BG GROUP PLC V. REPUBLIC OF ARGENTINA: A COMPARATIVE LEGAL ANALYSIS BETWEEN UNITED STATES & SWISS ARBITRATION LAW REGARDING PROCEDURAL PRECONDITIONS

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I. INTRODUCTION

The main objective of this article is to develop a comparative legal analysis between U.S. Arbitration Law and Swiss Arbitration Law regarding the doctrine established by the U.S. Supreme Court in its recent decision in *BG Group PLC v. Republic of Argentina*.[1] This legal research paper will first center on how U.S. Arbitration Law manages procedural arbitration preconditions stemming from treaty provisions in light of *BG Group*.[2] Thereafter, this analysis will focus on the same legal issue under Swiss Arbitration Law regarding how it treats arbitration procedural preconditions.[3] Lastly, this paper will explore how *BG Group PLC v. Republic of Argentina* would have been decided under Swiss Arbitration Law if it would have been appealed to the Federal Supreme Court of Switzerland in *lieu* of the Supreme Court of the United States.

II. UNITED STATES ARBITRATION LAW

A. The Federal Arbitration Act

United States Arbitration Law — federal, not state — is governed by the *Federal Arbitration Act* (FAA).[4] With the enactment of the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[5] The FAA "is based upon . . . the incontestable federal foundations of 'control over interstate commerce and over admiralty.'"[6] Section 2 of the FAA therefore limits the scope of its application to a "written

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[1] BG Grp. PLC v. Republic of Arg., 572 U.S. ___, 134 S.Ct. 1198 (2014).
[2] *Id.*
[3] The author chose to perform the analysis using Swiss Law due to its attractiveness and importance in international commercial arbitration as well as international investment arbitration.
[4] 9 U.S.C. §§ 1–16 (2017).
[5] Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).
[6] *Id.* at 11 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)).

provision in any maritime transaction or a contract evidencing a transaction involving commerce."[7] On the other hand, Section 1 defines the scope of the meaning of "commerce,"[8] construing it to the scope and extent of the interstate commerce clause of the United States Constitution.[9]

The focus of this article is on procedural prerequisites, which are "preconditions [that] should be exhausted before instituting the arbitral proceeding. . . ."[10] Under U.S. Arbitration Law, issues regarding procedural preconditions are matters to be decided by the arbitrators rather than by courts, for it is understood that "courts should normally assume that parties would have intended arbitrators to interpret and apply contractual provisions of this kind."[11] Moreover, courts should defer to the arbitrators' decisions regarding these issues.[12]

Drawing on its jurisprudential development of the issues concerning procedural preconditions in earlier labor arbitration and commercial arbitration cases, the United States Supreme Court extrapolated its domestic analysis applying it to an international investment arbitration dispute in the following landmark decision.

III. THE CASE OF *BG GROUP V. REPUBLIC OF ARGENTINA*

The Case of *BG Group PLC v. Republic of Argentina* arose from a dispute regarding the meaning of Article 8 — dealing with a local litigation requirement as a procedural precondition to arbitration — of the Argentina-U.K. BIT.[13] BG Group was a British corporation doing business in Argentina who invested in Argentinean MetroGas.[14] The legal framework in this investment was a bilateral investment treaty — the Argentina-U.K. BIT. At first, the investment was very profitable for BG Group.[15] However, due to an economic crisis, Argentina commenced to enact laws and regulations that resulted in losses to BG Group.[16]

Instead of fulfilling the local litigation requirement in Article 8 of the Argentina-U.K. BIT, and considering the dispute stemming from the Argentinian laws and regulations which BG Group considered to tacitly violate the provisions of the investment treaty,[17] they "never wanted to bring its claim to Argentina's local courts, and so it went right to arbitration instead."[18]

A. The Final Award

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[7] 9 U.S.C. § 2.

[8] *Id.* § 1. The *Federal Arbitration Act* defines *commerce* as: ("[C]ommerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation . . .".)

[9] U.S. CONST. art. 1, § 8, cl. 3 ("The Congress shall have power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . . .").

[10] JOHAN BILLIET, INTERNATIONAL INVESTMENT ARBITRATION: A PRACTICAL HANDBOOK 184 (2016).

[11] STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 185–86 (2015).

[12] *Id.* at 182.

[13] Agreement for the Promotion and Protection of Investments, U.K.-Arg., art. 8, Dec. 11, 1990, 1765 U.N.T.S. 38 [hereinafter *Argentina-U.K. BIT*].

[14] Lauren Corbett, *Application of Contract Law in* BG Group v. Argentina, 34 B.U. INT'L L.J. 181, 188 (2016).

[15] *Id.*

[16] *Id.* ("Specifically, Argentina had enacted new laws that changed the currency used from calculating gas tariffs from dollars to pesos . . . .").

[17] *Id.*

[18] BREYER, *supra* note 10, at 188.

On December 24, 2007, a final award was issued regarding the dispute between BG Group PLC and the Republic of Argentina. The formal seat of the arbitration was Washington D.C.,[19] and the arbitral tribunal was comprised by arbitrators Prof. Alejandro M. Garro — appointed by the Republic of Argentina — and Prof. Alber Jan van den Berg — appointed by BG Group —, and President Guillermo Aguilar Alvarez C —designated by van den Berg and Garro.[20]

The Republic of Argentina raised several objections regarding jurisdiction and competence of the Arbitral Tribunal. Argentina also challenged the admissibility of BG Group's claims and requested that they be dismissed.[21] Argentina's argument revolved around Article 8 of the Argentina-U.K. Bilateral Investment Treaty.[22] The Tribunal agreed that under article 8(2)(a)(1)[23], "recourse to arbitration [was] possible only where disputes [had] been submitted for 18 months to the competent tribunal of the State which hosts the investment and: (i) the tribunal [had] not issued a final decision; or (ii) the parties [were] still in dispute after the decision."[24] In addition, the Tribunal accepted Argentina's argument that "investors acting under the Argentina-U.K. BIT *must* litigate in the host State's courts for 18 months before they can bring their claims to arbitration."[25] Notwithstanding this analysis, the Tribunal recognized that article 8(2)(a)(i) could not constitute "an absolute impediment to arbitration."[26]

The Tribunal noted that Argentina's enactment of Decree 214/02 stayed all suits arising under the emergency measures adopted by the Argentinian government.[27] Furthermore, this Decree remained valid "five years after its promulgation in 2002,"[28] and to the date the arbitral award was issued, the emergency laws enacted by Argentina had not been repealed and remained

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[19] BG Grp. PLC v. Republic of Arg. (U.K. v. Arg.), Final Award, at 1 (Dec. 24, 2007) [hereinafter *BG Grp. PLC v. Republic of Arg., Final Award*], http://www.italaw.com/sites/default/files/case-documents/ita0081.pdf.

[20] *Id.* at 7.

[21] *Id.* at 30.

[22] Agreement for the Promotion and Protection of Investments, U.K.-Argentina, Art. 8, Dec. 11, 1990, 1765 U.N.T.S. 38 [hereinafter *Argentina-U.K. BIT*]. Sections (1) and (2) of Article 8 of the Argentina-U.K. BIT state that:

> (1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled *shall* be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.
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> (2) The aforementioned disputes *shall* be submitted to international arbitration in the following cases:
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> (a) if one of the Parties so requests, in any of the following circumstances:
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> (i) where, after a period Of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;
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> (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;
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> (b) where the Contracting Party and the investor of the other Contracting Party *have so agreed*.

[23] *Id.* (emphasis added). Section (1) states that disputes *shall* be submitted to the competent tribunal in whose territory the investment was made. The arbitration procedures in Section (2)(a) are conditioned upon Section (1), whereas Section (2)(b) allows the parties to proceed directly to arbitration if they agree to do so, thus waiving the local litigation requirement. *Id.*

[24] BG Grp. PLC v. Republic of Arg., Final Award, at 47.

[25] *Id.* at 50 (emphasis added).

[26] *Id.* at 50.

[27] *Id.* at 50.

[28] *Id.* at 51.

in full force.[29] Other Argentinian laws and regulations also provided that "any licensee seeking judicial redress would be excluded from the renegotiation process of its license."[30]

The Tribunal therefore proceeded to examine the reasonableness of exhausting judicial remedies in light of the Argentinean Government's constant interference with the normal operation of its courts and its exclusion of litigious licensees from the renegotiation process.[31] They found that BG Group's claims were admissible, and consequently did not have to determine "whether [BG Group] should have sought relief by the courts of Argentina during at least a period of 18 months before resorting to arbitration."[32] The Tribunal in light of the factual findings, concerned with the results and implications of such a restrictive interpretation of Article 8(2)(a)(i) of the Argentina-U.K. BIT, concluded particularly and most importantly that:

> Where recourse to the domestic judiciary is unilaterally prevented, or hindered by the host State, any such interpretation would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, 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.[33]

This determination follows a general consensus in international investment arbitration cases concerning the requirement of the exhaustion of local judicial remedies -stemming from bilateral investment treaties- as a precondition to arbitration.[34] Intriguingly, it is not the first time that an international arbitral tribunal has waived the local litigation constraint by virtue of the futility exception in a dispute arising from an Argentinian bilateral investment treaty.[35]

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[29] *Id.* The Tribunal took into consideration, among other legislative efforts, Argentina's enactment of Decree 320/02 which "extended the application of the Emergency Law until 31 December 2007." *Id.* at 51 n.138.

[30] *Id.* at 52; *see* BREYER, *supra* note 11, at 188 ("In fact, Argentina had not blocked BG Group's access to the local courts completely, but it had suspended the execution of those court's judgements for six months, as well as issuing an order banning firms that had already tried going to the courts (or arbitration) from taking advantage of a special negotiation process it had created precisely to deal with investment problems such as BG Group's.").

[31] BG Grp. PLC v. Republic of Arg., Final Award, at 53.

[32] *Id.* at 53.

[33] *Id. at* 50. Article 32 of the Vienna Convention on the Law of Treaties regarding the supplementary means of interpretation of treaties states that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) Leaves the meaning ambiguous or obscure; or
>
> (b) *Leads to a result which is manifestly absurd or unreasonable.*

Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 340 (emphasis added).

[34] According to Johan Billiet:

> The State party may require the investor to resort to domestic courts before bringing the dispute before an international tribunal as a condition of its consent to arbitration. . . . In such cases, the investor must seek to settle the dispute before domestic courts for a period of time, usually 18 months. However, where the domestic proceedings were futile or no decision on the merit was rendered after the expiration of the period and the dispute is persisting, the investor may legitimately access international arbitration.

BILLIET, *supra* note 10, at 191 (citing C. MCLACHLAN *ET AL.*, INTERNATIONAL INVESTMENT ARBITRATION, SUBSTANTIVE PRINCIPLES 121 (2007) and A. BJORKLUND, YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2012-2013 408 (2014)).

[35] *See e.g.*, Giovanni Alemanni and Others v. The Argentine Republic, ICSID Case No. ARB/07/08, Decision on Jurisdiction and Admissibility (Jan. 27, 2015) (ruling by the International Centre for Settlement of Investment Disputes (ICSID) that applies the futility exception to the local litigation requirement in a dispute arising under the Italy-Argentina bilateral investment treaty).

B. Supreme Court Decision

After the Tribunal issued a $185 million award in favor of BG Group,[36] Argentina, invoking Section 10(a)(4) of the FAA,[37] sought relief in the U.S. District Court for the District of Columbia, which in turn confirmed the award.[38] However, the Court of Appeals for the District of Columbia Circuit reversed,[39] stating that "the interpretation and application of Article 8's local litigation requirement was a matter for courts to decide *de novo*, *i.e.*, without deference to the views of the arbitrators,"[40] and held that "the circumstances did not excuse BG Group's failure to comply with the requirement."[41] In light of the Court of Appeals' reversal, BG Group filed a petition for certiorari before the Supreme Court of the United States.[42]

The issue before the Supreme Court, thus, was whether the procedural precondition from the arbitration award made under the Argentina-U.K. BIT requiring local ligation before recourse to arbitration was a matter for the arbitrators to decide — and for the courts to give deference to — or for the courts to review *de novo*.[43] The Court held that "the matter is for the *arbitrators*, and courts must review their determinations *with deference*."[44]

One of the most important and relevant holdings of *BG Group* concerning bilateral investment treaties was that treaties do not make a critical difference in the courts' scrutiny regarding who decides procedural precondition issues.[45] In other words, the fact that the procedural precondition arises from a treaty is irrelevant, and the domestic rule regarding such matters is applicable.

C. The Dissident Opinion

Chief justice Roberts filed a dissenting opinion for the *BG Group* case, in which article 8(2)(a) of the Argentina-U.K. BIT was not a valid arbitration agreement between Argentina and BG Group, nonetheless a "unilateral *offer* to arbitrate, which an investor may accept by complying with its terms."[46] Roberts contends that article 8(2)(b) was the only way that BG Group could have bypassed the local litigation requirement. Under article 8(2)(b), the parties could go directly

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[36] BG Grp. PLC v. Republic of Arg., 134 S. Ct. 1198, 1205 (2014).
[37] 9 U.S.C. § 10(a)(4).
[38] Republic of Arg. v. BG Grp. PLC, 764 F. Supp. 2d 21 (D.D.C. 2011); Republic of Arg. v. BG Grp. PLC, 715 F. Supp. 2d 108 (D.D.C. 2010).
[39] Republic of Arg. v. BG Grp. PLC, 665 F.3d 1363 (D.C. Cir. 2012).
[40] *BG Grp. PLC*, 134 S.Ct. at 1205. The Court of Appeals' ruling agreed with international investment arbitration cases.
[41] *Id.* at 1205.
[42] *Id.*
[43] *Id.* at 1203–04.
[44] *Id.* at 1204 (emphasis added); *see* Anthea Roberts & Christina Trahanas, *International Decision: Judicial Review of Investment Treaty Awards: BG Group v. Argentina*, 108 A.J.I.L. 750, 750 (2014) ("[T]he majority adopted a highly deferential standard of review based on interpretive presumptions developed under U.S. domestic law for arbitration agreements found in ordinary contracts between private parties."); *but see* THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE 32 (6th ed. 2007) ("An unusual feature of the U.S. law on arbitration is that it does not recognize or incorporate the *kompetenz-kompetenz* doctrine. FAA § 3 provides that jurisdictional issues pertaining to arbitration (whether a valid agreement exists and whether a dispute is covered by the agreement) shall be decided by a federal district court in the context of determining whether a judicial proceeding should be stayed pending arbitration.").
[45] *BG Grp. PLC*, 134 S. Ct. at 1206 ("In answering the question, we shall initially treat the document before us as if it were an ordinary contract between private parties. Were that so, 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*." (emphasis added)).
[46] *Id.* at 1216.

to arbitration "by obtaining the Contracting Party's explicit agreement to proceed directly to arbitration."[47] Hence, since the lack of an explicit agreement to proceed directly to arbitration between Argentina and BG Group was nonexistent, BG Group was obliged to comply with the local litigation requirement under article 8(2)(a).

Chief Justice Roberts was of the opinion that the structure of article 8 of the Argentina-U.K. BIT constituted "a condition to the formation of an [arbitration] agreement."[48] Therefore, "whether an investor had complied with the requirement was a question for a court to decide *de novo*,"[49] rather than a procedural precondition to be determined by the arbitrator and to which the courts must bestow deference, as held by the majority opinion of the Supreme Court.[50] It has been argued that Chief Justice Robert's approach to the issue is more preferable than the approach of the majority opinion since "it appreciates the public international law basis and public law nature of investment treaty arbitration, which differs in important ways from contractual arbitration between private parties."[51]

IV. SWISS ARBITRATION LAW

In Switzerland arbitration as defined by Gabrielle Kaufmann-Kohler — a prominent International Arbitration professor at the University of Geneva — is "a consensual method of dispute resolution resulting in binding decisions made by private individuals who are chosen by the parties and empowered to adjudicate disputes in lieu of the courts."[52] As in the United States, arbitration in Switzerland is consensual.[53]

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[47] *Id.* at 1217. Chief justice Roberts argued that:

> Whereas Article 8(2)(a) is part of a completed *agreement* between Argentina and the United Kingdom, it constitutes only a unilateral standing *offer* by Argentina with respect to U. K. investors—an offer to submit to arbitration where certain conditions are met. That is how scholars understand arbitration provisions in bilateral investment treaties in general.

Id.; *see* CHRISTOPHER DUGAN *ET AL.*, INVESTOR-STATE ARBITRATION 221 (2008).

[48] Christina Trahanas, *Introduction Note to BG Group PLC v. Republic of Argentina*, 54 I.L.M. 130 (2014) (citing *BG Grp. PLC*, 134 S. Ct. at 1216–17, 1221).

[49] *Id.* (citing *BG Grp. PLC*, 134 S. Ct. at 1221).

[50] *BG Grp. PLC*, 134 S. Ct. at 1204 ("In our view, the matter is for the arbitrators, and courts must review their determinations with deference.").

[51] *Roberts & Trahanas*, *supra* note 42, at 751. Roberts and Trahanas argue that:

> "Although triggered by different grounds of review and institutional structures, annulment proceedings and national court review share at least two characteristics: they cannot be too interventionist because they are not meant to amount to full appellate review, but they cannot be too deferential because they must provide some meaningful level of oversight, especially on jurisdictional questions. That is why the issue of standards of review assumes particular importance in the investment treaty system. The appropriate standard has prompted considerable controversy in the annulment context but to date has received little attention in the national court context. The sharply diverging opinions in *BG Group* should change this asymmetry by enlivening the debate about what standard national courts should adopt when reviewing investment treaty awards, particularly when reviewing preconditions to jurisdiction."

Id. at 751. This analysis is important because it suggests that the underlying premise used by the majority opinion in reaching its decision -that it did not matter that the document before them was a treaty- is problematic in terms of the interrelationship between arbitration agreements and bilateral investment treaties.

[52] GABRIELLE KAUFMANN-KOHLER & ANTONIO RIGOZZI, INTERNATIONAL ARBITRATION: LAW AND PRACTICE IN SWITZERLAND 5 (2015).

[53] *Id.* ("[R]ecourse to arbitration is voluntary. The arbitration agreement is the basis for and the cornerstone of every arbitration: there can be no arbitration without an arbitration agreement. The arbitration agreement also determines

The following consideration of Swiss Arbitration Law will emphasize more on the *jurisdictional* implications of the procedural precondition. That is, we will hypothesize on when a procedural precondition is not met, and the party is obliged to execute the procedural precondition, the jurisdiction of the arbitral tribunal may have been acquired erroneously.[54]

A. The Swiss Private International Law Act

Switzerland, unlike the United States, has promulgated laws, as well as rules that govern and treat domestic and international arbitration differently. Thus, "Swiss law distinguishes between domestic and international arbitration."[55] Chapter twelve of the Federal Statute on Private International Law, adopted in 1987,[56] governs international arbitrations.[57] Although many other nations promulgated an international arbitration framework legislation pursuant to the United Nations Commission on International Trade Law (UNCITRAL) Model Law, chapter twelve of the PILA "is not based on the UNCITRAL Model Law."[58] The rules of chapter twelve will apply to an arbitration proceeding only if the following two conditions under Article 176 of the statute are met: (1) If the arbitral tribunal is located in Switzerland, and (2) if at least one of the parties neither resides nor is domiciled in Switzerland.[59] Chapter twelve will therefore not govern arbitral proceedings if the arbitral tribunal is seated elsewhere than Switzerland and if all parties are domiciled or have habitual residences in Switzerland.[60] The parties however can exclude the application of chapter twelve by an express agreement.[61]

Under Swiss Arbitration Law, the arbitral tribunal itself has the power to determine whether it has jurisdiction or not by virtue of Article 186 of the PILA.[62] Accordingly, Article 186 incorporates the principle of *kompetenz-kompetenz* into Swiss Law.[63] This issue is decided with a preliminary award issued by the arbitral tribunal.[64] If, however a party to the arbitration proceeding is of the opinion that the arbitral tribunal "wrongly accepted or declined

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the scope of the arbitration. Thus, there can be no arbitration outside the limits set by the parties' agreement to arbitrate. This is the *contractual element* of arbitration.").

[54] *See supra* Part II.B. Argentina sought relief in the U.S. District Court by impugning the jurisdiction of the Arbitral Tribunal.

[55] GERALD SPINDLER & FRITJOF BÖRNER, E-COMMERCE LAW IN EUROPE AND THE USA 560 (2002).

[56] *KAUFMANN-KOHLER & RIGOZZI*, *supra* note 50, at 3.

[57] Bundesgesetz über das Internationale Privatrecht [Private International Law Act], Dec. 18, 1987, SR 291, art. 176 (Switz.) ("Einzige Beschwerdeinstanz ist das schweizerische Bundesgericht. Das Verfahren richtet sich nach Artikel 77 des Bundesgerichtsgesetzes vom 17. Juni 2005") [hereinafter PILA] (translation by the Swiss Arbitration Association).

[58] KAUFMANN-KOHLER & RIGOZZI, *supra* note 50, at 17.

[59] PILA art. 176.

[60] *Id.*

[61] *Id.*

[62] *Id.*, art. 186(1); MATTHIAS SCHERER & MARTIN DAWIDOWICZ, INTERNATIONAL ARBITRATION GUIDE: SWITZERLAND 7 (2012) ("Under Article 186(1) SPILA, the arbitral tribunal shall rule on its own jurisdiction (*competence-competence*)."), http://www.ibanet.org/Document/Default.aspx?DocumentUid=8DA26206-5B7E-49A5-A69F-4BEF37D6408A.

[63] KAUFMANN-KOHLER & RIGOZZI, *supra* note 50, at 239, 243 ("Competence-competence under Article 186(1) PILA entails that a party cannot seek declaratory judgement from a Swiss court in respect of the validity of the arbitration agreement." (citations omitted)). For an explanation of the *kompetenz-kompetenz* doctrine, see, e.g., THOMAS E. CARBONNEAU, ARBITRATION LAW AND PRACTICE 31 (6th ed. 2007) ("The *kompetenz-kompetenz* doctrine, also known as jurisdiction to rule on jurisdictional challenges, provides that the arbitral tribunal has the authority to decide on its own authority to rule.").

[64] PILA art. 186.

jurisdiction,"[65] the party may file an action for annulment directly with the Swiss Federal Supreme Court,[66] for in Switzerland, the principle of *kompetenz-kompetenz* is *not absolute*.[67] Moreover, challenging the jurisdiction of the arbitral tribunal is important, for "[a] negative decision on arbitral jurisdiction may deprive the claimant of any meaningful access to justice."[68] In other words, even though Article 186 of the PILA gives the arbitral tribunal the power to determine whether it has jurisdiction or not,[69] the award may be set aside if the arbitral tribunal did so wrongfully. Under article 190(2)(b) of the PILA, the Swiss Federal Supreme Court can only revise an arbitral tribunal's decision if said tribunal erroneously held that it had or did not have jurisdiction.[70] The Swiss Federal Supreme Court would revise an issue of this nature *de novo*.

B. Swiss Jurisprudence

Under Swiss Law, "[t]he sole judicial authority to set aside an arbitration award rests in the Swiss Federal Supreme Court."[71] Namely, if a party to an arbitration procedure governed by the *Private International Law Act* wants to set aside an arbitration award, it must appeal directly to the Supreme Court. Thus, one must turn to the case law of the Federal Supreme Court of Switzerland to understand how it has interpreted and developed the pertinent *Privet International Law Statute* provisions.

In the case of *République A. v. B. International*,[72] a dispute between Electricité de France (EDF) -a French anonymous society- and the Republic of Hungary regarding the jurisdiction of

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[65] *Id.*, art. 190(2)(b) (translation by the Swiss Arbitration Association). Article 190 of the Swiss Private International Law Act states that:

> The award may only be annulled:
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> a) if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;
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> b) *if the arbitral tribunal wrongly accepted or declined jurisdiction*;
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> c) if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;
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> d) if the principle of equal treatment of the parties or the right of the parties to be heard was violated;
>
> e) if the award is incompatible with public policy.

Id. (emphasis added) (translation by the author).

[66] *Id.* arts. 190–91; KAUFMANN-KOHLER & RIGOZZI, *supra* note 50, at 243 ("The tribunal's decision to uphold or deny jurisdiction can be challenged before the Supreme Court . . . ."); SCHERER & DAWIDOWICZ, *supra* note 60, at 7 ("In international arbitration proceedings, the arbitral tribunal's decision on its jurisdiction can generally be appealed before the Swiss Federal Supreme Court.").

[67] KAUFMANN-KOHLER & RIGOZZI, *supra* note 50, at 239.

[68] *Id.*, at 239.

[69] PILA art. 186. Regarding international arbitral awards, Scherer and Dawidowicz explain that:

> International arbitral awards, whether final, partial or interim, may be set aside pursuant to Article 190 SPILA. The limited grounds upon which an award may be set aside are contained in Article 190(2) SPILA. Grounds for a challenge are an irregular constitution of the arbitral tribunal, *a wrong decision on jurisdiction*, where the arbitral tribunal has ruled beyond the claims submitted to it, or failed to decide on the claims, where there is a violation of the right to be heard or of the principle of equal treatment of the parties, or where the award is incompatible with public policy. Interim awards can be challenged only on the grounds of the irregular constitution of the arbitral tribunal and a wrong decision on jurisdiction (Article 190(2)(a) and (b) SPILA).

SCHERER & DAWIDOWICZ, *supra* note 60, at 17 (emphasis added).

[70] PILA art. 190(2)(b).

[71] *Id.*, art. 191.

[72] Judgement of 4A_34/2015 of October 6, 2015 [hereinafter *Judgement of 4A_34/2015*], *available at* http://relevancy.bger.ch/php/aza/http/index.php?lang=fr&type=highlight_simple_query&page=1&from_date=&to_d

the arbitral tribunal arising from an investment treaty provision,[73] the Federal Supreme Court of Switzerland stated that, "[s]eized of a jurisdictional objection, the Federal Tribunal *freely reviews the legal issues, including preliminary questions, which determine the jurisdiction or the lack of jurisdiction of the arbitral tribunal*."[74] The court then examined the text of the treaty and the arbitral award.[75] After evaluating the legal framework from which the jurisdictional issue arose, the Court held that the arbitral tribunal did not err in accepting jurisdiction.[76] The importance and relevance of this case is that it is an illustration of the *de novo* revision of an annulment action that questions the jurisdiction of the arbitral tribunal. Rather than conferring deference to the determination of the arbitral tribunal, as in U.S. Arbitration Law, under Swiss Arbitration Law the Federal Supreme Court of Switzerland scrutinizes *inter alia* the legal framework and factual findings, in order to determine whether the arbitral tribunal correctly acquired jurisdiction.[77] In considering these factors, whether or not the party complied with procedural preconditions -even so if the party was obliged to do so- will affect the Court's determination.

In the case of *A. SA v. B. SA*,[78] the issue before the Federal Supreme Court of Switzerland was whether a pre-arbitration dispute resolution procedure, particularly a dispute adjudication board (DAB), was mandatory *vel non*, and the legal consequences of having failed to comply with the procedural requirement as a precondition to arbitration. The Court held that such a procedure is mandatory if the arbitration agreement so provides, and that the dispute may not be submitted to arbitration until the procedural precondition has been met.[79]

Consequentially, if a party were to submit the dispute to arbitration, and the arbitral tribunal were to accept jurisdiction, the aggrieved party may initiate an annulment action under Article 190(2)(b) of the PILA. The Federal Supreme Court of Switzerland would review the issue

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ate=&sort=relevance&insertion_date=&top_subcollection_aza=all&query_words=4A_34/2015&rank=1&azaclir=aza&highlight_docid=aza%3A//06-10-2015-4A_34-2015&number_of_ranks=1 (last visited May 7, 2016).

[73] *Id.*; *see The Swiss Supreme Court addresses the Difference between Treaty Claims and Contract Claims*, SWISS INTERNATIONAL ARBITRATION DECISIONS, http://www.swissarbitrationdecisions.com/swiss-supreme-court-addresses-difference-between-treaty-claims-and-contract-claims?search=%22investment+treaty%22 (last visited May 7, 2016) ("Although the Federal Tribunal did its best to 'anonymize' the judgment, it is immediately apparent that it involved the dispute between Eléctricité de France (EDF) International SA and the Republic of Hungary.").

[74] *Id.*, ¶ 3.1 (emphasis added).

[75] *Id.*, ¶ 3.2.

[76] *Id.*, ¶ 3.5.5.

[77] The Federal Supreme Court of Switzerland also "retains the ability to review the factual findings on which the award under appeal is based in one of the grievances mentioned at Art. 190(2) PILA is raised against such factual findings . . . ." Judgment of 4A_124/2014 of July 7, 2014, ¶ 2.3 [hereinafter *Judgement of 4A_124/2014*], *available at* http://relevancy.bger.ch/php/aza/http/index.php?lang=fr&type=highlight_simple_query&page=1&from_date=&to_date=&sort=relevance&insertion_date=&top_subcollection_aza=all&query_words=4A%20124%202014&rank=1&azaclir=aza&highlight_docid=aza%3A//07-07-2014-4A_124-2014&number_of_ranks=212 (last visited May 16, 2016); *see Federal Tribunal Upholds FIDIC Pre-Arbitration Requirements*, SWISS INTERNATIONAL ARBITRATION DECISIONS, http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-fidic-pre-arbitration-requirements (last visited May 16, 2016).

[78] Judgement of 4A_124/2014.

[79] *Id.*; *Federal Tribunal Upholds FIDIC Pre-Arbitration Requirements*, SWISS INTERNATIONAL ARBITRATION DECISIONS, http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-fidic-pre-arbitration-requirements (last visited May 16, 2016) ("The conclusion is that international arbitrators sitting in Switzerland must consider the FIDIC DAB pre-arbitration procedure as mandatory. An arbitration may not be initiated without going first to the DAB if the contract so provides but an *ad hoc* DAB which has not been constituted 18 months after it was requested creates a situation in which the Respondent in an arbitration can no longer rely on the mandatory nature of the DAB procedure.").

de novo, rather than offer deference to the arbitral tribunals determination regarding its' jurisdiction, notwithstanding the doctrine of *kompetenz-kompetenz*.

V. BG GROUP PLC UNDER SWISS ARBITRATION LAW

The following section addresses the inquiry on how *BG Grp. PLC v. Republic of Arg.* would have been determined under Swiss Arbitration Law if it would have been appealed to the Federal Supreme Court of Switzerland in *lieu* of the Supreme Court of the United States. The examination of this segment will be limited to the issue presented in the Supreme Court case regarding procedural preconditions.[80]

Assuming *arguendo* that the Argentina-U.K. BIT had established that the arbitral tribunal would be in Switzerland, as neither party resided nor was habitually domiciled in Switzerland, and assuming no agreement to the contrary, chapter twelve of the PILA regarding international arbitration would thus govern the dispute between Argentina and BG Group.[81]

Since Argentina "sought to vacate the award in part on the grounds that the arbitrators lacked jurisdiction,"[82] they could have commenced an annulment action before the Federal Supreme Court of Switzerland to set aside the final award by virtue of article 190(2)(b) of the PILA on the ground that the arbitrators wrongly acknowledged jurisdiction.[83]

Having filed such an annulment action, the issue would have been revised by the Federal Supreme Court of Switzerland *de novo*, to determine whether the arbitrators indeed erroneously accepted jurisdiction.[84]

VI. CONCLUSION

The doctrine set forth in *BG Group PLC* departs from international standards of review of arbitration agreements in international commerce, by extrapolating the domestic analysis from U.S. Arbitration Law arising under the Federal Arbitration Act regarding procedural preconditions and applying it, as is, to international commercial investment arbitration cases. Other States, like Switzerland, recognize the difference between domestic arbitration and international arbitration. U.S. Arbitration Law, however, does not make such distinction. Customarily, under U.S. Arbitration Law, issues regarding procedural preconditions are solved by the arbitrators, and the courts in the United States must provide deference to the arbitral tribunal's determination. Whereas under Swiss Arbitration Law, even though the arbitral tribunal has the power to determine its' own jurisdiction by virtue of the doctrine of *kompetenz-kompetenz*, such determination is not absolute nor will deference be provided by the Federal Supreme Court of Switzerland. Instead, whether the procedural precondition was mandatory *vel non*, and if it was complied with, will be a matter for the Federal Supreme Court of Switzerland to determine *de novo*.

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[80] An analysis of *how* the Federal Supreme Court of Switzerland would have solved the merits of the case once the jurisdictional question would have been answered is out of the scope of this work.
[81] PILA arts. 176-94.
[82] *BG Grp. PLC*, 134 S. Ct. at 1205.
[83] PILA art. 190(2)(b); Judgement of 4A_34/2015, ¶ 3 ("A civil appeal is admissible against awards concerning international arbitration pursuant to the requirements of Art. 190-192 PILA.").
[84] *Id.*, art. 190(2)(b).