of the contracting party where the investment was made? That question raises the antecedent question of whether the contracting parties intended the answer to be provided by a court or an arbitrator.[8]

The court applied U.S. Supreme Court and other precedents indicating that courts should decide issues of arbitrability absent "clear and unmistakable evidence that the parties intended for the arbitrator to decide the question of arbitrability."[9] It found no such evidence in the Argentina-UK BIT. The court acknowledged that the UNCITRAL arbitration rules (which applied in the arbitration) give arbitrators the power to rule on questions of arbitrability,[10] but it concluded that those rules applied only after an arbitration was properly initiated. "But the Treaty's incorporation of the UNCITRAL Rules has a temporal limitation: the Rules are not triggered until after an investor has first, pursuant to Article 8(1) and (2), sought recourse, for eighteen months, in a court of the contracting party where the investment was made."[11]

> Because the Treaty provides that a precondition to arbitration of an investor's claim is an initial resort to a contracting party's court, and the Treaty is silent on who decides arbitrability when that precondition is disregarded, we hold that the question of arbitrability is an independent question of law for the court to decide. . . . The district court therefore erred as a matter of law by failing to determine whether there was clear and unmistakable evidence that the contracting parties intended the arbitrator to decide arbitrability where BG Group disregarded the requirements of Article 8(1) and (2) of the Treaty to initially seek resolution of its dispute with Argentina in an Argentine court.[12]

Unlike the arbitrators and the district court, the court of appeals had no doubt that the claimant's failure to comply with Article 8(2) rendered its claims nonarbitrable.

> Accordingly, "[b]ecause we conclude that there can be only one possible outcome on the [arbitrability question] before us," namely, that BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration pursuant to Article 8(3) if the dispute remained, we reverse the orders denying the motion to vacate and granting the cross-motion to confirm the Final Award, and we vacate the Final Award.[13]

[8] *Id.* at 1369.
[9] *Id.* at 1370.
[10] *See* Republic of Ecuador v. Chevron Corp., 638 F.3d 384 (2d Cir. 2011).
[11] *BG Group*, 665 F.3d at 1371.
[12] *Id.* at 1371–72 (citation omitted).
[13] *Id.* at 1373 (citation omitted).