> based on outside legal sources and without regard to the contracting parties' agreement establishing a precondition to arbitration.[4]

The court's ruling evoked concern in the U.S. international arbitration community, and several scholars and practitioners filed amicus curiae briefs supporting certiorari, contending, inter alia, that the D.C. Circuit misapplied U.S. law regarding the proper scope of judicial review of arbitrators' decisions on jurisdiction.[5] The solicitor general filed an amicus brief opposing certiorari, contending, inter alia, that the D.C. Circuit's opinion was unlikely to have implications beyond the unusual circumstances of the case.[6] The Supreme Court disagreed, granting certiorari to consider whether, "[i]n disputes involving a multi-staged dispute resolution process, a court or the arbitrator determine whether a precondition to arbitration has been satisfied."[7] Oral argument is scheduled for December 2, 2013.

BRIEF NOTES

China Agrees to Resume Expanded Bilateral Investment Treaty Negotiations with United States

At the conclusion of the U.S.-China Strategic and Economic Dialogue in Washington, D.C., in July 2013, officials announced that China and the United States have agreed to restart negotiations on a bilateral investment treaty (BIT). China reportedly dropped an earlier demand that a BIT exclude services sectors of China's economy. While BIT talks have formally been underway since 2008, little progress has been made.[1] U.S. Trade Representative Michael Froman welcomed the resumption of negotiations.

> China has for the first time agreed to negotiate a Bilateral Investment Treaty on the basis of principles that will be critical to achieving access to China's market and leveling the playing field for American firms. As the Office of the U.S. Trade Representative prepares to lead these negotiations along with the State Department, we look forward to building on the important commitments China made today to bring home the economic benefits of more exports and more American jobs.[2]

U.S. Treasury Secretary Jacob Lew echoed Froman's view.

[4] *BG Group*, 665 F.3d at 1365–66.

[5] The amicus briefs supporting and opposing certiorari are available online at http://www.scotusblog.com/case-files/cases/bg-group-plc-v-republic-of-argentina.

[6] *See* Brief for the United States as Amicus Curiae at 17, BG Group PLC v. Republic of Argentina, No. 12-138 (U.S. May 2013), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2013/05/12-138-BG-Group.pdf ("In light of its case-specific nature, the decision below will likely have few implications for the construction of international investment treaties.").

[7] *See* http://www.supremecourt.gov/qp/12-00138qp.pdf.

[1] Annie Lowrey, *U.S. and China to Discuss Investment Treaty, but Cybersecurity Is a Concern*, N.Y. TIMES, July 12, 2013, at A5; Howard Schneider, *China Agrees to Broad Investment Talks with U.S.*, WASH. POST, July 12, 2013, at A9; *U.S., China Move Forward on Bilateral Investment Treaty*, VOICE OF AMERICA, July 11, 2013, *at* http://www.voanews.com/content/us-china-to-focus-on-economy-on-final-day-of-talks/1699526.html.

[2] Office of the U.S. Trade Representative Press Release, USTR Michael Froman Welcomes Progress at U.S.-China Strategic and Economic Dialogue (July 12, 2013), *at* http://www.ustr.gov/about-us/press-office/press-releases/2013/july/amb-froman-welcomes-progress-SandED.

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> A high-standard U.S.-China Bilateral Investment Treaty is a priority for the U.S. and would work to level the playing field for American workers and businesses by opening markets for fair competition. The commitment made today stands to be a significant breakthrough and marks the first time China has agreed to negotiate a Bilateral Investment Treaty, to include all sectors and stages of investment, with another country.[3]

NAFTA Tribunal Dismisses Drug Company's Claims Against the United States

An Arbitral Tribunal, convened under Chapter 11 of the North American Free Trade Agreement (NAFTA) and the Arbitration Rules of the United Nations Commission on International Trade Law, has issued an Award on Jurisdiction and Admissibility in the case between Apotex, Inc. and the United States, dismissing all of the claims against the United States.

Apotex is a Canadian company that develops and manufactures generic drugs. In order to market and sell its drug products in the United States, it must prepare and file applications with the U.S. Food and Drug Administration (FDA). Both claims in the arbitration proceeding "relate to the treatment said to have been accorded it by the USA, its agencies and Federal Courts, in the course of its efforts to bring new generic drugs to market in the United States."

Apotex alleged that the United States "committed errors in interpreting federal law," thus breaching its obligations under NAFTA including Article 1102 (national treatment) and Article 1105 (minimum standard of treatment). Apotex also claimed that "the challenged U.S. court and agency decisions expropriated Apotex's investments under NAFTA Article 1110." The United States objected to the claims on the basis that Apotex did not qualify as an "investor" who made an "investment" within the scope of NAFTA Articles 1116 and 1139; that Apotex did not pursue available remedies within the U.S. court system, rendering the judicial acts complained of not "final"; and that the NAFTA time bar of Article 1116(2) applies.

The Tribunal found that Apotex's "activities with respect to the contemplated sales of its . . . products in the United States are those of an exporter, not an investor." Further, "like any company that intends to export generic drug products to the United States," Apotex sought approval from the FDA, but "this process cannot change the nature of the underlying activity, or constitute an '*investment*' in and of itself, within the meaning and scope of NAFTA Article 1139." Thus, the Tribunal found that it lacked jurisdiction over Apotex's claims, and dismissed them in their entirety. It went on to hold that even if Apotex qualified as an investor who made an investment, the Tribunal lacks jurisdiction *ratione materiae* because Apotex failed to exhaust all local judicial remedies, and that the Tribunal had no jurisdiction *ratione temporis* because of the NAFTA time bar.[4]

[3] U.S. Department of the Treasury Press Release, U.S. and China Agree to Negotiate a Breakthrough Investment Treaty (July 29, 2013), *at* http://www.treasury.gov/press-center/news/Pages/U.S.-and-China-Agree-to-Negotiate-a-Breakthrough-Investment-Treaty.aspx.

[4] This item is reproduced from the July 12, 2013, issue of the American Society of International Law's electronic publication *International Law in Brief* (*ILIB*) and was written solely by Kathleen Doty, *ILIB* editor. ASIL's permission to reproduce this material is gratefully appreciated. The tribunal's award is available online at http://www.state.gov/documents/organization/211699.pdf.

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United States Appoints Judge Rosemary Barkett to Iran-U.S. Claims Tribunal

In August 2013, the U.S. Department of State announced the appointment of Judge Rosemary Barkett of the U.S. Court of Appeals for the Eleventh Circuit to be a member of the Iran-United States Claims Tribunal in The Hague. Judge Barkett will resign from the court of appeals.[5] The announcement follows:

> The U.S. Department of State announces the appointment of Judge Rosemary Barkett as a U.S.-appointed member of the Iran-United States Claims Tribunal in The Hague. Judge Barkett will assume her duties at the Tribunal effective October 1, 2013. She succeeds Judge Gabrielle McDonald, who recently resigned from the Tribunal after serving with distinction for 12 years.
>
> Judge Barkett has had a distinguished career as a federal judge. Most recently, she has served on the U.S. Court of Appeals for the Eleventh Circuit, an appointment she held since 1994 and from which she will have resigned effective September 30. A graduate of Spring Hill College and the University of Florida Law School, Judge Barkett worked in private practice in Florida and then served in numerous capacities on Florida State Courts, including sitting as a Justice and later Chief Justice on the Florida Supreme Court, before her elevation to the federal bench. Judge Barkett has been an adjunct professor of law at Columbia Law School and Florida State University College of Law and is a member of the International Women's Forum and the American Society of International Law, where she serves on the Judicial Outreach Program Advisory Board.
>
> The Iran-United States Claims Tribunal was established pursuant to the Algiers Accords of January 19, 1981. It consists of nine members, three appointed by the United States, three appointed by Iran, and the remaining three selected by another process. The other U.S.-appointed members of the Tribunal are Mr. Charles N. Brower and Mr. O. Thomas Johnson.[6]

D.C. District Court Upholds Securities and Exchange Commission's Conflict Minerals Rule

In 2012, the U.S. Securities and Exchange Commission (SEC) adopted a "Conflict Minerals Rule"[7] mandated by Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[8] In that legislation Congress found that exploitation and trade in certain "conflict minerals"—particularly tantalum, tin, tungsten, and gold—originating in the Democratic Republic of the Congo (DRC) is fueling violent conflict in the DRC and neighboring countries. Congress directed the SEC to develop rules requiring covered companies to investigate the origins of conflict minerals used in their products and to disclose the results to the

[5] Bill Rankin, *Barkett to Leave Appeals Court*, ATLANTA J.-CONST., Aug. 19, 2013, *at* http://www.ajc.com/news/news/local/barkett-to-leave-appeals-court/nZSdK.

[6] U.S. Dep't of State Press Release No. 2013/2028, Appointment of Judge Rosemary Barkett as a Member of the Iran-United States Claims Tribunal (Aug. 23, 2013), *at* http://www.state.gov/r/pa/prs/ps/2013/08/213477.htm.

[7] Securities and Exchange Commission Final Rule on Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. §§240, 249b); *see* John R. Crook, Contemporary Practice of the United States, 107 AJIL 431, 452 (2013).

[8] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

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SEC and the public if those minerals originated or may have originated in the DRC or adjoining countries.[9]

Three major business groups promptly filed suit to overturn the SEC action, attacking it as arbitrary and capricious and as contrary to the First Amendment to the U.S. Constitution. In a sixty-three-page memorandum opinion in July 2013, Judge Robert L. Wilkins of the U.S. District Court for the District of Columbia rejected these claims and granted summary judgment in favor of the SEC. An appeal was filed August 12, 2013, and on August 15 the U.S. Court of Appeals for the D.C. Circuit set an expedited briefing schedule requiring briefing to be completed by November 13, 2013. The first paragraph of District Judge Wilkins's opinion follows:

> Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank"), the Securities and Exchange Commission promulgated a rule imposing certain disclosure requirements for companies that use "conflict minerals" originating in and around the Democratic Republic of the Congo ("DRC"). Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012) (codified at 17 C.F.R. §§240, 249B) (the "Conflict Minerals Rule," "Final Rule," or "Rule"). The plaintiffs in this action—the National Association of Manufacturers ("NAM"), the Chamber of Commerce, and Business Roundtable (collectively, "Plaintiffs")—challenge various aspects of the SEC's Final Rule as arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. §§701, *et seq.* Plaintiffs also mount a constitutional attack against both the Rule and Dodd-Frank §1502, claiming that the disclosures required by the SEC and by Congress run afoul of the First Amendment. Finding no problems with the SEC's rulemaking and disagreeing that the "conflict minerals" disclosure scheme transgresses the First Amendment, the Court concludes that Plaintiffs' claims lack merit. Accordingly, upon careful consideration of the parties' briefing and the arguments of counsel, along with a thorough review of the Joint Appendix the parties relied upon as the administrative record in this case, the Court, for the reasons that follow, will DENY Plaintiffs' Motion for Summary Judgment (Dkt. No. 14) and will GRANT the Commission's and Intervenors' Cross-Motions for Summary Judgment (Dkt. Nos. 15, 16).[10]

U.S. Department of State Supports International Code of Conduct for Private Security Service Providers

In 2010, fifty-eight private international security companies adopted the International Code of Conduct for Private Security Service Providers to establish principles and standards for their industry.[11] The United States has strongly supported the code.[12] In August 2013, the U.S. Department of State announced that it intends to join an association being organized to oversee activities under the code, and that the Department's Bureau of Diplomatic Security anticipates making both membership in the association and conformity with the code requirements for bidding on its future security contracts. The announcement follows:

[9] John R. Crook, Contemporary Practice of the United States, 104 AJIL 654, 668 (2010).

[10] Nat'l Ass'n of Mfrs. v. SEC, 2013 U.S. Dist. LEXIS 102616, at *2–4 (D.D.C. July 23, 2013) (footnote omitted).

[11] *See* David A. Wallace, *International Code of Conduct for Private Security Service Providers*, Introductory Note, 50 ILM 89 (2011).

[12] John R. Crook, Contemporary Practice of the United States, 105 AJIL 122, 156 (2011).

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> On September 19th and 20th of this year, the Government of Switzerland will host the launch of the association to serve as a governance and oversight mechanism of the International Code of Conduct for Private Security Service Providers (ICoC). The United States has expressed its intention to join the Association as a founding member and will participate in the launch conference.
>
> The Department of State recognizes and appreciates the progress made on the development of the ICoC and the pending establishment of an ICoC Association. As long as the ICoC process moves forward as expected and the association attracts significant industry participation, the Bureau of Diplomatic Security (DS) anticipates incorporating membership in the ICoC Association as a requirement in the bidding process for the successor contract to the Worldwide Protective Services (WPS) program. DS also anticipates that the successor contract to WPS will require demonstrated conformance with the ANSI/ASIS PSC.1-2012 standard.
>
> For more information on the ICoC: www.icoc-psp.org.[13]

U.S. Department of State Announces Online Publication of 2012 Digest of U.S. Practice

In July 2013, the U.S. Department of State announced that the official *2012 Digest of U.S. Practice in International Law* is now available gratis on the department's website. The announcement follows:

> The Department of State is pleased to announce the release of the 2012 Digest of United States Practice in International Law, covering developments during calendar year 2012. The Digest provides the public with a record of the views and practice of the Government of the United States in public and private international law. The official edition of the 2012 Digest is available exclusively on the State Department's website at: www.state.gov/s/l/c8183.htm. Past Digests covering 1989 through 2011 are also available on the State Department's website. The Digest is edited by the Office of the Legal Adviser.
>
> The Digest traces its history back to an 1877 treatise by John Cadwalader, which was followed by multi-volume encyclopedias covering selected areas of international law. The Digest later came to be known to many as "Whiteman's" after Marjorie Whiteman, the editor from 1963–1971. Beginning in 1973, the Office of the Legal Adviser published the Digest on an annual basis, changing its focus to documentation current to the year. Although publication was temporarily suspended after 1988, the office resumed publication in 2000 and has since produced volumes covering 1989 through 2011. A cumulative index covering 1989–2006 was published in 2007, and an updated edition of that index covering 1989–2008 was published in 2010.[14]

[13] U.S. Dep't of State Press Release No. 2013/1011, State Department to Incorporate International Code of Conduct into Worldwide Protective Services Contracts (Aug. 16, 2013), *at* http://www.state.gov/r/pa/prs/ps/2013/08/213212.htm.

[14] U.S. Dep't of State Press Release No. 2013/0870, Department of State Announces Online Publication of the 2012 Digest of United States Practice in International Law (July 11, 2013), *at* http://www.state.gov/r/pa/prs/ps/2013/07/211807.htm.

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