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

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

It comes as no surprise that the Solicitor General recommends that this Court deny certiorari. That is now the near-reflexive conclusion to almost every invitation brief. When the Court looks below the surface of that conclusion to the arguments advanced in support, however, it will find that its intervention is plainly warranted.

In particular, the United States rejects Argentina's attempt to rewrite the ruling below as holding that the parties never agreed to arbitrate. *See* BIO 1. The Solicitor General recognizes that petitioner properly "submitted the dispute to international arbitration under Article 8 of the Treaty." U.S. Br. 5. With this conclusion, the United States implicitly concedes that the issue presented is as framed by petitioner: whether the D.C. Circuit's decision allocating to itself jurisdictional competence over whether preconditions to arbitration have been satisfied can be squared with this Court's precedents and the decisions of four other circuits.

In nonetheless asserting that the D.C. Circuit's decision creates no conflict and raises no recurring question, the Solicitor General reasons in two steps. *First*, he claims that under "settled principles," U.S. Br. 9, a court asks anew in every case "whether, in entering into the particular" arbitration agreement, the parties intended a court or instead an arbitrator to decide whether a precondition to arbitration has been satisfied, *id*. 11. *Second*, he asserts that the D.C. Circuit's decision turned on two particular facts: that the precondition required litigation and appeared in a treaty. *Id.* 17-19.

The Solicitor General's legal error lies in the first step, which without explanation (or even acknowledgment) reverses the United States' prior position on this precise issue. *See infra* Part I. In fact, until the ruling below, it was settled that arbitrators determine compliance with preconditions to arbitration absent the parties' contrary agreement. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (applying *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555-59 (1964)). Four circuits faithfully adhere to that principle. *See infra* Part II; Pet. 28-31. In square conflict with those decisions, the D.C. Circuit adopted the opposite rule: that courts determine compliance with preconditions to arbitration, absent clear and unmistakable evidence to the contrary.

The legal error concerning the presumptive responsibility for determining compliance with preconditions to arbitration proves that it makes no difference to the certiorari calculus that this case involves a litigation precondition contained in a treaty. The conflict arises from the D.C. Circuit's antecedent legal standard, which is not limited to cases involving international arbitration, treaties, or litigation preconditions. And that conflict was indisputably outcome determinative here. Neither the D.C. Circuit, nor Argentina, nor the United States even attempts to suggest that the fact that this case involves a litigation precondition in a treaty comes *anywhere close* to establishing an agreement by the parties to assign the decisional role to U.S. courts rather than arbitrators. As the many expert *amici* have explained, the importance of the Question Presented is beyond dispute. *See infra* Part III.

Certiorari accordingly should be granted.

I. The Solicitor General Ignores This Court's Repeated Holding That Absent The Parties' Agreement Arbitrators Rather Than Courts Determine Compliance With Arbitral Preconditions.

This Court has twice addressed the allocation of authority to determine compliance with preconditions to arbitration. In *Howsam*, the Court held that "in the absence of an agreement to the contrary," "issues of procedural arbitrability," such as whether "conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." 537 U.S. at 85. *Howsam* relied on the holding of *John Wiley & Sons*, 376 U.S. at 555-59, that an arbitrator, not a court, decides whether the pre-arbitral stages in the arbitration provisions of a labor contract have been completed. *See Howsam*, 537 U.S. at 84-85. And *Howsam* specifically rejected the court of appeals' contrary view that under *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995), compliance with preconditions is a question of substantive "arbitrability" to be decided by a court. *See Howsam*, 537 U.S. at 82-83.

There accordingly is no merit to the attempt of the D.C. Circuit and the Solicitor General to recharacterize this Court's decisions in *Howsam* and *John Wiley & Sons* as merely assessing the particular facts of those cases. Those decisions hold that unless the parties agree otherwise, arbitrators rather than courts determine compliance with arbitral preconditions.

Four circuits faithfully adhere to this Court's precedents. *See* Pet. 28-34. Even Argentina's brief in

opposition frankly recognizes the "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. All four circuits recognize that *Howsam* and *John Wiley* adopt a categorical rule, not a case-specific inquiry. *See Dialysis Access Center, LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 383 (1st Cir. 2011) (there is a "presumption that the arbitrator should decide whether the parties complied with such a procedural pre-requisite to arbitration"); *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393 (6th Cir. 2008) (any "condition precedent to an obligation to arbitrate" is "presumptively allocated to the arbitrator"); *Lumbermens Mut. Cas. Co. v. Broadspire Mgm't Servs., Inc.*, 623 F.3d 476, 481 (7th Cir. 2010) ("[A] procedural question about a condition precedent to arbitration . . . is for the arbitrators to address"); *Int'l Brotherhood of Elec. Workers, Local 545 v. Hope Electrical Corp.*, 380 F.3d 1084, 1099 (8th Cir. 2004) ("[A]rbitrators and not judges are empowered to decide such issues").

It must be understood that, in attempting to deny the holdings of this Court and those four circuits, the Solicitor General is not writing objectively. Instead, the United States has a parochial interest in preserving the ruling below. As the United States acknowledges, it is often in the same position as respondent Argentina: a treaty signatory subject to foreign investors' claims, with a corresponding interest in challenging arbitral rulings finding that the investors have satisfied preconditions to arbitration. U.S. Br. 21-22 (explaining that the Question Presented arises regularly in the context of bilateral and multilateral

investment treaties to which the United States is a signatory, including particularly the North American Free Trade Agreement). Indeed, the "model" United States investment treaty requires an investor to, *inter alia*, "wait six months after the events giving rise to the claim before initiating arbitration." *Id.* 2. If the Solicitor General can persuade this Court to deny review, the United States will gain, in the D.C. Circuit, an additional ground for challenging adverse arbitral rulings.

Further, and perhaps for that reason, this Solicitor General has elected as a policy matter to reverse the vastly more pro-arbitration position previously taken by that office. In *Howsam*, the government took the exact opposite position that the threshold matters of arbitrability decided by the court must be "construe[d] narrowly," such that disputes "concern arbitrability *only* when they have involved one of two fundamental questions: whether the parties are bound by a valid arbitration agreement, and whether the subject matter of their underlying dispute falls within that agreement." S.G. Br., *Howsam* at 13-14 (emphasis added). In that case, the then-Solicitor General urged this Court to adopt a categorical rule that "'the question whether 'procedural' conditions to arbitration have been met' is presumptively for the arbitrator to decide." *Id.* at 16 (quoting *John Wiley*, 376 U.S. at 556-58). The United States recognized the possibility that the parties could affirmatively agree to assign the issue to the courts, but stated unequivocally that "any doubts about the parties' intent would be resolved in favor of the arbitrator's deciding." *Id.* at 17 n.5. This Court adopted exactly that rule in *Howsam*, 537 U.S. at 84-85, yet the brief in this case

announcing the new position of the Solicitor General does not even *acknowledge* that prior position or this Court's clear ruling in *Howsam* (and *John Wiley* before it) adopting a very strong presumption that arbitrators determine compliance with arbitral preconditions.

II. There Is No Merit To The United States' Characterization Of The D.C. Circuit's Ruling.

According to the Solicitor General, the D.C. Circuit did not adopt any generalizable legal rule. Instead, it merely considered the facts of this case to determine whether the treaty signatories intended arbitrators or instead courts to determine compliance with preconditions to arbitration. U.S. Br. 10-12. Even if that characterization of the ruling below were correct, certiorari would be warranted: this Court and four circuits reject such a free-flowing inquiry. They hold that the question is decided by arbitrators unless the parties agree to the contrary; the court of appeals found no such agreement. *See supra* Part I.

But in any event, the Solicitor General is wrong. The D.C. Circuit adopted the *opposite* presumption. The ruling below holds that courts determine compliance with a precondition to arbitration unless there is "clear and unmistakable" evidence to the contrary. *E.g.*, Pet. App. 10a; *id.* 11a-12a, 15a. In support of that conclusion, the court deemed compliance with the precondition to be a question of substantive arbitrability under this Court's decision in *First Options*. *See* Pet. App. 11a-12a. That is *precisely* the reasoning that this Court rejected in *Howsam*. *See supra* at 3.

Having deemed compliance with the precondition to be a question of substantive arbitrability, the D.C. Circuit applied its rule that the presumption that a court must decide the question can only be overcome by "clear and unmistakable" evidence. That presumption determined the court's ultimate holding in Argentina's favor. The court held:

> *Because* [1] the Treaty provides that a precondition to arbitration of an investor's claim is an initial resort to a contracting party's court, and [2] *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.

Id. 15a (emphasis added). The court held that there cannot be "clear and unmistakable evidence" that the parties intended arbitrators to resolve compliance with the precondition, Pet. App. 15a, because "'[t]he Treaty does not directly answer' that question," U.S. Br. 7 (quoting Pet. App. 14a).

Other circuits would reach the opposite result. In the wake of *Howsam*, we have been unable to identify *any* other case *ever* finding that a contract contains an agreement to assign to the courts the responsibility to determine compliance with a precondition to arbitration. And, as noted, neither Argentina nor the Solicitor General seriously suggests that any feature of this case would persuade another circuit that this arbitration agreement contemplates that the courts would determine compliance with the arbitral precondition. The petition explained, and neither the United States nor Argentina disputes, that it makes no sense

whatsoever to say that treaty signatories would have intended a *domestic United States court* to construe the precondition in a treaty between Argentina and the United Kingdom, rather than the panel of expert international arbitrators whose appointment the treaty specifically contemplates. Cert. Reply 7; USCIB Br. 9-10. Indeed, the United States recognizes that the essential point of the arbitration provision is to assure investors that they will not be subject to the authority of the local judiciary. *See* U.S. Br. 18.

III. The Importance Of The Question Presented And Of This Case In Particular Are Undeniable.

Experts and organizations that deal daily with commercial arbitration have pleaded with the Court to recognize the broad significance of the ruling below and to intervene. *See generally* AAA Br.; USCIB Br. The United States makes much of the fact that this case arises from an arbitration under a treaty. But that argument ignores two fundamental points. *First*, the conflict created by the ruling below is antecedent to any examination of the facts: it arises from the D.C. Circuit's square holding that courts decide compliance with preconditions to arbitration absent clear and unmistakable evidence to the contrary.

Second, the Solicitor General ignores that the Question Presented arises regularly in all manner of commercial arbitration challenges, both domestic and international. Although there are some differences between treaty arbitration and domestic commercial arbitration, none has *any* relevance to this case, which Argentina correctly framed as a challenge to

the award under the Federal Arbitration Act, governed by this Court's decisions in *First Options*, *John Wiley*, and *Howsam*. In turn, as the Solicitor General admits, "the court of appeals applied principles articulated by this Court in cases involving arbitrability under private (and mostly domestic) agreements." U.S. Br. 13; *see* Pet. App. 10a-12a. Strikingly, after months spent reviewing the case, the United States cannot identify *any* relevant distinction. The reason is obvious: there is no relevant distinction to be drawn; there is no other potentially applicable body of law. Once the decision is properly viewed as establishing the principle that courts determine compliance with preconditions to arbitration, its grave implications are uncontested. *See, e.g.*, Professors & Practitioners Br. 1, 10-14; USCIB Br. 17-21.

The Solicitor General's hopeful assertion that the ruling below may "have few implications for the construction of international investment treaties" instead rests on its false premise that the decision is "case-specific" in nature. U.S. Br. 17. But as discussed, that is not correct. And the United States acknowledges that "dispute-resolution preconditions are common in international treaties," U.S. Br. 17-18, and that the proper treatment of those preconditions is an issue of recurring significance not only to international commerce but to the government's own litigation efforts under NAFTA. *Id.* 21-22. Further, there are "[n]early 3,000" similar treaties, which "often place conditions on an investor's resort to arbitration." *Id.* 1, 2.

When awards are entered in such cases, the parties can and often do litigate in U.S. courts. The

arbitrations are very often seated in this country, and generally "an aggrieved party may seek to set aside an award in a competent court of the jurisdiction in which the arbitration was seated." U.S. Br. 3. This case is a perfect example. In addition, no matter where an arbitration is seated, disputes over the award's validity can enter this country's courts through a petition to enforce the award. *See* 9 U.S.C. § 207.

The Solicitor General's alternative argument is that this case involves a "litigation" precondition. To be sure, every case must involve *some* type of precondition, none of which in isolation may be common enough to give rise to a distinct circuit conflict. But as discussed, that makes no difference to the certiorari determination. The court of appeals adopted a generalized rule, not one limited to those cases in which litigation is a precondition to arbitration. Conversely, this Court's precedents and the decisions of four other circuits adopt the opposite general rule – not one that exempts "litigation" preconditions. Of note, despite the Solicitor General's practiced expertise at denying circuit conflicts, the brief of the United States is unable to identify one word in any decision of any those four circuits that supports its view that Argentina might prevail under their settled rule.

As the *amici* explain, the D.C. Circuit's ruling undermines the finality of arbitration by inviting parties to bring judicial challenges to numerous and varied procedural rulings of arbitrators, arguing that in the particular case each decision was of a type that the parties in enacting that particular arbitration clause would have intended it to be resolved by a

court instead. Those challenges may be brought both before the arbitration commences and by a disappointed losing party afterwards. As the then-Solicitor General wrote in the government's brief in *Howsam*, those "judicial proceedings not only delay resolution of the underlying dispute but impose increased costs on the parties, a result that is contrary to the very reasons that the parties agreed to arbitration in the first place – to increase the speed and decrease the cost of resolving their dispute." S.G. Br., *Howsam* 18 (citing *John Wiley*, 376 U.S. at 558). The D.C. Circuit's approach also substantively reverses the assignment of responsibility between arbitrators and the judiciary, vastly expanding the matters that are presumptively for the courts to resolve. As a former Attorney-Adviser for the Department of State has explained:

> In urging the Supreme Court to deny the Petition, the SG disregards the long-established distinction between "admissibility" and "jurisdiction" in international law, the long-established distinction between procedural and substantive [arbitrability] in U.S. jurisprudence, and the threat that the D.C. Circuit's decision poses both to treaty and commercial arbitration in the United States.

Laurence Shore et al., *Commentary on the US Solicitor General's Office (CVSG) brief in* BG Group PLC v. Republic of Argentina *(May 2013)*, Transnational Dispute Management, May 16, 2013, at 1, *available at* http://hsf-arbitrationnotes.com/2013/05/17/cert-petition-in-the-bg-v-argentina-case-no-support-from-the-us-solicitor-general.

Those disinterested authorities are far more experienced than the Solicitor General on this point, as the Question Presented does not involve the operation of any governmental program. If this Court denies review in the wake of the resistance of the court of appeals and the extensive *amicus* submissions highlighting this as the most carefully watched arbitration case in the federal courts, it will sow considerable confusion regarding the meaning of a previously well-settled body of law. That result cannot be reconciled with "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).

CONCLUSION

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

Respectfully submitted,

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