No. 12-138

In the Supreme Court of the United States

BG GROUP PLC, PETITIONER

v.

REPUBLIC OF ARGENTINA

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

A bilateral investment treaty between the United Kingdom and Argentina provides that before a foreign investor may pursue arbitration of an investment dispute with the host State, the investor must first litigate the dispute for at least 18 months in the host State's courts. The question presented is:

Whether the court of appeals erred in concluding that the parties to the Treaty intended that a court, rather than the arbitral panel, should decide whether petitioner's noncompliance with the litigation requirement deprived the arbitral tribunal of jurisdiction.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Bilateral investment treaties (BITs) are agreements between two sovereign Nations undertaken to promote and protect investment on a reciprocal basis. Nearly 3,000 BITs have been concluded worldwide. See U.N. Conference on Trade and Development, *World Investment Report 2012*, at 84, http://www. unctad-docs.org/UNCTAD-WIR2012-Full-en.pdf. A BIT typically affords various legal protections to covered investors and investments, including basic guarantees of non-discrimination and prohibitions on expropriation without adequate compensation. See Kenneth Vandevelde, *Bi-*

lateral Investment Treaties: History, Policy, and Interpretation 4-7 (2010) (Vandevelde). A BIT also contains provisions for resolving disputes between the host State and an investor with respect to covered investments, commonly through international arbitration.

BITs often place conditions on an investor's resort to arbitration. For example, the United States' 2012 Model Bilateral Investment Treaty—which the Executive Branch uses as a model in negotiating new BITs—requires that a foreign investor seeking to arbitrate a dispute with the United States provide advance written notice of its intent to pursue arbitration; wait six months after the events giving rise to the claim before initiating arbitration; provide a written waiver of any right to pursue other dispute-settlement procedures with respect to any measure at issue in the arbitration; and initiate arbitration within three years of when the party knew or should have known of the allegedly wrongful acts. See U.S. Dep't of State, *2012 U.S. Model Bilateral Investment Treaty*, arts. 24-26, http://www.state.gov/documents/organization/188371.pdf.

BITs usually specify the fora where investor-state arbitration may proceed, and frequently offer claimants a range of options. BITs commonly provide for arbitration before the International Centre for Settlement of Investment Disputes (ICSID), which administers an international arbitral regime created pursuant to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. BITs may also contemplate dispute resolution according to the rules of other arbitral institutions and before ad hoc arbitral tribunals convened under the United Nations Commission on International

Trade Law (UNCITRAL) Rules. See Vandevelde 434-435.

An award rendered in an investor-state arbitration may be subject to annulment or set-aside proceedings. For certain investor-state arbitrations, including ad hoc arbitrations conducted using the UNCITRAL Rules, an aggrieved party may seek to set aside an award in a competent court of the jurisdiction in which the arbitration was seated. See, *e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) Art. V(1)(e), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (recognizing that an arbitral award may be "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made"). Investor-state arbitral awards rendered by tribunals seated in the United States may be subject to vacatur proceedings under the Federal Arbitration Act (FAA), 9 U.S.C. 1-16, 201-208.

2. a. In 1990, respondent Republic of Argentina entered into a bilateral investment treaty with the United Kingdom. See Agreement for the Promotion and Protection of Investments (the Treaty), Argentina-United Kingdom, Dec. 11, 1990, 1765 U.N.T.S. 33. The Treaty, which entered into effect in 1993, was designed to "promote a favorable investment environment between the contracting parties." Pet. App. 3a.

The Treaty provides for a "two-tiered system of dispute resolution." Pet. App. 23a-24a. Under Article 8(1) of the Treaty, any dispute between an "investor of one Contracting Party and the other Contracting Party * * * shall be submitted" to a "competent tribunal of the Contracting Party in whose territory the investment was made." Treaty Art. 8(1); Pet. App. 3a. If the court does not issue a final decision within eighteen months,

or if the parties are "still in dispute" after the court's decision, the matter "shall be submitted to international arbitration" upon the request of one of the parties. Treaty Art. 8(2); Pet. App. 24a n.2. The Treaty contemplates arbitration under various arbitral rules, including those established by ICSID, as well as arbitration before an ad hoc tribunal convened under the UNCITRAL Rules. Treaty Art. 8(3). The Treaty further provides that "[t]he arbitral tribunal shall decide the dispute in accordance with the provisions of [the Treaty], the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law." Treaty Art. 8(4).

b. In the early 1990s, Argentina implemented economic and financial reforms intended to restrain inflation, reduce the public deficit, and promote economic growth. Pet. App. 4a, 101a-102a. Argentina established a 1:1 fixed parity between the Argentine peso and the U.S. dollar and privatized various state-owned companies. In particular, Argentina privatized the state-owned gas company, Gas del Estado, by dividing it into smaller companies and tendering controlling interests therein to international investors. *Ibid.*

Petitioner BG Group PLC, a United Kingdom company, invested in one of the newly privatized companies, MetroGAS, through a consortium of investors known as Gas Argentino, S.A. Pet. App. 5a, 104a. MetroGAS had been granted a 35-year exclusive license to distribute gas in the City of Buenos Aires and parts of the surrounding metropolitan area. The license provided that tariffs would be calculated in U.S. dollars and expressed in pesos. *Id.* at 110a-111a, 239a-242a.

c. In 2001, Argentina experienced a severe economic crisis. Pet. App. 5a. In response, the government enacted an emergency law that terminated the currency board that had pegged the Argentine peso to the U.S. dollar, thereby allowing the peso to devalue; converted dollar-based tariffs into peso-based tariffs at a rate of one peso to one dollar; and revised existing contracts for public works and services by converting dollar-based adjustment or indexation clauses into peso-based clauses. *Ibid.* These measures had a substantial impact on petitioner's investment. *Id.* at 62a.

The emergency law also authorized the creation of a "renegotiation" process for public services contracts, which was intended to ameliorate the law's adverse effects on private investors. Pet. App. 5a. The law provided, however, that "any licensee that sought redress in an arbitral or other forum" could not participate in the renegotiation process. *Id.* at 131a. The government also enacted a decree staying for 180 days the country's compliance with any injunctions or final judgments in lawsuits related to the emergency law. *Id.* at 5a.

3. a. In April 2003, petitioner submitted the dispute to international arbitration under Article 8 of the Treaty. Pet. App. 25a. Petitioner argued that Argentina's emergency measures violated the Treaty by, among other things, failing to provide fair and equitable treatment to its investments. *Id.* at 25a-26a.

Although the Treaty requires a claimant to litigate an investment dispute in the host State's courts for at least 18 months before resorting to arbitration, see Pet. App. 23a-24a & n.2, petitioner did not do so. Instead, petitioner initiated arbitration under the UNCITRAL Rules, and an arbitral panel was convened in Washington, D.C. *Id.* at 26a. Argentina challenged the arbitral

tribunal's jurisdiction on the ground that petitioner had failed to comply with the Treaty's litigation requirement.[1] *Id.* at 162a-163a.

b. On December 24, 2007, the arbitral tribunal issued a unanimous decision in petitioner's favor on both jurisdiction and the merits. Pet. App. 92a-306a.

With respect to jurisdiction, the tribunal held that petitioner had properly initiated arbitration. Pet. App. 161a-171a. The tribunal declined to construe the Treaty's litigation requirement "as an absolute impediment to arbitration." *Id.* at 165a. The tribunal explained that Article 32 of the Vienna Convention on the Law of Treaties allows recourse to "supplementary means of interpretation" when interpreting a treaty if application of the ordinary meaning of its terms, understood in context and in light of its object and purpose, would "lead[] to a result which is manifestly absurd or unreasonable." Vienna Convention on the Law of Treaties Art. 32, May 23, 1969, 1155 U.N.T.S. 331; Pet. App. 158a n.128. The tribunal reasoned that it would be "absurd and unreasonable" to mandate compliance with the Treaty's litigation precondition here. *Id.* at 165a-166a. By staying suits related to the emergency law and excluding from the renegotiation process licensees who sought redress in Argentine courts, the tribunal concluded, Argentina had "directly interfer[ed] with the normal operation of

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[1] This case is unlike other cases in which Argentina has refused to comply with final arbitral awards entered against it, for which all applicable review mechanisms have been exhausted, contrary to its international legal obligations. See, *e.g.*, 77 Fed. Reg. 18,899 (2012) (Presidential Proclamation suspending special trade privileges for Argentina based on a finding that it had not acted in good faith in failing to pay arbitral awards owed to U.S. companies).

its courts," *id.* at 170a, and unilaterally hindered "recourse to the domestic judiciary," *id.* at 165a.

On the merits, the tribunal ruled that Argentina had breached the Treaty by "violat[ing] the principles of stability and predictability inherent to the standard of fair and equitable treatment." Pet. App. 241a. The tribunal awarded petitioner approximately $185 million in damages, as well as interest, arbitral costs, and attorneys' fees. *Id.* at 304a-306a.

4. In March 2008, Argentina filed this suit in district court, seeking to vacate the arbitral award under the FAA and the New York Convention. Petitioner BG Group PLC cross-petitioned to confirm the Award. The district court rejected Argentina's challenge to the arbitrators' jurisdiction and confirmed the award on the merits. Pet. App. 21a-57a.

5. The court of appeals reversed the district court's judgment and vacated the award, concluding that the arbitral tribunal had exceeded its powers by allowing arbitration to proceed. Pet. App. 1a-20a.

The court of appeals first considered whether the court itself or the arbitral tribunal should determine the effect of petitioner's failure to commence litigation in an Argentine court on the arbitral tribunal's jurisdiction to entertain the dispute. The court observed that "[t]he Treaty does not directly answer" that question. Pet. App. 14a. The court explained that, under this Court's decisions, when the precondition is of the sort that "the contracting parties would likely have expected a court to decide," *id.* at 11a (quoting *Howsam* v. *Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002)), "'[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so,'" *id.* at 10a (quoting *First*

Options of Chi., Inc. v. *Kaplan*, 514 U.S. 938, 944 (1995)). Concluding that the parties would have expected the effect of noncompliance with the litigation requirement to be determined by a court, the court of appeals held that "the question of arbitrability is an independent question of law for the court to decide." *Id.* at 15a.

Assessing de novo the effect of petitioner's failure to comply with the litigation requirement, the court of appeals held that petitioner "was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration," and that the arbitral tribunal had therefore lacked jurisdiction over the parties' dispute. Pet. App. 19a-20a.

DISCUSSION

The court of appeals examined the text and structure of the Treaty between the United Kingdom and Argentina in order to ascertain the Treaty States' intent concerning who should decide whether the arbitral tribunal had jurisdiction over the underlying dispute in this case. The court's decision thus rested on its construction of the particular provisions of the Treaty, and specifically, the Treaty's requirement that an investor engage in litigation in the host State's courts before initiating arbitration. The court's case-specific conclusions do not conflict with any decision of this Court or another court of appeals. The decision is unlikely to have any significant impact beyond this case because the Treaty's litigation requirement does not have analogues in any modern treaties or other investment agreements to which the United States is a party, and it appears to be uncommon in international treaty practice. For similar reasons, this case would also be an unsuitable vehicle for establishing general principles governing the interpretation

of more typical international or domestic arbitration agreements. Further review is not warranted.

A. The Court Of Appeals Applied Settled Principles In Determining A Question Of Arbitrability By Reference To The Intent Of The Parties

1. Arbitration is fundamentally "a matter of contract between the parties." *First Options of Chi., Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995). Accordingly, a "party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648 (1986). The jurisdiction of an arbitral tribunal to resolve a dispute thus depends on whether the parties have agreed to arbitrate the matter. See *First Options*, 514 U.S. at 943. In the context of disputes arising under bilateral investment treaties or other investment agreements between States, ascertaining the intent of the contracting States typically also requires application of principles of treaty interpretation. See generally Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

When a court is asked to determine whether an arbitral tribunal exceeded its jurisdiction, it must ascertain whether the parties intended that the particular jurisdictional issue be resolved by the arbitrators or by a court. In *First Options*, this Court, in articulating general principles under United States law governing arbitration, held that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." 514 U.S. at 944. Thus, presumptively, a "gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." *Howsam* v. *Dean Witter Reynolds,*

Inc., 537 U.S. 79, 84 (2002). The Court has also made clear, however, that not every "potentially dispositive gateway question" is a "question of arbitrability" within the meaning of *First Options*. *Id.* at 83. In "circumstance[s] where parties would likely expect that an arbitrator would decide the gateway matter," including "'allegation[s] of waiver, delay, or a like defense to arbitrability,'" the matter is presumptively for the arbitrator to resolve. *Id.* at 84 (quoting *Moses H. Cone Mem. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

In determining whether the "parties would likely expect that an arbitrator would decide the gateway matter," the Court has examined the nature of the issue and its relationship to the parties' underlying dispute. See *Howsam*, 537 U.S. at 84. In *Howsam*, for example, the Court concluded that a time limit provided by a National Association of Securities Dealers (NASD) rule "falls within the class of gateway procedural disputes" presumptively to be decided by an arbitrator because it "closely resembles" other "gateway questions that this Court has found not to be 'questions of arbitrability'" and because NASD arbitrators would be "comparatively more expert about the meaning of their own rule." *Id.* at 85. Similarly, in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 555-559 (1964), the Court held that whether parties had satisfied a requirement that they exhaust employer-union grievance procedures before proceeding to arbitration was presumptively for the arbitrator to decide because such questions were likely intertwined with the merits of "labor disputes of the kind involved here." *Id.* at 556.

2. In this case, the court of appeals did not purport to articulate any new principles governing whether, under

United States law, courts or arbitrators should bear principal responsibility for reviewing compliance with preconditions to arbitration in dispute resolution clauses. Nor did the court announce any broad rules addressing the full range of such preconditions—such as negotiation or mediation—or addressing preconditions in ordinary private commercial contracts. Instead, the court focused narrowly and specifically on the "'gateway' question" of whether, in entering into the particular Treaty before the court, the sovereign treaty parties, the United Kingdom and Argentina, "intend[ed] that an investor under the Treaty could seek arbitration without first fulfilling Article 8(1)'s requirement that recourse initially be sought in a court" of the host State. Pet. App. 10a. The court then stated that this inquiry raises the "antecedent question of whether the contracting parties intended the answer to be provided by a court or an arbitrator." *Ibid.* Under *First Options*, the court explained, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Ibid.* (quoting *First Options*, 514 U.S. at 944). The court further explained that "[a] court will decide the question" of arbitrability "in the kind of narrow circumstances where the contracting parties would likely have expected a court to have decided the gateway matter." *Id.* at 11a (quoting *Howsam*, 537 U.S. at 83-84).

After examining the text and structure of the Treaty, the court of appeals concluded that "[t]he Treaty provides a prime example of a situation where the 'parties would likely have expected a court' to decide arbitrability," *i.e.*, "whether the gateway provision should be followed." Pet. App. 15a (quoting *Howsam*, 537 U.S. at 83). The court emphasized that, under the Treaty's

multi-stage dispute-resolution framework, the "gateway provision *itself* is resort to a court," which in the court's view indicated that the parties contemplated judicial proceedings prior to arbitration. *Ibid.* The court also relied on the Treaty's express provision that if a dispute arises between the Treaty parties themselves (*i.e.*, between the United Kingdom and Argentina), and they are unable to resolve it through diplomatic channels, the dispute is referred directly to arbitration. Treaty Art. 9(2). In that instance the arbitral tribunal "shall determine its own procedure," Treaty Art. 9(5), which in the court's view indicated "that the contracting parties were aware of how to provide an arbitrator with the authority to determine a question of arbitrability." Pet. App. 14a-15a (internal quotation marks omitted). By contrast, the court held, there "is no clear and unmistakable evidence * * * that the contracting parties intended an arbitrator to decide the gateway question" concerning compliance with the Treaty's distinct requirement for investor-state disputes of litigation in the host State's courts. *Id.* at 15a (citing *First Options*, 514 U.S. at 944).

The court of appeals distinguished *John Wiley* and *Howsam*, which held that certain gateway requirements in private agreements were presumptively for the arbitrator to decide, on the basis of the distinct preconditions at issue in those cases. The court explained that no considerations comparable to the labor policies in *John Wiley* were present in the "entirely different context" here, involving "an international investment treaty between two sovereigns." Pet. App. 16a-17a. The court further explained that in this case, unlike in *John Wiley* and *Howsam*, the facts underlying the question whether the litigation requirement had to be satisfied were not intertwined with the merits of the parties' dispute. *Id.*

at 16a-18a & n.6. The court distinguished *Howsam* on the additional ground that the NASD arbitrators were comparatively more expert than a court would be in construing the rule at issue, whereas in this case there was no reason to think that the arbitral panel would have a comparative advantage in construing the Treaty's litigation requirement. *Id.* at 18a n.6.

3. Petitioner contends (Pet. 21-28) that the court of appeals should have treated the litigation requirement as presumptively for the arbitral panel to adjudicate, like the provisions at issue in *John Wiley* and *Howsam*. Petitioner thus challenges the court of appeals' application of settled principles to the particular treaty provision at issue in this case and the court's case-specific conclusion that the parties to the Treaty would have expected a court to decide whether the litigation precondition had to be satisfied. That narrow issue does not warrant this Court's review.

To be sure, the court of appeals' interpretation of the Treaty is not free of doubt. The Treaty's choice-of-law provision, for example, states that disputes shall be decided "in accordance with the provisions of this Agreement, the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the applicable principles of international law." Treaty Art. 8(4). While the court of appeals applied principles articulated by this Court in cases involving arbitrability under private (and mostly domestic) agreements, it did not consider the role that international law might play in ascertaining the intent of the Treaty parties concerning the application of the threshold litigation requirement. The court did not, for example, address petitioner's argument that interpret-

ing the Treaty to mandate compliance with the litigation requirement under these circumstances would be "absurd and unreasonable" and therefore contrary to international-law principles of treaty interpretation. Cf. Christopher F. Dugan et al., *Investor-State Arbitration* 208 (2008) ("[Q]uestions concerning the consent of the parties to jurisdiction, in the context of a BIT arbitration, are generally governed by international law.") (footnote omitted).[2]

These questions, however, concern the court of appeals' case-specific construction of the Treaty and its conclusions about the intent of the United Kingdom and Argentina in entering into the Treaty. For the reasons discussed below, any errors in the court's construction of the Treaty are unlikely to have implications beyond this case.

B. The Court Of Appeals' Decision Does Not Conflict With Decisions Of Other Courts Of Appeals

1. Petitioner asserts (Pet. 28-34) that the court of appeals' decision deepens an existing conflict among the circuits regarding "the division of competence over preconditions to arbitration." Pet. 28. But the decisions

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[2] Petitioner did not argue before the court of appeals that it was entitled, through the Treaty's "most favored nation" clause, to borrow the more favorable investor-state dispute resolution provisions contained in the Argentina-United States BIT, which does not contain a litigation requirement. The court of appeals therefore did not consider that issue. Some arbitral tribunals interpreting Argentine BITs containing such a litigation requirement have applied the most favored nation clause in ruling that investors need not exhaust the litigation requirement prior to commencing arbitration. See, *e.g.*, *Hochtief AG* v. *Argentina*, Case No. ARB/07/31, Decision on Jurisdiction, ¶¶ 56-111, ICSID (Oct. 24, 2011); *Impregilo S.p.A.* v. *Argentina*, Case No. ARB/07/17, Award, ¶¶ 95-109, ICSID (June 21, 2011).

on which petitioner relies applied *Howsam* and *First Options* to the specific preconditions at issue in each case, which were quite different from the requirement at issue here. See *Dialysis Access Ctr., LLC* v. *RMS Lifeline, Inc.*, 638 F.3d 367, 383 (1st Cir. 2011) (arbitrator should review compliance with good-faith negotiation precondition that was a procedural prerequisite analogous to the grievance procedure in *John Wiley*); *JPD, Inc.* v. *Chronimed Holdings, Inc.*, 539 F.3d 388, 391-393 (6th Cir. 2008) (effect of noncompliance with alleged conditions precedent to arbitration concerning contractual obligations for documenting finances was for arbitrator to resolve because, as in *Howsam*, the issue was intertwined with the merits); *Lumbermens Mut. Cas. Co.* v. *Broadspire Mgmt. Servs., Inc.*, 623 F.3d 476, 481 (7th Cir. 2010) (notice-of-claim requirement was, as in *Howsam*, a procedural issue within arbitrators' expertise and intertwined with the merits because it involved "the same documents and * * * the same issues"); *International Bhd. of Elec. Workers* v. *Hope Elec. Corp.*, 380 F.3d 1084, 1099 (8th Cir. 2004) (whether grievance preconditions under labor agreement had been satisfied was, as in *John Wiley*, presumptively for the arbitrator to decide); cf. *Kemiron Atl., Inc.* v. *Aguakem Int'l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002) (duty to arbitrate was never triggered because it was undisputed that neither party requested mediation as required by the agreement).

Those decisions' application of settled standards to the particular agreement in each case, and their conclusions about the parties' intent, do not create a conflict warranting this Court's review. More basically, none of those decisions concerned a litigation requirement,

much less such a requirement in a treaty between sovereign States.

2. Petitioner also contends (Pet. 31-34) that the decision below conflicts with *Republic of Ecuador* v. *Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011) (*Ecuador*), which held that the incorporation of the UNCITRAL Rules into the arbitration clause of the United States-Ecuador BIT, see Bilateral Investment Treaty, United States-Ecuador, Art. VI, Aug. 27, 1993, S. Treaty Doc. 103-15, constituted "'clear and unmistakable evidence' that the parties intended" that waiver and estoppel defenses should "be decided by the arbitral panel in the first instance." 638 F.3d at 394. Petitioner is incorrect.

The court of appeals in this case agreed with the *Ecuador* court that the incorporation of the UNCITRAL Rules into an investment treaty could constitute "'clear[] and unmistakabl[e] evidence' that the parties intended for the arbitrator to decide questions of arbitrability." Pet. App. 14a (internal citations omitted). But the court concluded, based on its analysis of the text and structure of the particular Treaty here, that the Treaty's incorporation of the UNCITRAL Rules was subject to a "temporal limitation," in that the Rules were not "triggered" until "after an investor has first * * * sought recourse, for eighteen months, in a court of the contracting party where the investment was made." *Ibid.* By contrast, no similar pre-arbitration litigation requirement was at issue in *Ecuador*. The *Ecuador* court thus had no occasion to consider whether the United States-Ecuador BIT's incorporation of the UNCITRAL Rules was subject to a similar "temporal limitation," or whether, even if so limited, the incorporation of the Rules nonetheless would constitute clear and unmistakable evidence that the arbitral panel should

determine compliance with that requirement. See *Ecuador*, 638 F.3d at 393-395 (considering Ecuador's argument that party waived or was estopped from arbitration because it had agreed to resolve dispute in another manner); cf. United States-Ecuador BIT Art. VI (containing no litigation requirement).

C. The Court Of Appeals' Decision Is Unlikely To Have Implications Beyond The Unusual Circumstances Of This Case And Does Not Warrant This Court's Review

In light of its case-specific nature, the decision below will likely have few implications for the construction of international investment treaties. Nor would this case be an appropriate vehicle by which to provide general guidance on the interpretation of international or domestic commercial agreements.

1. a. The decision below is unlikely to have any significant impact on the interpretation of international investment treaties generally, and United States treaty practice in particular.

In concluding that a court should decide whether petitioner was required to comply with the Treaty's litigation requirement, the court of appeals relied heavily on the fact that the Treaty itself provided that the dispute be submitted for *judicial* determination, rather than some other form of dispute resolution. See Pet. App. 15a. That aspect of the Treaty is unusual. No modern United States investment treaty contains a similar litigation requirement.[3] And such a requirement also ap-

[3] We are aware of one similar (but not identical) litigation requirement in a United States investment treaty, namely, the now-superseded BIT between the United States and Morocco. See Treaty Concerning the Reciprocal Protection of Investments, United States-Kingdom of Morocco, Art. VI, July 22, 1985, IC-BT 624. That treaty was superseded in the United States-Morocco Free Trade Agree-

pears to be uncommon in international treaty practice more generally, as arbitration treaties and other international investment agreements between States do not often require resort to local courts as a precondition to arbitration. See Vandevelde 439-442 (stating that while negotiation and mediation are common preconditions, only a "few BITs * * * require exhaustion of, or at least some recourse to, local remedies" in court). The relatively infrequent incidence of such provisions is unsurprising, as "one of the principal reasons for creating treaty-based, investor-state arbitration [is] to enable investors to avoid the courts of the countries in which they invest." Jeswald W. Salacuse, *The Law of Investment Treaties* 358 (2010).

The court of appeals' decision is therefore unlikely to have broad implications for the interpretation of international investment treaties generally. Although petitioner observes (Pet. 18) that dispute-resolution preconditions are common in international treaties to which the United States is a party, the preconditions employed in those agreements typically involve cooling-off periods, mediation, or negotiation. See Vandevelde 439-442; cf. Pet. 18 (citing Int'l Bar Ass'n, *IBA Guidelines for Drafting International Arbitration Clauses* 30 (2010), which states that negotiation and mediation preconditions are "common," without mentioning litigation preconditions). The court of appeals did not purport to announce principles that would apply when the States entering into a

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ment, although certain grandfathered investment claims under the BIT may be brought until 2016. United States-Morocco Free Trade Agreement Art. 1.2(3) & (4), June 15, 2004, 44 I.L.M. 544, http://www.ustr.gov/free-trade-agreements/morocco-fta/final-text. To our knowledge, the litigation provision in the BIT has not been the subject of litigation.

treaty have agreed to a precondition that does not expressly require resort to a court in the host State, see Pet. App. 15a, and thus its decision likely will not have implications for the more common types of preconditions to arbitration used in typical investment treaties.[4]

b. The court's decision also has limited implications for the interpretation of modern United States investment agreements. The United States is not a party to the Treaty at issue here, which does not extend to United States investors or address their rights in disputes arising out of their investments in Argentina. And because modern United States investment treaties do not contain comparable litigation requirements, this case offers no occasion to provide guidance on jurisdiction over arbitrability questions that arise in connection with treaties to which the United States is a party.

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[4] Because the decision below rests on a case-specific construction of an unusual provision in a treaty between two other nations, it is unlikely to discourage disputing parties from locating future arbitrations within the United States. But see Pet. 35-36; Pet. Reply Br. 11-12. And in any event, de novo judicial review of certain questions of arbitral jurisdiction is not unprecedented, as many arbitration regimes provide for such review when the resisting party challenges the existence or validity of an agreement to arbitrate. See *Dallah Real Estate & Tourism Holding Co.* v. *Ministry of Religious Affairs, Gov't of Pakistan*, [2010] UKSC 46 ¶ 104 (holding that English courts are "entitled (and indeed bound) to revisit the question of the [arbitral] tribunal's decision on jurisdiction" in post-arbitral proceedings); Gary B. Born, *International Commercial Arbitration* 1139-1140 (2009); George A. Bermann, *The 'Gateway' Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1, 18-19 (2012) (explaining that French courts engage in de novo review of an arbitral tribunal's jurisdictional findings); William W. Park, *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 Am. Rev. Int'l Arb. 133, 134-136 (1997) (describing decision of Swiss high court applying de novo review under similar circumstances).

c. Nor does the decision below warrant review by this Court as a vehicle to articulate principles concerning the interpretation of international investment treaties more generally. Only one of the parties to the particular treaty at issue (Argentina) is a party to this litigation, and Argentina of course agrees with the court of appeals' interpretation of the Treaty. Nor is it clear from the submissions in the lower courts whether Argentina's interpretation of the Treaty reflects the shared intent of both treaty parties. And because the litigation requirement in this Treaty is relatively unusual, review by this Court would not necessarily shed light on the arbitrability of disputes concerning other, more common prerequisites to arbitration.

2. a. Similarly, the decision below will likely not affect the construction of domestic commercial arbitration agreements. The Treaty's litigation provision requires resort to a formal legal process in the courts of one of the Treaty States, thereby permitting that State to provide an avenue for redress within its own sovereign legal structure. Such a provision is unlikely to appear in a domestic commercial arbitration agreement, as neither party to such an agreement has comparable sovereign status or its own court system, and the purpose of a commercial agreement is to resolve disputes without the expense and delay typically associated with litigation in court. See *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010). As discussed above, courts construing domestic commercial arbitration agreements have looked to the nature of the precondition at issue and its relationship to the merits of the dispute between the parties in deciding whether arbitral jurisdiction is presumptively for the arbitrators to decide. See pp. 10, 15, *supra*. The court of appeals' inter-

pretation of the Treaty is therefore unlikely to affect the construction of domestic commercial agreements.

b. Petitioner urges (Pet. 16) this Court to grant review in order to hold that "it is for arbitrators, not courts, to decide whether preconditions to arbitration have been fulfilled or excused," without distinguishing between domestic commercial arbitration agreements and arbitration provisions found in international treaties. But international investment treaties like the Treaty here are distinct from domestic arbitration agreements in several respects. Such a treaty is an agreement between two sovereigns that establishes a legal regime setting forth the protections that each will accord to the other's investors and investments, as well as the terms under which each sovereign Contracting State agrees to submit to an adjudication of disputes with private parties. It is thus structurally different from typical domestic commercial arbitration agreements that govern the circumstances under which the two private parties will arbitrate their disputes with each other. That structure, as well as the sovereign status of the parties and the background of international law and state practice, may influence the nature of conditions precedent to arbitration in individual international investment treaties and the parties' underlying intent in including them.

For example, the United States has taken the position under the North American Free Trade Agreement (NAFTA) that unless a claimant investor complies with the requirements enumerated in Article 1121 ("Conditions Precedent to Submission of a Claim to Arbitration"), no binding agreement to arbitrate arises with the respondent State. See, *e.g.*, *Tembec Inc.* v. *United States*, Objection to Jurisdiction of Respondent United

States of America, at 35-38, UNCITRAL (Feb. 4, 2005); *Methanex Corp.* v. *United States*, Memorial on Jurisdiction and Admissibility of Respondent United States of America, at 70-78, UNCITRAL (Nov. 13, 2000); NAFTA Art. 1121, Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993). The other two State parties to NAFTA, Canada and Mexico, have similarly stated that Article 1121 imposes mandatory prerequisites. See *Mondev Int'l Ltd.* v. *United States*, Case No. ARB(AF)/99/2, Rejoinder on Competence and Liability of Respondent United States of America, at 61-62, ICSID (Oct. 1, 2001) (citing Canada's and Mexico's position).

In addition, international agreements involving sovereign parties implicate "concerns of international comity" that domestic agreements do not. See *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); cf., *e.g.*, George A. Bermann et al., *Restating the U.S. Law of International Commercial Arbitration*, 113 Penn State L. Rev. 1333, 1337 (2009) (stating that investment treaty arbitrations involve issues that "are distinct from their conventional international commercial arbitration counterparts"); Campbell McLachlan et al., *International Investment Arbitration: Substantive Principles* 65 (2007) (identifying "debate about the extent to which an analogy can be maintained between BIT arbitrations and commercial arbitrations"). Consequently, this case would not be a suitable vehicle in which to establish general rules concerning arbitrability questions that would apply to domestic agreements, as distinct from international investment treaties and the particular Treaty here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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