No. 12-138

IN THE

Supreme Court of the United States

BG GROUP PLC,

Petitioner,

v.

REPUBLIC OF ARGENTINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The D.C. Circuit held in this case that a court, rather than an arbitral tribunal, decides whether a party is excused from complying with a precondition to arbitration. As the petition demonstrated and the four *amicus* briefs confirm, that ruling conflicts with this Court's precedent and decisions of other circuits, and moreover is exceptionally important to arbitration. Indeed, that showing is so plainly correct that Argentina's argument against certiorari depends on its attempt to rewrite the ruling below as if the court instead held that the parties had never reached an agreement to arbitrate in the first place. Argentina's position is meritless for several reasons: (i) it misrepresents the D.C. Circuit's holding; (ii) it is inconsistent with the facts established in the record – *i.e.*, that BG accepted Argentina's arbitration offer; and (iii) even if the basis for the D.C. Circuit's decision had been the absence of an arbitration agreement, that decision would conflict with the decisions of other circuits. Because this case easily satisfies all of the criteria for this Court's review, the petition should be granted.

I. This Case Squarely Presents The Question Whether Courts Or Instead Arbitrators Decide Whether A Party Is Excused From Complying With A Condition Precedent To Arbitration.

Argentina's well-recorded and oft-demonstrated disdain for the judgments of U.S. courts, *see* Pet. 11, reaches new heights in the Opposition, which disavows the reasoning of the D.C. Circuit's ruling *in its favor*. According to Argentina, "this case concerns whether there was an agreement to arbitrate, and

not, as BG and *amici* urge, compliance with conditions precedent," BIO 1, because supposedly "the Court of Appeals found that BG did not accept Argentina's offer, and therefore no agreement to arbitrate between BG and Argentina was ever formed," *id*. That argument lacks the slightest merit.

1. Argentina did not even make this argument to the panel below, which did not adopt it. The D.C. Circuit instead recognized that the Treaty specifies litigation as a precondition to arbitration, and held that courts (not arbitrators) must decide whether a party is excused from complying. The court reasoned that "Article 8(2) sets the *conditions* by which such a dispute may be submitted to international arbitration." Pet. App. 3a (emphasis added). The court then recognized that "[t]he Treaty does not directly answer whether the contracting parties intended a court or the arbitrator to determine questions of arbitrability where the *precondition* of resort to a contracting party's court pursuant to Article 8(1) or (2) is disregarded by an investor." *Id.* 14a (emphasis added). The D.C. Circuit then held that a court, rather than an arbitrator, determines whether a party has complied with "a *precondition* to arbitration." *Id.* 15a (emphasis added).

Argentina's (mis)reading of the ruling below depends entirely on quoting the decision below out of context. Specifically, Argentina quotes the D.C. Circuit's statement that the arbitrators erred in not giving due "regard to the contracting parties' agreement," BIO 6, but it omits that the court actually referred to the "contracting parties' agreement establishing a *precondition* to arbitration," Pet. App. 2a (emphasis added). Argentina then

quotes the D.C. Circuit's statement that there was insufficient evidence to overcome the presumption "that the contracting parties intended an arbitrator to decide the gateway question," BIO 7, omitting the court's explanation in the next sentence of what that "question" constitutes:

> Because the Treaty provides that a *precondition* to arbitration of an investor's claim is an initial resort to a contracting party's court, and the Treaty is silent on who decides arbitrability when that *precondition* is disregarded, *we hold that the question of arbitrability is an independent question of law for the court to decide*.

Pet. App. 15a (emphasis added).

That holding is also of course what has driven the outpouring of *amicus* participation, including from "the world's largest provider of alternative dispute resolution services," AAA Br. 1, "the world's leading institution for international commercial arbitration," USCIB Br. 1, and numerous eminent authorities on arbitration practice, Professors & Practitioners Br.

2. The D.C. Circuit's understanding that the Treaty creates a precondition to arbitration – not merely "an agreement to *litigate*," BIO 3 – is also obviously right. Argentina cites the Treaty provision stating that a claim "shall be submitted" to its local courts. Treaty art. 8(1). But Argentina omits the more important point that the Treaty confers on every investor an absolute, unqualified right to have its claim arbitrated, even upon receiving an adverse court judgment. *Id.* art. 8(2)(a)(ii) (claim "shall be submitted to international arbitration" if after

judicial ruling "the Parties are still in dispute"). As Argentina concedes, the Treaty merely gives "an Argentine court . . . the first opportunity to decide any issue." BIO 11.

Only the arbitration – not the court ruling – is "final and binding." Treaty art. 8(4). That feature of the Treaty is essential to its *raison d'être*: to attract capital. Foreigners will not entrust multi-billion dollar investments to the potential biases of local courts.[1] Argentina's dismissive assertion that the question presented merely involves the economic interests of arbitral organizations, BIO 7-8 n.3, thus overlooks that the ruling below in fact threatens the interests of *sovereigns*, which equally "depend on this system . . . to provide an incentive for foreign investment." Professors & Practitioners Br. 14.

Argentina's contrary reading that the Treaty confers only an agreement to litigate is absurd. On that view, the host state could close its courts to claims under the Treaty or impose a massive financial penalty for bringing suit in court – hypothetical provisions similar to the measures

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[1] *See* USCIB Br. 18 ("It is generally highly unappealing, if not invidious, for international investors to be forced to submit disputes with a host State to that State's own courts."); *See* Marc J. Goldstein, *US Appellate Review of a BIT Award: Unmistakably Unclear*, Arbitration Commentaries, Jan. 18, 2012, http://arbblog.lexmarc.us/2012/01/us-appellate-review-of-a-bit-award-unmistakably-unclear/ ("Did the Argentine Republic foresee that it would be arguing this to an Argentine judge, from whom the UK investor would seek a pre-arbitral declaration of the investor's right to proceed with arbitration? Obviously not.").

actually adopted in this case. But because the investor would not have litigated its claim for the minimum eighteen months, Argentina would never have made an offer to arbitrate, leaving the investor with no recourse *at all*. Indeed, the ruling below provides a ready road map to any sovereign that seeks to strip investors of any right to relief: "The D.C. Circuit's decision will allow States to insist that investors comply with the local remedies precondition to arbitration while at the same time preventing them from doing so." USCIB Br. 20.

Argentina argues that its position is supported by arbitral rulings concluding that compliance with such a litigation precondition was not excused, BIO 10 n.5, while the *amici* cite arbitral rulings reaching a different result on different facts, AAA Br. 10-11 n.9; Professors & Practitioners Br. 24 n.27. But the relevant question here is not *how* the disputes over the arbitration preconditions were resolved, but *who* resolved them. In both sets of proceedings cited, it was the arbitrators – not courts – that decided the issue.

II. The Ruling Below Conflicts With The Precedent Of This Court And Of Other Circuits.

1. The petition established that by holding that courts presumptively resolve all questions of "arbitrability," Pet. App. 15a, the ruling below conflicts with this Court's holding that "issues of *procedural* arbitrability, *i.e.*, whether prerequisites such as time limits, notice laches, estoppel, and other *conditions precedent to an obligation to arbitrate* have been met, are for the *arbitrators* to decide," *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002)

(emphasis added; other emphasis omitted) (citation omitted); *see also John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) (arbitrator must resolve "[d]oubts . . . [as to] whether [grievance procedures] have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate").

Argentina does not seriously defend the court of appeals' position that *Howsam* and *John Wiley* are properly limited to their facts. Pet. 23-27; Pet. App. 17a-19a & n.6. As the petition demonstrated, certiorari is warranted because of the plain conflict between the ruling below and this Court's precedents.

Argentina nonetheless argues that it prevails under this Court's holding in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), "that the question whether a valid and binding agreement to arbitrate exists is generally one for the courts to decide." BIO 1. But that was exactly the Tenth Circuit's reasoning in *Howsam*. *See Howsam*, 537 U.S. at 82. This Court rejected that reasoning, recognizing that it was true only in the overbroad sense that "one might call any potentially dispositive gateway question a 'question of arbitrability,' for its answer will determine whether the underlying controversy will proceed to arbitration on the merits." *Id.* at 83. In fact, under this Court's precedents, "the phrase 'question of arbitrability' has a far more limited scope," *id.*, and specifically is "*not* applicable" to threshold "'procedural' questions" such as whether "a condition precedent to arbitrability has been fulfilled," *id.* at 84-85 (quoting Revised Uniform Arbitration Act of 2000 § 6(c), and citing the staged procedure in *John Wiley*).

Contrary to the D.C. Circuit's simplistic view that parties would expect a court to decide whether an investor must first proceed in court, BIO 14 (citing Pet. App. 15a), the parties here (as in *Howsam*) would naturally expect the arbitrators to decide whether compliance with the litigation precondition may be excused. That question requires construing the Treaty (including its incorporation of international law), *not* domestic Argentine law. The Treaty necessarily contemplates that the arbitrators would be expert in this question: as noted, the Treaty provides an absolute, irrevocable right to arbitrate claims arising from the Treaty's application. "Indeed, these sorts of disputes are resolved almost exclusively by specialist arbitrators, like those here, who are skilled in the interpretation of investment treaties and the matrix of international law in which they are interpreted." USCIB Br. 9.

2. Argentina recognizes that its (erroneous) reading of the ruling below is the only basis on which it can hope to distinguish "cases from the First, Sixth, Seventh, and Eighth Circuits that have all held that compliance with preconditions to arbitration are for arbitrators to decide." BIO 15; *see* Pet. 28-31. For the reasons given in Part I, *supra*, there is no merit to Argentina's argument that the D.C. Circuit did not regard this case as involving a precondition to arbitration.

The conflict will not be repeated again here, other than to reinforce that it is intolerable. This Court has emphasized "the need of the international commercial system for predictability in the resolution of disputes," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 629 (1985),

because parties must know *ex ante* whether an arbitration may commence before undertaking proceedings that regularly last several years and cost millions of dollars. The currently "confused state of United States law," Professors & Practitioners Br. 25, creates an unacceptable level of "uncertainty for parties choosing to arbitrate," USCIB Br. 22. Only this Court can resolve the conflict, which is rooted in the courts of appeals' irreconcilable views over whether this Court's decisions in *Howsam* and *John Wiley* announce a general rule or instead are limited to their particular facts.

C. Even if the D.C. Circuit had held that BG Group and Argentina never reached an agreement to arbitrate, certiorari would be warranted. Argentina admits that the Second Circuit in particular "has held that when the parties' arbitration agreement incorporates rules that empower the arbitrators to consider their own jurisdiction, as the UNCITRAL Rules do, such incorporation provides 'clear and unmistakable' evidence of the parties' intent to delegate questions of arbitrability to the arbitrators." BIO 17; *see* Pet. 31-33; AAA Br. 14-15 & n.14 (collecting additional Second Circuit rulings). The UNCITRAL Rules parallel those of "virtually all major arbitral institutions," USCIB Br. 13, and several circuits have held that such jurisdictional questions are decided by arbitrators under those arbitral systems as well, *see* AAA Br. 17 & n.15; USCIB Br. 16-17.

Argentina repeats the D.C. Circuit's assertion that the UNCITRAL rules are "not triggered until" the litigation condition is satisfied. Pet. App. 14a; BIO 17. But that temporal distinction is

"unprecedented and unsupported," AAA Br. 15: BG Group accepted Argentina's offer by duly submitting a notice of arbitration and claim, and the arbitral proceedings were undertaken pursuant to the UNCITRAL Rules.

Argentina's attempt to convert an ordinary dispute about the meaning of a term in a valid arbitration agreement into an existential dispute over the party's consent to arbitration is a rhetorical trick that could be played with respect to nearly any provision of an arbitration agreement. "*Any* precondition to arbitration, such as an obligation to negotiate for a period of time before commencing arbitration, will by definition refer to an event or events that should have preceded the arbitration." Professors & Practitioners Br. 20.

Argentina could just as well argue that it agreed to arbitrate only timely filed disputes, thereby requiring judicial resolution of untimeliness allegations, despite this Court's clear direction that procedural "prerequisites such as time limits . . . are for the arbitrators to decide." *Howsam*, 537 U.S. at 85 (emphasis omitted). An employer could likewise insist that "the possibility of arbitration does not even arise until" a union exhausts a grievance process, BIO 11, and insist that failure to complete that process before invoking arbitration amounts to a failure to accept the arbitration agreement. *Cf. John Wiley*, 376 U.S. at 556 ("Wiley argues that since Steps 1 and 2 [of the grievance process] have not been followed, and since the duty to arbitrate arises only in Step 3, it has no duty to arbitrate this dispute."); *id*. at 557 (nonetheless holding that question was for the arbitrator).

Not surprisingly, other courts would reject the D.C. Circuit's view that the parties' *prior* agreement to a specified system of arbitral rules is ineffective until *after* preconditions to arbitration are satisfied. As the Second Circuit has reasoned, "[a]ll that is necessary to form an agreement to arbitrate" under an investment treaty is for the investor to "consent to arbitration of an investment dispute in accordance with the Treaty's terms." *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 392 (2d Cir. 2011). And all that is required to effectuate such consent is a notice of arbitration: "a foreign investor's written demand for arbitration completes the 'agreement in writing' to submit the dispute to arbitration." *Id*. at 392-93. Applying those principles in the *Ecuador* case, the Second Circuit found that Chevron had "notif[ied] Ecuador in writing" of its demand for arbitration. *Id*. at 393. And with that, the court concluded that "the existence of a valid arbitration agreement [was] established." *Id*.

III. The Ruling Below Seriously Harms Arbitration.

Certiorari is also warranted because the importance of the question presented is beyond reasonable dispute. Argentina's passing assertion that such preconditions are relatively uncommon, BIO 21 n.9, is mistaken: there are roughly 2700 investment treaties, most of which "contain similar arbitration provisions." Professors & Practitioners Br. 9-10; *see* AWG Br. 12-13. But in any event, analogous preconditions are "prevalent in both commercial contracts and investment treaties." AAA Br. 7-8 & nn.5-6; *see* Pet. 17-18; USCIB Br. 8. In turn, "the question of whether a party has complied

with the procedural preconditions to arbitration is a recurring issue in many international disputes." AWG Br. 14.

Precisely because such provisions are "so common," the ruling below creates "wide-ranging opportunities for delay and dilatory actions," AAA Br. 5, as it "open[s] the flood gates to ancillary litigation," USCIB Br. 7. Because the United States is itself a party to forty-seven similar treaties, Professors & Practitioners Br. 10, the ruling below has "potentially far-reaching consequences for U.S. investors, who invest hundreds of billions of dollars abroad," USCIB Br. 21.

The ruling below specifically throws open the doors to this nation's courts to hear challenges to the results of years-long international arbitrations, especially given the special role of the District of Columbia in international arbitration. Pet. 35-36. The decision provides "an opportunistic pretext to derail already completed arbitration proceedings," AWG Br. 17, with "seriously detrimental consequences for the future of international investment treaty arbitration," USCIB Br. 17. Argentina itself makes a special point of its right to bring such collateral attacks in U.S. courts to completed arbitral awards. BIO 6 n.2.

If the United States is going to depart from the international consensus that these disputes are resolved by arbitrators, adopting a rule "at odds with standards followed by other major international arbitration jurisdictions," AAA Br. 6, that critical judgment should be made by this Court rather than a court of appeals. The ruling below has "set United States courts on a collision course with the

international regime embodied in thousands of [investment treaties]." Professors & Practitioners Br. 15. It substantially upsets the settled expectations of foreign entities, which – because the United States has "the world's largest annual international arbitration caseload," AAA Br. 2 – will now be regularly brought into our courts. For just that reason, the ruling below has generated considerable "scrutiny of and skepticism about how U.S. courts treat international awards rendered in the United States," *id.* 21, and has been recognized as such "a dangerous precedent for both investment and commercial arbitration," Sebastian Perry, *BG Group v Argentina – a Dallah for the US?*, Global Arbitration Review, Jan. 27, 2012, http://www.globalarbitrationreview.com/news/article/30124/bg-group-v-argentina-dallah-...10/12/2012, that it is "a desirable candidate for the granting of a writ of *certiorari* by the US Supreme Court," Goldstein, *US Appellate Review*, *supra*.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition and the *amicus* briefs, certiorari should be granted.

Respectfully submitted,

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