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Supreme Court Cites Hughes Hubbard Brief in BG Group Ruling

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The U.S. Supreme Court, citing a Hughes Hubbard & Reed amicus curiae brief, reinstated a \$185.3 million arbitration award won by British gas provider BG Group Plc in a dispute with Argentina over that country's 2002 emergency measures.

On March 5, 2014, the high court said in a 7-2 vote that the federal appeals court in Washington should not have vacated the award. The D.C. Circuit ruled in 2012 that the three-member arbitration panel in Washington exceeded its powers by finding that BG Group was excused from complying with a requirement in the Argentine-UK treaty that investors must pursue 18 months of domestic litigation before bringing an arbitration.

Hughes Hubbard filed the brief in August 2013 on behalf of 20 professors and practitioners of arbitration law in support of reversing the D.C. Circuit's decision to vacate the award. Hughes Hubbard wrote the brief with Columbia Law School professor George Bermann. The case represented the first time the high court had ever taken up a case involving an investment treaty award.

In the majority opinion, Justice Stephen Breyer said the appeals court should have deferred to the arbitration panel's conclusion that the case could go forward. Breyer also quoted Hughes Hubbard's amicus brief to note that the bulk of international authority supported the majority's view that the local litigation provision in the treaty functioned as a purely procedural precondition.

Breyer quoted a statement from the Hughes Hubbard brief that, to assume the parties intended de novo review of the provision by a court "is likely to set United States courts on a collision course with the international regime embodied in thousands of [bilateral investment treaties]".

In a concurring opinion, Justice Sonia Sotomayor also quoted the Hughes brief, writing that there was no compelling reason to suppose the parties silently intended to make the local litigation requirement a condition on their consent to arbitrate, given that the entire purpose of bilateral investment agreements is, as the brief said, to "relieve investors of any concern that the courts of host countries will be unable or unwilling to provide justice in a

dispute between a foreigner and their own government."

The two dissenters, Chief Justice Roberts and Justice Kennedy, agreed that the D.C. Circuit's decision should be reversed, but would have remanded the case for further consideration.

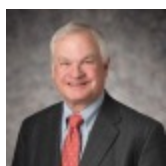
John Townsend told Global Arbitration Review that the decision is notable for "integrating the standard for review for investment treaty awards" within the existing standard for review of commercial awards. Global Arbitration Review (GAR) quoted him as saying: "The majority makes clear that treaty awards are a distinct category of award that requires special attention but also leaves undisturbed the default rule that, unless the parties agree otherwise, courts will decide disputes about whether parties have agreed to arbitrate in the first place, while arbitrators will decide whether procedural preconditions to arbitration have been met."

GAR also quoted Townsend as noting that the court's conclusion that the local litigation rule is a procedural requirement will be "controversial." "But the majority is persuasive that the sovereign parties to the BIT expressed their agreement to leave decisions about whether that condition had been complied with to the arbitrators. Once that conclusion is reached, it follows that US courts should apply the same deferential standard of review that they apply to commercial awards. The BG award is thus, in my view, properly reinstated."

The decision also made headlines in The Associated Press, Bloomberg, Reuters and other news outlets.

The Hughes Hubbard team that worked on the brief and on an earlier one urging the Supreme Court to grant certiorari in the case, consisted of John Townsend, John Fellas, Jim Boykin, Alex Hess, Tyler Grove, Jan Dunin-Wasowicz, Kate McNeece and Sam Salyer.

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John M. Townsend



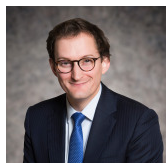
John Fellas



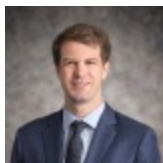
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