APPLICATION OF CONTRACT LAW IN *BG GROUP V. ARGENTINA*

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Abstract

Bilateral investment treaties are a relatively new legal instrument. As such, questions of their interpretation offer valuable opportunities for courts to develop and shape the law. However, when presented with one such interpretive issue in BG Group v. Argentina*, the Supreme Court relied on the simple application of contract law and failed to appreciate the significant differences associated with the bilateral investment treaty context. This Note offers an alternative approach that encompasses these differences and also illustrates the application of such an approach to a recent treaty.*

Introduction

As the world has continued on its path of globalization, new forms of interactions between countries have emerged. In particular, the new mechanism of bilateral investment treaties ("BITs") has combined public international law and private commercial dispute resolution in new and interesting ways. These new areas of law require new ways of thinking and new forms of analysis. It is not enough to simply conform innovative law into old models of interpretation.

In its March 2014 decision in *BG Group v. Argentina*,[1] the Supreme Court made a critical mistake by its application of US contract law principles to a bilateral investment treaty between the United Kingdom and Argentina. Though the decision favored continued growth of international investment, the reasoning was far too narrowly construed. Justice Sotomayor's concurrence[2] and Chief Justice Roberts' dissent[3] approached the issue in interesting ways, but neither method is beyond reproach. The application of simple contract law in the bilateral investment treaty setting ignores the special characteristics associated with this newly developed area of the law and is simply inadequate.

In Part I, this Note will explore some of the history of bilateral investment treaties — noting that although they are a relatively recent development, they stem from instruments that have lengthy political and historical backgrounds. Part I will also discuss the importance of these bilateral investment agreements, particularly the benefits they provide for both the host country and the investor, especially through the arbitration provisions that have become standard practice. Part II will be a discussion of the recent Supreme Court case, *BG Group v. Argentina*, and the various Justices' viewpoints. An argument will then be made in Part III that the Supreme Court majority erred in its analysis by oversimplifying the context of bilateral investment treaties and ignoring the history and characteristics that make them unique. In Part IV, an alternative

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[1] 134 S. Ct. 1198 (2014).

[2] *Id.* at 1213-15 (Sotomayor, J., concurring).

[3] *Id.* at 1215-24 (Roberts, J., dissenting).

approach will be suggested that encompasses these differences. The suggested approach will blend the characteristics of contracts and treaties in order to support a finding in favor of arbitration. Finally, in Part V, the pitfalls of the Supreme Court's analysis discussed in Part II and the benefits of the newly suggested approach from Part IV will be demonstrated through an illustrative application of the US-Korea Free Trade Agreement.

I. Background and History of Investor State Relationships and Bilateral Investment Treaties

As a general matter, foreign investment is a critical component of the world economy because it allows for growth and development in states that would otherwise be unable to achieve such economic growth.[4] This importance is reflected in the fact that the number of foreign investment treaties in effect has continued to increase rapidly, with arbitration serving as the main dispute resolution technique in a large number of the disputes surrounding them.[5] Indeed, in the last forty years, there have been almost 3,000 bilateral investment treaties enacted.[6]

The core principles surrounding these treaties are the ideas of "access, reasonableness, security, non-discrimination, transparency and due process," each of which will be discussed in more detail below.[7] These objectives can only be achieved successfully when the host country is willing to legally bind itself to the document.[8] In order to better understand the importance of bilateral investment treaties to foreign investment and subsequent economic growth, it is important to first consider their history. It is also prudent to consider certain specific areas of development in foreign investment and to analyze the importance of arbitration in maintaining the entire system.

A. *Why Foreign Investment is Important*

To be competitive in the world market, countries that struggle with capital, technology, and other resources rely heavily on foreign investment.[9] Although foreign investment does not necessarily transform a struggling country overnight, it can provide for various advancements. One leading foreign investment book states, for example, that:

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[4] *See* Margaret L. Moses, The Principles and Practice of International Commercial Arbitration 220 (2008).

[5] *See* Doak R. Bishop et al., Foreign Investment Disputes: Cases, Materials and Commentary 1 (2d ed. 2014).

[6] *Id.*

[7] Kenneth J. Vandevelde, Bilateral Investment Treaties: History, Policy and Interpretation 2 (Oxford University Press 2010).

[8] *See id.*

[9] Moses, *supra* note 4, at 220.

> Foreign investment is not a panacea for all that ails such societies, but in many cases it can provide a way to jump start economies, a short cut to higher wages, an improved infrastructure, better schools and hospitals, and more efficient and cost effective public services. Psychologically it can provide economic role models, generate financial incentives and create hope. In short, it can be a motivational force. At a minimum, it can build, maintain, and operate important parts of a country's infrastructure or introduce complex technology to a country lacking it.[10]

Foreign investment's importance has led to the creation of various instruments through which investors channel their funds. The bilateral investment treaty is one such recently created, essential instrument.[11]

B. *What is a Bilateral Investment Treaty?*

Bilateral and multilateral investment treaties are complicated treaties combining public law treaty formats with private international law characteristics, such as the dispute resolution mechanisms.[12] These investment treaties are public because they are between states, but they confer benefits on the private party investor as well as the receiving state.[13] Such treaties provide mutual protections for qualifying investors.[14] Because of the nature of the history and development of bilateral investment treaties, many of them contain surprisingly similar clauses and are arranged in similar patterns.[15]

The success of bilateral investment treaties is dependent upon the relationship between the host state and the investor and the willingness of both to accept the legally binding nature of their agreement.[16] The main benefit is that they obligate both parties to maintain a certain type of conduct, a type that might not be required or monitored under national

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[10] BISHOP ET AL., *supra* note 5, at 8.

[11] *See id*. at 7-9.

[12] *See* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 50 (2013) ("Accordingly, many substantive rules developed in public international law, and many procedural rules developed in private international law, apply directly rather than by way of analogy.") (internal citation omitted).

[13] *See id.* at 45-46.

[14] *See id.* at 53 ("[BITs] typically contain a most-favored-nations clause that operates to extend the greatest protection offered by a state in any single treaty to the beneficiaries of all of its treaties, which has a multilateralizing effect. Many awards are made public, and tribunals often engage in extensive reviews of them as persuasive (though nonbinding) precedents.") (internal citations omitted).

[15] BISHOP ET AL., *supra* note 5, at 1.

[16] VANDEVELDE, *supra* note 7, at 2.

private law, and to operate within the scope of the agreement rather than particular national laws.[17]

C. *A Brief History of Foreign Investment and Bilateral Investment Treaties*

Bilateral investment treaties are relatively recent developments as far as legal instruments go — they were first introduced between Germany and Pakistan about fifty years ago.[18] However, predecessors to the bilateral investment treaty in the form of other instruments for foreign investment date back to the 1770s, primarily in the form of treaties of friendship, commerce, and navigation, which are discussed in more detail below.[19]

Increases in international investment were originally triggered by both the Napoleonic wars and the resulting peace in Europe, and the changes resulting from the industrial revolution and the blossoming of liberal economic theory.[20] Regarding economic theory, there was a shift from the idea that a nation's wealth could be measured by the gold in its coffers to the idea that it should in fact be measured by the nation's productivity.[21]

One type of agreement that formed the early foundations for bilateral investment treaties was the treaty of friendship, commerce, and navigation ("FCNs"), which the United States used to establish trade relations.[22] An early example of this can be found in an agreement between the United States and Great Britain in 1794.[23] BITs are more narrowly focused on investment, while FCNs could address a range of issues including, for example, investment, human rights and general trade.[24]

Arbitration, however, was not the primary means for controlling foreign investment disputes throughout the 19th century.[25] Rather, the general practice was to use military force to protect the investments.[26] This all ended with the Hague Conventions of 1899 and 1907, which provided for the peaceful resolution of inter-state disputes, offering arbitration as a valuable alternative.[27] The end of military force in the 19th century

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[17] *Id.* at 4.

[18] *Id.* at 1 (internal citation omitted).

[19] *See id.* at 20-21.

[20] *See id*. at 20.

[21] *See id.* at 20-21.

[22] *See id.* at 21-22.

[23] *Id.* (citing Treaty of Amity, Commerce and Navigation, November 19, 1794, 8 Stat. 116, T.S. No. 105).

[24] *See* John F. Coyle, *The Treaty of Friendship, Commerce and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L LAW 302, 304 (2013).

[25] *See* VANDEVELDE, *supra* note 7, at 29.

[26] *Id.*

[27] BISHOP ET AL., *supra* note 5, at 4.

spurred the growth of the global market, with foreign direct investment accounting for 9% of the world GDP by 1914.[28]

D. *Recent Developments in the Field of Foreign Investment*

In 1949, the International Chamber of Commerce ("ICC") adopted the International Code of Fair Treatment for Foreign Investors, and this adoption was followed soon after, in 1966, by the creation of the International Centre for Settlement of Investment Disputes ("ICSID").[29] Both developments leant legitimacy to foreign investment by creating more regulation on which parties could rely.[30] In particular, ISCID was the first institution designed specifically to administer arbitrations of foreign investment disputes.[31] In the early 1980s, further commonality was found through the introduction of the US Model Bilateral Investment Treaty.[32]

As previously stated, there has been a significant increase in bilateral investment treaty activity in the recent past. This increase comes with a corresponding need to create a stable framework in which to deal with the inevitable disputes arising out of bilateral investment treaties in order to facilitate and protect investments.[33]

E. *The Role of Arbitration in Foreign Investment*

A foreign investment dispute can be understood to mean "a dispute between an investor from one country and a government that is not its own that related to an investment in the host country."[34] Investors prefer stability and desire a certain level of protection for their investments.[35] Arbitration offers such protection by shielding investors from uncertain government regimes and potentially biased courts.[36]

Arbitration provides a level of protection that allows investment in attractive under-developed regions that otherwise would be unfeasible because of economic and legal uncertainties.[37] That is, the economic and legal structures of these developing countries might in themselves stifle financial growth through risk taking by dis-incentivizing innovation and

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[28] VANDEVELDE, *supra* note 7, at 27.

[29] BISHOP ET AL., *supra* note 5, at 5.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 7. The US Model Bilateral Investment Treaty is a draft bilateral investment treaty which acts as a model upon which other BITs may build.

[33] Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW 655, 659-60 (1990).

[34] BISHOP ET AL., *supra* note 5, at 10.

[35] *See* VANDEVELDE, *supra* note 7.

[36] *See* WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES 701-02 (2d ed. 2012).

[37] *See id.*

creating a risky environment for international investors.[38] Investors are interested in financial gains, and in protecting those financial gains through legal channels.[39] Well-informed investors will not risk their money to legal structures that provide insufficient protection.[40]

Before arbitration, there were several problems with the dispute resolution avenues available to investors. For example, local courts that held jurisdiction over the disputes might be unsympathetic to the foreign investors.[41] Local laws would "imped[e] the entry of foreign capital, trea[t] foreign investments in an arbitrary and discriminatory manner, and impos[e] onerous conditions on the operation of privately owned foreign enterprises."[42] Therefore, relying on the local law to resolve disputes exposed investors to too much risk, driving prudent investors from the host country and eliminating any potential for economic growth therein.

Arbitration, on the other hand, may "level [the] playing field" and reduce the potential for host state "hometown justice."[43] There is a sense that arbitration is simply *fairer* than dispute resolution in home state judiciaries.[44] Arbitrators are meant to be unbiased. They remove the politics surrounding foreign investment, and focus on the legal aspects of the claim.[45] The efficiency of any arbitration agreement, however, is premised on the ability to enforce the agreement.[46] If the agreement is unenforceable, any benefit arising thereunder will be unattainable.

The Supreme Court of the United States recently considered one important bilateral investment treaty and its arbitration provision in *BG Group v. Argentina*.[47] This case involved a British company investing in Argentinean energy under the Agreement for the Promotion and Protection of Investments ("Treaty") between the countries.[48] As discussed below, the Supreme Court majority proceeded in its determination of the case under the presumptions of US contract law.

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[38] BISHOP ET AL., *supra* note 5, at 8.

[39] See *id.*at 9.

[40] *Id.*

[41] *See id.* at 3.

[42] *Id.* at 21.

[43] PARK, *supra* note 36, at 701-02, 704.

[44] See *id.* at 703 (emphasis added).

[45] *Id.* at 704.

[46] GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 42 (2012).

[47] 134 S. Ct. 1198 (2014).

[48] Agreement for the Promotion and Protection of Investments, Arg.-UK, Dec. 11, 1990, 1765 U.N.T.S. 38.

II. *BG Group v. Argentina*

A. *Procedural History*

BG Group v. Argentina stemmed from a disagreement over the interpretation of the arbitration clause in a treaty between the United Kingdom and Argentina.[49] In 2003, a UK company, BG Group, who had been investing heavily in Argentinean MetroGas, under the terms of the Treaty sought arbitration, claiming that some of Argentina's new laws and regulatory practices violated provisions of the longstanding Treaty.[50] Specifically, Argentina had enacted new laws that changed the currency used from calculating gas tariffs from dollars to pesos, resulting in significant losses to BG Group, a previously profitable company.[51] In response to the claim, Argentina argued that the selected arbitrators lacked jurisdiction and that the "failure to bring grievances to Argentine courts for 18 months renders the claims in this arbitration inadmissible."[52]

Ultimately, the arbitration tribunal found that it did have jurisdiction, stating that Argentina's laws and regulatory practices hindered recourse to the domestic judiciary.[53] Specifically, the Argentinean president's 2002 decree staying execution of the courts' final judgments in suits claiming harm based on the new economic regime created an environment in which BG Group could not appeal to the local judiciary for dispute resolution.[54] Such hindrance waived the treaty's 18-month local tribunal jurisdictional requirement.[55] Having found jurisdiction, the arbitrators held for BG Group on a finding that Argentina had denied them fair and equitable treatment.[56] Damages from the claim amounted to $185 million dollars.[57]

Subsequently, in 2008, both parties filed petitions for review in a New York district court.[58] BG Group sought to confirm the arbitration award below under the New York Convention, while Argentina sought to vacate the award on the grounds that the arbitrators lacked jurisdiction from the start.[59] The district court ultimately confirmed the award for BG Group; however, the United States Court of Appeals of the Second Circuit

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[49] 134 S. Ct. 1198 (2014).
[50] *Id.* at 1201.
[51] *Id.*
[52] *Id.* at 1204.
[53] *Id.* at 1205.
[54] *Id.* at 1220.
[55] *Id.* at 1204.
[56] *Id.*
[57] *Id.* at 1205.
[58] *Id.*
[59] The official name of the New York Convention is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It is the principal international treaty and it specifically provides for the enforcement of arbitral awards for countries who have signed it. *See id.* (internal citation omitted).

reversed this holding after *de novo* review of the issue.[60] In the opinion of the Second Circuit, BG Group was not excused from compliance with the local litigation requirement, and the arbitration was invalid.[61] As a result, BG Group filed a petition for certiorari with the Supreme Court of the United States, which was accepted due to the broad implications of the decision on the treatment of international arbitral awards.[62]

B. *The Majority Opinion*

The Supreme Court decided *BG Group v. Argentina* on March 5, 2014, ruling on the issue of whether a court of the United States, in reviewing an arbitration award made under this Treaty, should interpret and apply the local litigation requirement *de novo,* or with the deference that courts ordinarily owe arbitration decisions.[63] The majority ultimately held that the local litigation requirement was a matter primarily for the arbitrators to interpret and apply, and that the arbitrators' interpretation was entitled to judicial deference.[64] While the holding is in my view correct, the reasoning used to reach this holding was flawed.

The majority stated first that the Treaty should be viewed as an ordinary contract, with ordinary contract presumptions guiding interpretation.[65] Generally, the parties to the contract determine whether an issue is for the courts or for arbitrators.[66] However, the majority wrote, where the contract is silent on who is to decide a particular matter, two specific presumptions apply to assist with determining the intent of the parties: first, that parties intend courts to decide disputes on "arbitrability," including the obligation of arbitration clauses and the context,[67] and second, that the parties intend arbitrators to decide disputes on the meaning and application of particular procedural preconditions to the use of arbitration.[68] Such issues include questions of waiver, delay, and other defenses, as well as satisfaction of prerequisites, "such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate."[69]

Upon application of these contract presumptions, the majority determined that the text and structure of the provision in question made it

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[60] *Id.* at 1203.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 1203-1204 (majority opinion).

[64] *Id.* at 1205.

[65] *Id.* at 1206.

[66] *Id.*

[67] *Id.* (citing Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002); Granite Rock Co. v. Teamsters, 561 U.S. 287, 299-300 (2010)).

[68] *Id.* at 1207.

[69] *Id.* (citing *Howsam*, 537 U.S. at 84 (quoting the Revised Uniform Arbitration Act of 2000 §6, Comment 2, 7 U. L. A. 13 (Supp. 2002) (emphasis omitted))).

clear that it was procedural in nature, noting in particular that the provision determined when the arbitration was to take place, not whether it was to take place at all.[70] The majority also pointed to precedent, stating that the local litigation requirement at issue was similar to other procedural provisions that had previously been before the Court, and for which the Court had held for arbitrator interpretation and application.[71] It followed, therefore, that the Court ought to defer to the arbitrators' decision if the application of contract law was proper.[72] As will be discussed further below, this condition of proper contract law application was vital to the analysis.

The majority then found that there was no reason to view the Treaty any differently than they would an ordinary contract.[73] Overriding the argument of the Solicitor General in his Amicus Curiae brief, the majority suggested that as a general matter, a treaty was simply a contract between nations.[74] Consequently, the majority argued that the goal of interpreting the Treaty was essentially the same as that of interpreting a contract: to determine the intent of the parties when they entered into the agreement.[75] There is an argument to be made that this comparison represented an oversimplification of the issues surrounding treaties, and that in fact they should not be interpreted solely under the presumptions of ordinary contracts, but rather under a compilation of public treaty and private contract law with consideration given to the unique characteristics of bilateral investment treaties.

Finally, the majority reasoned that the use of a consent label did not make a critical difference in the interpretation of Treaty provisions.[76] While they conceded that a label might indicate a higher level of importance for the provision in question, they argued that it was in no way conclusive of the intent of the parties.[77] Following these few observations, the majority left this particular question open for another day.[78] Their holding on this question was that in the absence of language indicating a certain type of authority, ordinary frameworks ought to apply, which in this case meant that the presumptions of contract law applied to a bilateral investment treaty despite its arguably different legal nature.[79]

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[70] *Id.* (citing CF. 13 R. LORD, WILLISTON ON CONTRACTS §38:7 (4th ed. 2013)) (internal citation omitted).

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 1208 (discussing the Brief for United States as Amicus Curiae) (internal citation omitted).

[75] *Id.*

[76] *Id.* at 1206-07.

[77] *Id.*

[78] *Id.* at 1209.

[79] *Id.*

C. *Sotomayor's Concurrence*

In her concurrence, Justice Sotomayor voiced concerns that seemed to stem from the tension between interpretations of a private contract versus of a public treaty.[80] While she agreed that the local litigation requirement was a procedural precondition to arbitration, she disagreed with certain aspects of the majority's dictum.[81] In particular, she noted that, "it is far from clear that a treaty's express use of the term 'consent' to describe a precondition to arbitration should not be conclusive in the analysis."[82] The argument might be made that while the majority looked only to the instrument before it, Sotomayor engaged in a speculative assessment of other treaties, which were not before the Court and the details of which cannot be known. Such speculation may lead to problematic dicta of an advisory nature.

Sotomayor's commentary on the contractual presumptions on which the majority relied emphasizes the tension between the Court's previous holdings regarding contracts and the current issue of bilateral investment treaties.[83] She pointed, for example, to one particularly salient difference between the contractual context and the case at bar, noting that "consent is especially salient in the context of a bilateral investment treaty, where the treaty is not an already agreed-upon arbitration provision between known parties, but rather a nation state's standing offer to arbitrate with an amorphous class of private investors."[84]

The weight here was given to the breadth of the Treaty.[85] Unlike in an ordinary commercial contract between two parties, the arbitration provision in a bilateral treaty was broad and sweeping.[86] It might well be going too far in this context to argue that every single party operating under the broad language of the Treaty had expressed the necessary intent to subject their disputes to common contract presumptions.[87] Sotomayor argued that it was entirely reasonable in the treaty setting, unlike in a commercial contract, for a nation state to wish to condition consent to arbitration with a party not privy to the original agreement on compliance with a purely procedural requirement.[88]

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[80] *See id.* at 1213-14 (Sotomayor, J., concurring).

[81] *See id.* at 1213.

[82] *Id.*

[83] *Id*.

[84] *Id*.

[85] *See id*. at 1213-14. *See also* Roberts, *supra* note 12, at 49 ("[I]nvestment treaties have traditionally been brief and broadly worded, leaving many gaps and ambiguities that are likely to be resolved through recourse to analogies.") (internal citation omitted).

[86] *See BG Grp*., 134 S. Ct. at 1213-14.

[87] *See id.* at 1214.

[88] *Id.*

Sotomayor also emphasized that the purposes behind bilateral investment treaties and common commercial contracts are different.[89] Citing an amici curiae brief written by practitioners of arbitration law, Sotomayor argued that the "entire purpose of bilateral investment agreements is to 'reliev[e] 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.'"[90] Contract law generally does not share this same purpose.

Finally, as will be discussed at greater length below, Sotomayor cemented her argument with an analogy to the US-Korea Free Trade Agreement — a treaty that does include an explicit consent provision.[91] Her argument tests the presumptions of the majority and tends to disprove certain elements of their dicta.[92]

D. *The Dissent*

Chief Justice Roberts' dissent was the only opinion that acknowledged, head on, that this treaty was one between countries, to which neither investors were original parties.[93] He dismissed the argument for applying contract law by stating simply and directly that the document in question was "of course, nothing of the sort."[94] Roberts argued, quite refreshingly, that by applying contract law, the majority "start[ed] down the wrong road" and "end[ed] up in the wrong place."[95]

Getting deeper into the issue of jurisdiction, Roberts focused on the language of the Treaty, pointing out "[w]hen there [was] no express agreement between the host country and an investor, they must form an agreement in another way, before an obligation to arbitrate arises."[96] Here, the distinction between contract and treaty became an observation not merely of passing interest, but of outcome determinative importance.

The logic of Roberts' argument can be laid out as follows — the agreement in question is not a contract, it is a treaty; the parties to the agreed treaty are Argentina and the United Kingdom, not Argentina and BG Group; since BG Group is not an original party to the agreement, they

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[89] *See id.*

[90] *Id.* (discussing the Brief for Professors and Practitioners of Arbitration Law as Amici Curiae) (internal citation omitted).

[91] *Id.*

[92] *See id.* at 1213.

[93] *Id.* at 1215 (Roberts, J., dissenting).

[94] *Id.*

[95] *See id. See also* Diane Marie Amann, *Opinion analysis: Clear statement ruling in investor-state arbitration case leaves open question on U.S. bilateral treaties*, SCOTUSBLOG (Mar. 6, 2014), http://www.scotusblog.com/2014/03/opinion-analysis-clear-statement-ruling-in-investor-state-arbitration-case-leaves-open-question-on-u-s-bilateral-treaties/.

[96] *BG Grp.*, 134 S. Ct. at 1216 (Roberts, J., dissenting).

must take steps to accept the "offer" of arbitration in Article 8(2)(a), and the only way to do this is to pass through the local litigation requirement.[97] Roberts contended that since BG Group sidestepped the local litigation requirement, the agreement was not successfully made, and the arbitrator has no authority over the disagreement.[98] In sum, "whereas Article 8(2)(a) [was] part of a completed *agreement* between Argentina and the United Kingdom, it constitute[d] only a unilateral standing *offer* by Argentina with respect to U.K. investors — an offer to submit to arbitration where certain conditions [were] met."[99]

Roberts also focused, albeit briefly, on Sotomayor's more tautological labeling argument. He seemed to dismiss the argument with the sweeping response that "[the Court] generally do[es] not require talismanic words in treaties."[100] Finally, in addressing the dissent's argument, the majority conceded the ability to interpret the provision as a standing offer, but also believed this practice to be in contradiction to standing case law on the subject.[101] The majority also argued that the most of the authority on the subject interpreted such provisions as "purely procedural preconditions to arbitrate."[102]

III. Ordinary Contract Law Should Not Singularly Control

As an initial observation, the Supreme Court majority's rationale follows from the determination that this bilateral treaty may essentially be treated as a contract between the investor and the state.[103] This Note argues that this presumption is false. While it is true that at its core the Treaty is an agreement, the considerations on both sides are drastically different from those at play in a commercial contract.

If the parties intended to apply general contract law to their agreement, they would have entered into a basic commercial contract. Instead they chose to create and enter into a complex BIT, binding themselves to its governance. The difference between the nature and character of these two instruments should be given due respect in the analysis.

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[97] *See id.* at 1216-24.

[98] *Id.* at 1216.

[99] *Id.* at 1217 (emphasis in original).

[100] *See id.* at 1218.

[101] *Id.* at 1211 (majority opinion).

[102] *Id.* (citing 1 G. Born, International Int'l Com. Arb. 842 (2009) ("A substantial body of arbitral authority from investor-state disputes concludes that compliance with procedural mechanisms in an arbitration agreement (or bilateral investment treaty) is not ordinarily a jurisdictional prerequisite.")) (internal citation omitted).

[103] *BG Grp.,* 134 S. Ct. at 1211.

A. *Important Differences between Contracts and Treaties*

Although use of the old legal principles and existing conceptual frameworks should be encouraged in the exploration of new legal fields, remaining doggedly attached to presumptions and interpretive tools that do not recognize the distinguishing characteristics of the new field can lead to flawed legal reasoning and inappropriate precedence.[104] Certain key differences exist between contract law and bilateral investment treaties that make direct application of existing contract law inappropriate.

1. Characteristics of a Contract

Contract law has a long and complicated history — it is one of the oldest legal fields. Under contract law, parties voluntarily assume obligations and determine the requirements of the agreement.[105] Contracts are often described as requiring a "meeting of the minds."[106] The Cornell Legal Institute defines a contract as "an agreement creating obligations enforceable by law," with the "basic elements [being] mutual assent, consideration, capacity, and legality."[107]

Usually a contract has at least two participants who play a part in the formation and performance of the contract.[108] These participants are given the opportunity to choose the expression of the terms of the contract.[109] The meaning attached to the terms of the contract may differ for each party.[110] Thus, the role of the courts in interpreting a contract is to determine which party's meaning is to prevail by relying on certain applicable contract law.[111] The court's search for meaning will be influenced by the awareness that the contract prescribes reciprocal rights and obligations for each of the parties.[112] The most important characteristic of a contract is that it binds only the parties who formed it.[113] Moreover, contracts are considered to be limited to their words — they are merely a method of commercial transaction, nothing more.[114] Treaties, on the other hand, involve more complex agreements, and they govern transactions beyond the commercial context.

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[104] Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 48 (2013).

[105] *Id.*

[106] LAURENCE KOFFMAN & ELIZABETH MACDONALD, THE LAW OF CONTRACT 7 (4th ed. 2001).

[107] *Contract,* CORNELL LEGAL INSTITUTE, http://www.law.cornell.edu/wex/contract (last visited Feb. 21, 2015).

[108] 5 CORBIN ON CONTRACTS § 24.1 (2014).

[109] *Id*.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] KOFFMAN & MACDONALD, *supra* note 106, at 1.

2. Characteristics of a Bilateral Investment Treaty

The Cornell Legal Institute defines a bilateral investment treaty as an international agreement "establishing the terms and conditions for private investment by nationals and companies of one state in another state."[115] Although, as in contracts, most disputes arising out of bilateral investment treaties are the results of commercial disputes between parties, there are important differences in the formation of and contents of the underlying instrument.[116]

Unlike typical commercial contracts, bilateral investment treaties are linked to certain traditional sources of international law — for example, custom.[117] Since BITs involve a private investor and a public government party, proceedings arising from the breach of such a treaty may also be characterized as mixed.[118] They are not limited to private implications, as is the case with contract law; as discussed above, these treaties are instruments with both public and private characteristics.[119] Therefore, the impact of the dispute and the dispute resolution is far more extensive than in the contract setting.

Bilateral investment treaties are tailored to the relationship between two countries and are only binding on those two countries.[120] It is important to note that the countries themselves are the parties to the bilateral investment treaty, not the private investor who will operate transactions under it. Moreover, provisions of a bilateral investment treaty are often cumulative, meaning that a host state's compliance with one provision does not excuse its obligation to comply with another provision.[121]

3. Implications

The far-reaching public and private impacts of a bilateral investment treaty affects both the confidentiality of proceedings and requisite considerations. For example, when considering strictly commercial arbitration in the setting of private contracts, one might understand the need for confidentiality and involvement of only the disputing parties.[122] This instinct is a reflection of the emphasis on "confidentiality and party autonomy" in private commercial arbitration.[123]

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[115] *Bilateral Investment Treaty*, CORNELL LEGAL INSTITUTE, http://www.law.cornell.edu/wex/bilateral_investment_treaty (last visited Feb. 21, 2015).

[116] GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 411 (2012).

[117] José E. Alvarez, *The Public International Law Regime Governing International Investment*, 75 HAGUE ACAD. OF INT'L LAW 4, 94, 105-108,114-117 (2011).

[118] BISHOP ET AL., *supra* note 5, at 2.

[119] *See supra* Part I.B.

[120] BORN, *supra* note 116, at 415.

[121] VANDEVELDE, *supra* note 7, at 7.

[122] *See* Roberts, *supra* note 104, at 48 (internal citation omitted).

[123] *See id.*

On the other hand, issues of public treaty resolution may require an inclusion of the treaty parties and not necessarily just the disputing parties.[124] The inclusion of parties not immediately involved in the specific dispute is a reflection on the importance of the outcome of the dispute on future endeavors under the treaty in question.[125] The dispute does not simply concern an agreement between two private parties, but also recognizes an agreement between two countries under which multiple deals and agreements might be made in the future.[126]

Courts are dealing with sovereign nations here, not simply commercial parties. The stakes of sovereign nations unilaterally exposing themselves in every instance are much greater.

B. *The Issue of Consent in Bilateral Investment Treaties*

One result of the open-ended nature of bilateral investment treaties is that parties other than those who originally drafted the treaty rely on it to shape their interactions.[127] This externality is a key difference from contracts, which bind only those parties who participated in the formation of the contract.[128] What follows naturally from these characteristics are questions of consent to bilateral investment treaties.

Some academics argue that provisions for dispute resolution in bilateral investment treaties provide for each state's binding consent to arbitration, permitting investors to demand arbitration of covered disputes without a traditional agreement with the host state.[129] However, some bilateral investment treaties do not include express consent to arbitration.[130] In such cases, it is necessary to secure express consent through a separate agreement.[131] One scholar explained the rationale:

> [As] investors are not a party to the treaty but are the beneficiaries of rights bestowed directly upon them under international law, or under domestic law, their own expression of consent might come later in time or under separate instruments. This happens typically when consent by the investor is given in a direct agreement with the

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[124] *See id.*

[125] *See id.* ("A public law approach, by contrast, would emphasize the public nature of investment disputes, suggesting that these proceedings need to be presumptively public and open to participation by interested parties, such as non-governmental organizations (NGOs) as amici, irrespective of the wishes of the disputing or treaty parties.") (internal citation omitted).

[126] *See id.* (internal citation omitted).

[127] BORN, *supra* note 116, at 416.

[128] *See Contract*, CORNELL LEGAL INSTITUTE, *supra* note 107.

[129] BORN, *supra* note 116, at 416 (internal citation omitted).

[130] *Id.*

[131] *Id.*

> State concerned or simply by resorting to such a choice in writing, or even by instituting proceedings in the Centre (ICC).[132]

In considering cases, ICSID will generally find the state's offer to submit to arbitration, followed by its acceptance, as a definite binding legal obligation without anything further needed to establish jurisdiction over the parties' claims.[133] Various portions of the Supreme Court's majority opinion in *BG Group*, however, struggled with the implications of consent and the resultant jurisdictional implications.[134]

The majority opinion in *BG Group* seems to brush off the issue of consent in the context of the Treaty.[135] This impression derives from their conclusion that no reason existed to treat the Treaty any differently than they would a contract.[136] By relying upon the instrument in creating and carrying through the investment, the investor in *BG Group* consented to the provisions of the Treaty, just as it would have if the underlying instrument were a commercial contract between private parties.[137] There was no need for a separate instrument between the actual parties, because the investors accepted the instrument at hand, and all of its provisions, when they began investment activities that the Treaty governed.[138]

Not all of the Supreme Court justices agreed to such a blanket acceptance of consent. Justice Sotomayor in particular grappled with the issue of consent in the context of bilateral investment treaties, treating it as an outcome determinative precondition throughout her concurrence in *BG Group v. Argentina*.[139] She believed the inclusion, or lack thereof, of the express term of consent for arbitration provisions in bilateral investment treaties should have skewed the interpretation of the agreement and changed the presumptions in favor of contract law that the majority adhered to.[140]

Sotomayor noted that the issue of consent is of particular importance in the bilateral investment treaty context.[141] Consent is important

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[132] *See* Francisco Orrego Vicuña, *Arbitrating Investment Disputes*, YOUNG ICCA 4, http://www.arbitration-icca.org/media/0/12224280177670/arbitrating_investment_disputes.pdf (last visited on Feb. 23, 2015).

[133] *See* Susan D. Frank, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1523 (2005).

[134] *See generally supra* notes 2-3.

[135] *See BG Grp.,* 134 S. Ct. at 1209 (majority opinion) ("[W]e have been unable to find any other authority or precedent suggesting that the use of the 'consent' label in a treaty should make a critical difference in discerning the parties' intent about whether courts or arbitrators should interpret and apply the relevant provision.").

[136] *See id.* at 1207-10.

[137] *See id*. at 1210.

[138] *See id.* at 1207-10.

[139] *See id.* at 1213-15 (Sotomayor, J., concurring).

[140] *See id.* at 1215.

[141] *See id.* at 1213.

because, as discussed above, bilateral investment treaties have implications beyond just the parties to the agreement.[142] The public characteristics of the BITs mean they affect everyone who might ever rely on them in the future, not just the parties to this particular claim. Indeed, *BG Group* is a product of a dispute with an investor who was not a party to the agreement for the underlying instrument.[143] Issues of consent when the party was not able to bind himself to the agreement and voice an opinion on its specific conditions are particularly salient.

Justice Roberts was also concerned with the implications of the differences between contracts and bilateral investment treaties and the resultant impact on the questions of consent and jurisdiction.[144] Unlike Sotomayor, who argued that the consent condition might have the ability to change the presumptions relied upon by the majority, Roberts argued that the very starting point for analysis should be different because of the nature of the instrument that formed the basis for the dispute.[145]

For Roberts, the different characteristics of the instruments themselves, rather than simply the wording of a provision within the instrument, were outcome determinative and should have had a heavy impact on the court's analysis and its final holding.[146] Roberts would have likely argued that because the investor was not a party to the original agreement, the investor and the state were obliged to form a different contract if they wished for the consent provision to be binding.[147] Otherwise, what was present in the bilateral investment agreement was an offer by the host state to arbitrate the claims without an express or implied acceptance by the private investor.[148]

The differences between contracts and bilateral investment treaties cannot be ignored in the analysis of the instrument. The histories of the instruments themselves point to divergent purposes and characteristics.[149] Moreover, the provisions included in each instrument are done so for different reasons and must be interpreted in a way that respects the legal framework in which they were created.

C. *The Correct Outcome was Reached*

Although the logic in reaching the conclusion that the arbitrators' decision must be respected was flawed due to its focus on contract law, the ultimate finding was one that benefits the foreign investment field and supports the continued growth of bilateral investment treaties. As will be

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142 *See id.* at 1213-14.
143 *See supra* Part II.A.
144 *See BG Grp.,* 134 S. Ct. at 1215 (Roberts, J., dissenting).
145 *See id*.
146 *See id.*
147 *See id.* at 1220.
148 *See id.* at 1224.
149 *See generally supra* Part III.A.

discussed in more detail below, the practice of arbitration has benefited foreign investment and subsequent economic growth for all parties involved. For this reason, the Supreme Court's analysis should encourage reliance on bilateral investment treaties.

D. *Arbitration is the Preferred Format for Dispute Resolution in the Bilateral Investment Treaty Context*

While concerns exist about the confidentiality and perceived lack of structure for arbitral tribunals, by and large, arbitration offers a useful alternative for dispute resolution in states where the judiciary is considered unstable or unpredictable.[150] Those who oppose the use of arbitration point to several shortcomings, including: the potential for a wide range of interpretations of vague treaty provisions; the ability for investors and companies to nationality shop and take advantage of the agreements; the lack of transparency in process and outcome; the relative smallness and lack of diversity of the pool of available arbitrators; the inconsistency in decisions; and the inability to review or appeal decisions.[151]

However, as discussed above, the need for arbitration as a protection for investors to spur economic growth in host states cannot be overlooked. Foreign investment is a critical component of the world economy — its continued growth must be pursued.[152] This growth is best achieved when investors feel that their investments are protected from potentially corrupt or biased local governments.[153] As such, arbitration provides this protection.

Although the Supreme Court relied on an incomplete analysis of the bilateral investment treaty instrument, it ultimately reached a decision that supports arbitration and therefore continues to contribute to the growth of foreign investment. However, this result may be reached through avenues of interpretation that respect the differentiating characteristics of bilateral investment treaties.

IV. Suggested Approach

As Justice Oliver Wendell Holmes once said, "[d]ifferent rules conceivably might be laid down for the construction of different kinds of writing."[154] Courts cannot blindly follow the application of contract law to bilateral investment treaties simply because the result is one that is aligned with our preconceived standards of acceptability. Rather, courts

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150 *See* discussion and accompanying texts *supra* Part I.A.

151 *See id.*

152 *See id.*

153 *Id.*

154 Alex Glashausser, *What We Must Never Forget When It Is a Treaty We are Expounding,* 73 U. Cin. L. Rev. 1243, 1244 (2005) (quoting Oliver Wendell Holmes, *The Theory of Legal Interpretation,* 12 Harv. L. Rev. 417, 419 (1899)).

must look critically at the characteristics of this newly developing body of law and determine which forms of reasoning and interpretation best encompass the varying characteristics and purposes of the treaties. Using contract law and statutory interpretation as starting points for the interpretative process, courts should create a new way of thinking and analyzing the treaty structure.[155]

It is important to note in particular that, "the investment system exists at the intersection of multiple fields, and it will not achieve adulthood until participants embrace and theorize its *sui generis.*"[156] There is an absolute requirement for dual focus on the public law characteristics of a treaty and the private commercial law characteristics of investment and contract.

A. *Problems of Incoherent Interpretation*

For BIT arbitration to provide the protection that investors require, it must provide legal predictability. If investors are uncertain about how their rights will be interpreted and protected, then the attraction of arbitration becomes weak and the system for foreign investment falls apart.[157] As explained previously, investment arbitration is a relatively new area of legal interpretation.[158] It is therefore necessary to not only acknowledge the problems with the analytical framework the Supreme Court currently uses, but also to find ways to mitigate the Court's interpretive difficulties.[159] In this way, arbitration of bilateral investment treaties can continue to promote economic growth through foreign investment.[160]

B. *How to Best Interpret Bilateral Investment Treaties*

In setting out an ideal approach to interpret bilateral investment treaties, it is important to first consider the goals and functions of the interpretation. The arbitrability of disputes arising out of bilateral investment treaties provides significant protections for investors hoping to cover the risk of their investments.[161] Therefore it will be beneficial to create a system of interpretation that respects the status of arbitration.

Much value is to be found in considering the instruments from which bilateral investment treaties have grown. These treaties can be considered specialized contracts — that is, agreements that govern the relationships between "special" parties to a transaction — and therefore it may be wise to begin with an application of the basic principles of contract

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155 Glashausser, *supra* note 154, at 1247.
156 Roberts, *supra* note 104, at 49.
157 *See* Vicuña, *supra* note 132, at 3.
158 *See supra* Part I.A.
159 *See* Frank, *supra* note 133, at 1523.
160 *Id.*
161 *See* PARK, *supra* note 36, at 701-02.

law, crafted to fit into the unique characteristics of bilateral investment treaties.[162]

Finally, courts must consider the parties to the agreements separately, from the parties to the dispute. The parties that sign the bilateral investment treaties are not necessarily the same parties that rely on them to guide transactions.[163] That is to say that the intention of the investors cannot necessarily be gleaned from the simple wording of the treaty.[164] Corporate actions and additional, subsequent agreements used by the investors themselves can be critical to the interpretation of bilateral investment treaties.[165]

In considering each of the items set forth above, a certain framework arises for the effective interpretation of bilateral investment treaties. It is prudent for those engaging in the analysis of these instruments to begin with the question of the meaning of the words of the treaty.[166] From there, however, presumptions under contract law should not necessarily control. Rather, the focus should be on the intention of the actual parties to the *investment* — those who are parties to the claim, not necessarily parties to the agreement. A presumption should exist in favor of arbitration, as this forum is the enabling force for the protection of investments under bilateral investment treaties.[167] Unless the parties clearly and explicitly agree that they do not wish for disputes to be subject to arbitration provisions, it is in the best interest of foreign investment and economic growth for the default position to be in favor of arbitration.

V. Illustrative Application

The US–Korea Free Trade Agreement is a prime example of a bilateral treaty, which, unlike the UK-Argentina Treaty, does include an explicit consent provision.[168] The US-Korea Free Trade Agreement ("Agreement") entered into force on March 15, 2012.[169] To date, the United States has been successful in every investor-state dispute brought against it under this agreement.[170] This Agreement is a particularly interesting one to consider because arbitral dispute resolution has thus far been

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[162] *See* Born, *supra* note 116, at 415-17

[163] *See id.*

[164] *See id.* at 44.

[165] *See id.*

[166] *See BG Grp.*, 134 S. Ct. at 1215 (Roberts, J., dissenting) ("I would start with the document that is before us and take it on its own terms.").

[167] *See* Park, *supra* note 36, at 701-702.

[168] *BG Grp.*, 134 S. Ct. at 1214.

[169] Jeanne J. Grimmet, *Dispute Settlement in the U.S.-South Korea Free Trade Agreement,* Cong. Res. Serv. 1 (Mar. 21, 2012).

[170] *Id.*

uncommon.[171] There is, therefore, room to hypothesize on the impact of different approaches on the protections provided under the Agreement.

The most important language for this analysis is found in Article 11.18.2, which provides that:

> No claim may be submitted to arbitration under this Section unless:
> (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
> (b) the notice of arbitration is accompanied,
> (i) for claims submitted to arbitration under Article 11.16.1(a), by the claimant's written waiver, and
> (ii) for claims submitted to arbitration under Article 11.16.1(b), by the claimant's and the enterprise's written waivers of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 11.16.[172]

As it is clear from the Agreement's language, consent is an explicit requirement, and the mechanisms for ensuring the binding nature of the arbitration provision are clear and concise.[173] It is useful to consider the implications of each position from *BG Group v. Argentina* as well as the approach suggested above in determining the impact of explicit consent conditions on the protections of the arbitration clause for investors.

A. *Application of Majority Position*

As a reminder, the Supreme Court majority in *BG Group v. Argentina* did not believe that the presence of an explicit consent requirement would impact the Court's contractually based analysis.[174] This is reflected in the dicta that they "do not now see why the presence of the term 'consent' in a treaty warrants abandoning, or increasing the complexity of, [the] ordinary intent-determining framework."[175] Although the majority professed to have left the question of interpretation in the face of express consent "for another day," it seems clear that the approach they would take in the face of the explicit consent language in the US-Korea Free Trade Agreement would be no different from the one in *BG Group v. Argentina*.[176] Thus, it is useful to apply this rationale to a hypothetical claim based on the US-Korea Free Trade Agreement in order to determine whether the majority approach adequately protects the investors

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[171] *Id.*

[172] US-South Korea Free Trade Agreement, 77 FED. REG. 15, 943, art. 11.18.2 (Mar. 19, 2012).

[173] *Id.*

[174] *See BG Grp.*, 134 S. Ct. at 1208 (majority opinion).

[175] *Id.* at 1203.

[176] *Id.* at 1209.

and fulfills the general goals and purpose of arbitration provisions in bilateral investment treaties.

As in *BG Group v. Argentina*, the majority would first reason that the US-Korea Free Trade Agreement can be viewed as an ordinary contract, with ordinary contract presumptions guiding their analysis.[177] As outlined above, these presumptions state that it is generally up to the parties to the contract to determine whether an issue is for the courts or for the arbitrators.[178] Already, the problem arises that the investors themselves were not actually parties to the agreement here, given that the majority in *BG Group* overlooked this particular component of bilateral investment treaties.[179] Now the question becomes whether the issue of assignment of interpretation to arbitrators or the courts has been explicitly set out in the "contract."

This analysis is tricky, because the majority reasoned that the explicit consent provisions should not impact the form of interpretation, but they inevitably do.[180] Through the use of the consent provisions, the parties to the US-Korea Free Trade Agreement arguably included their intentions quite plainly in the language of the Agreement.[181] It would no longer be necessary to apply the presumptions relied upon in *BG Group v. Argentina*, because the parties' intentions, assuming they have followed through with the consent requirement of the treaty and created a separate agreement, are clear. The inclusion of explicit consent requirements would in fact change the analysis. Even when relying on just contract law, as the majority believed to be sufficient, the inclusion of explicit consent provisions would change the approach of the court, contrary to the majority's dicta.[182]

The virtue of this application is that the express consent does not allow for any question about whether that submission to arbitration was the parties' true intention.[183] The dispute arising from the US-Korea Free Trade Agreement is thus highly likely to end up in front of an arbitral tribunal rather than the host state judiciary, an outcome which, as explained at length above, is beneficial to the bilateral investment treaty regime and foreign investment as a whole.

B. *Application of Sotomayor's Concurrence*

Unlike the majority, Justice Sotomayor recognized that the explicit consent requirement would change the analysis significantly.[184] Most

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177 *See id.* at 1208-09.
178 *See id.*
179 *Id.*
180 *Id.*
181 *Id.*
182 *See id.* at 1209-10.
183 *Id.*
184 *See id.* at 1213-14 (Sotomayor, J., concurring).

importantly, she recognized the prominence of consent in the context of bilateral investment treaties since these agreements functioned as standing offers to arbitrate with an unknown class of investors.[185]

In applying Sotomayor's rationale to the US-Korea Free Trade Agreement, the starting point is to look at the consent provisions as offers to bind unknown investors to an agreement to arbitration. Sotomayor would emphasize that if this consent waiver provision were to appear without the consent label, then by its wording, it would likely be characterized as a procedural "conditional precedent to arbitrability" under the majority rationale.[186] With the inclusion of the explicit consent label, however, it could be critical in determining whether the parties to the Agreement intended the condition to be reviewed by a court. This is because a dispute about consent is a question of whether the parties agreed to arbitrate, which is presumed to be a question for the courts since otherwise arbitrators could "force unwilling parties to arbitrate a matter they reasonably would have thought a judge [. . .] would decide."[187]

The label of consent in the US-Korea Free Trade Agreement, if we, both as scholars and litigators, continue to apply contract presumptions despite the nature of the Agreement as a bilateral investment treaty, would change the analysis and shift the decision making power to the courts.[188] This is a very problematic outcome. The entire purpose of bilateral investment treaties and arbitration provisions is to "reliev[e] 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."[189]

By challenging the majority's dicta and showing the ways in which explicit consent requirements in an arbitration agreement would change the analysis, Sotomayor displays the weaknesses of the majority rationale. If the bilateral investment treaty is analyzed as a contract despite its unique characteristics, then a thorough analysis in light of explicit consent requirements perverts the treaty's protections and renders the entire purpose of the Agreement void.

C. *Application of Roberts' Dissent*

Chief Justice Roberts would begin the analysis of a dispute arising out the US-Korea Free Trade Agreement by giving credence to the fact that the instrument in question is a treaty between two sovereign nations, not

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185 *Id.*

186 *Id.* at 1214 (internal citation omitted).

187 *Id.* (citing First Options of Chi., Inc. v. Kaplan, 514 U.S. 938 (1995) (internal quotations omitted).

188 *See id.*

189 *Id.* (internal quotations and citations omitted).

a contract between private parties.[190] Indeed his focus would be on the idea that the hypothetical investor bringing the suit against the host state was not even a party to the original agreement.[191]

Roberts would contend that a completed agreement to arbitrate in the bilateral investment treaty is not necessarily a defining characteristic for the parties to the actual dispute.[192] Just because an agreement has been reached between two sovereign nations does not mean that the same agreement can automatically attach to a private investor who was not a party to the original agreement.[193] Therefore, Roberts would require a separate agreement by the investor himself to arbitrate disputes before he would impose such an obligation upon a private party.

Roberts' approach would require parties operating under the terms of a bilateral investment treaty to create a separate agreement to the terms upon the establishment of an investor relationship.[194] Simply relying upon the agreement between the sovereign parties would not be sufficient.[195] Therefore, Roberts would find the explicit consent provisions of the US-Korea Free Trade Agreement irrelevant. Without a separate agreement, the terms would not be enforceable against the investor. The investor would have to accept the offer to arbitrate before he is bound by it.[196]

The problem with Roberts' approach is that it essentially submits a presumption *against* arbitration. From a public policy standpoint, coming from the position that foreign investment spurs economic growth, any unnecessary barriers to arbitration should be viewed negatively. Requiring parties to opt into arbitration, in a sense, seems likely to lower the proportion of bilateral investment disputes that qualify for this protection.[197]

D. *Application of Suggested Approach*

The suggested approach is essentially a conglomeration of all of the best arguments of the various positions of the Supreme Court. For example, Chief Justice Roberts is prudent in finding that the document in question is a bilateral investment treaty, not a contract.[198] This is where the analysis should begin. As with a contract, it is important to look first to the words of the agreement and attempt to glean the parties' intent from

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190 *See id.* at 1215 (Roberts, J., dissenting).

191 *Id.*

192 *See id.* at 1216.

193 *See id.*

194 *See id.* at 1218-19.

195 *See id.*

196 *Id.* at 1219.

197 *Cf. supra* Parts I.D. and I.E.

198 *See BG Grp.*, 134 S. Ct. at 1215 (Roberts, J., dissenting).

those words.[199] However, as this is a bilateral investment treaty, it is important to bear in mind that the intent discovered through analysis of the words would be that of the parties to the agreement, two sovereign nations, not the intent of the parties to the dispute, a sovereign nation and a private investor.[200]

In the case of the US-Korea Free Trade Agreement, it is clear that the parties' intent was to make consent to the arbitration provision explicit.[201] It is a requirement of this particular agreement that, for example, "the claimant consents in writing."[202] In the case of such explicit instruction in the words of the bilateral investment treaty, the parties' intent will be determined by their ability to fulfill the requirements. The suggested approach would lead to a different result in the case of the UK-Argentina Free Trade Agreement that underlay the *BG Group* case. In that Agreement, the requirements for consent were not explicit, as they were in the US-Korea Agreement.[203] Therefore, in light of the public policy considerations that attach to bilateral investment treaties, the presumption would be in favor of the idea that the parties to the dispute intended arbitration unless otherwise indicated in a separate agreement.

The suggested approach is beneficial in that it considers the unique characteristics of a bilateral investment treaty, without losing sight of the fact that the treaty is essentially a specialized agreement between parties governing a transaction, much like a contract.[204] The presumption in favor of arbitration is important because without such explicit consent requirements, the default should be to pass the interpretive duties on to arbitrators.[205] In this way, investors can protect their investments from potentially corrupt or biased host state judiciaries, and the host state can benefit from the inflow of capital and economic growth in their state.[206]

Conclusion

When considering bilateral investment treaties — relatively new instruments with an inchoate legal framework — courts must not lose sight of the defining characteristics of these treaties. These instruments are unlike any other legal mechanism and should be treated as such in their application. Most important to this analysis is the idea that bilateral investment treaties bind more than just the parties to the agreement; their scope is necessarily broad.

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199 *Id.*

200 *See id.* at 1212-13, 1216-17.

201 *See supra* note 172.

202 *Id.*

203 *See BG Grp.*, 134 S. Ct. at 1209.

204 *See supra* notes 107 & 128.

205 *See supra* Part I.D.

206 *See id.*

Certain protections are usually built into bilateral investment treaties to protect the financial return of the investors. These protections are a necessary byproduct of the nature of foreign investment. That is to say that the countries that attract foreign investment are generally those that are still developing. Their legal and business structures may not yet be at the point where they are stable enough to support foreign investment.

The most important protection against this instability comes in the form of arbitration provisions in bilateral investment treaties, which are fundamentally important to the success of those treaties. The prudent investor will not be attracted to foreign investment if they are concerned that it will be abused by corrupt local judiciaries. To combat the risk of unprotected investment, investors should be able to rely on arbitration provisions. These provisions allow for a level playing field in which both host states and investors can actively participate in investments without feeling that they are exposed to legal uncertainty.

In the course of its analysis, the Supreme Court majority in *BG Group v. Argentina* made a key mistake by overlooking and oversimplifying the characteristics of the underlying bilateral investment treaty. By applying presumptions of contract law and concluding that there was no reason to treat this instrument any differently than a normal commercial contract, the majority did a real disservice to the development of bilateral investment treaties. Although the interpretive measures the majority used were wanting, the final determination to rely on arbitrators was a success.

Both Justice Sotomayor's concurrence and Chief Justice Roberts' dissent were more focused on the importance of the actual instrument before the Court. However, as discussed above, both had problems with their analyses. Therefore, this Note has suggested that an alternative method of interpretation will better meet the needs of the foreign investment community by acknowledging and applying the differences of bilateral investment treaties.

There is still a long way to go in the development of the law of bilateral investment treaties, and it is important that the various bodies responsible for promoting their growth are focused on the purposes of the instruments. In performing this task, courts and arbitrators cannot ignore the complex history and purpose of these instruments. To do so would be a detriment to the protection of individual investors and sovereign nations alike and would be devastating to the growing foreign investment sector.