No. 12-138

IN THE

Supreme Court of the United States

BG GROUP PLC,

Petitioner,

v.

REPUBLIC OF ARGENTINA,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In disputes involving a multi-staged dispute resolution process, does a court or instead the arbitrator determine whether a precondition to arbitration has been satisfied?

PARTIES TO THE PROCEEDING BELOW

The case caption contains the names of all parties who were parties in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, petitioner states that it has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

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BRIEF FOR PETITIONER

Petitioner BG Group Plc (BG) respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals vacating the final arbitral award in petitioner's favor (Pet. App. 1a) is reported at 665 F.3d 1363. The opinions of the district court denying respondent's petition to vacate or modify the award (Pet. App. 58a) and granting petitioner's motion to confirm the award (Pet. App. 21a) are reported at 715 F. Supp. 2d 108 and 764 F. Supp. 2d 21, respectively. The award (Pet. App. 92a) is not published.

JURISDICTION

The court of appeals issued its opinion on January 17, 2012. A timely petition for rehearing or rehearing en banc was denied on March 15, 2012. Pet. App. 307a. The Chief Justice extended the time to file a petition for certiorari to and including July 27, 2012. App. No. 11A1134. Petitioner timely filed the petition, which this Court granted on June 10, 2013. 133 S. Ct. 2795 (2013). This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND TREATY PROVISIONS

Section 10(a) of the Federal Arbitration Act, 9 U.S.C. § 10(a), provides:

> In any of the following cases the United States court in and for the district wherein the award

was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Article 8 of the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S. 33, provides:

Settlement of Disputes
Between an Investor and the Host State

(1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled

shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made.

(2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

(a) if one of the Parties so requests, in any of the following circumstances:

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;

(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

(3) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and

Nationals of other States, opened for signature at Washington DC on 18 March 1965[1] (provided that both Contracting Parties are Parties to the said Convention) and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the Parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The Parties to the dispute may agree in writing to modify these Rules.

(4) The arbitral tribunal shall decide the dispute 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. The arbitration decision shall be final and binding on both Parties.

[1] Treaty Series No. 25 (1967), Cmnd. 3255.

(5) The provisions of this Article shall not apply where an investor of one Contracting Party is a natural person who has been ordinarily resident in the territory of the other Contracting Party for a period of more than two years before the original investment was made and the original investment was not admitted into that territory from abroad. But, if a dispute should arise between such an investor and the other Contracting Party, the Contracting Parties agree to consult together as soon as possible so that they can reach a mutually acceptable solution.

STATEMENT

I. Factual Background

A. The U.K.–Argentina Bilateral Investment Treaty

This case arises from cross-motions to vacate (by respondent Republic of Argentina) and enforce (by petitioner BG Group Plc) an arbitral award rendered in the United States. The award resolved a dispute under the bilateral investment treaty (referred to as a "BIT") between Argentina and the United Kingdom. *See* Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S.

33 (the Treaty), *reproduced infra* App. 1a-15a.[1]

The purpose of the Treaty is to encourage cross-border investment by protecting the investments of U.K. nationals in Argentina and vice-versa. To this end, the Treaty provides that "[i]nvestments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment" and that "[n]either Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party." Treaty art. 2(2), App. 4a. The Treaty also provides for National Treatment and Most-Favored-Nation Treatment, *i.e.*, Argentina may not subject U.K. investments to treatment less favorable than domestic or other foreign investments, and the United Kingdom must treat Argentine investments the same way. *Id.* art. 3, App. 4a-5a. Other clauses provide investors with a guarantee of prompt and adequate compensation in the event of expropriation, and the ability to repatriate investments and returns. *Id.* arts. 5-6, App. 5a-7a.

Investors are less likely to invest under the Treaty without a reliable and neutral means of enforcing

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[1] Argentina has entered into 58 BITs, while the United Kingdom has entered into 105. *See* BITs Concluded by Argentina, U.N. Conf. on Trade & Dev. (June 1, 2013), http://unctad.org/Sections/dite_pcbb/docs/bits_argentina.pdf; BITs Concluded by the United Kingdom, U.N. Conf. on Trade & Dev. (June 1, 2013), http://unctad.org/Sections/dite_pcbb/docs/bits_uk.pdf. Around the globe, there are presently 2857 BITs in force. *See* U.N. Conference on Trade and Dev., *World Investment Report*, at xix (2013).

their rights. Arbitration is therefore a critical feature of international commerce because it provides foreign parties with an impartial forum in which to resolve their disputes. Arbitration constitutes "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974).

In order to encourage fulfillment of its objective "to create favourable conditions for greater investment by investors of one State in the territory of the other State," Treaty recitals, App. 1a, the Treaty permits investors to submit disputes with contracting states to arbitration, avoiding the potential bias of local courts. Under Article 8, if a dispute regarding an investment arises between an investor and a contracting state, either party may submit it to "the competent tribunal" (*i.e.*, the courts) of the contracting state. *Id.* art. 8(1), App. 8a-9a. But the judiciary has no power to render a final decision on the dispute. Instead, if either party remains dissatisfied after eighteen months in litigation – whether or not the local court has rendered a decision – the dispute "shall be submitted to international arbitration . . . ." *Id.* art. 8(2), App. 9a.

The Treaty provides that the arbitration presumptively will be conducted under the rules of the United Nations Commission on International Trade Law (UNCITRAL). *Id.* art. 8(3), App. 9a-10a. Article 21 of the UNCITRAL Rules grants the arbitral tribunal the power to "rule on objections that it has no jurisdiction." Rep. of the U.N. Comm. on Int'l Trade Law, 9th Sess., Apr. 12-May 7, 1976, U.N. Doc. A/31/17, at 24, art. 21(1); GAOR, 31st Sess., Supp. No. 17 (1976).

The Treaty provides that it shall be interpreted in accordance with its terms, any relevant domestic law of the contracting state, and "the applicable principles of international law." Treaty art. 8(4), App. 10a. The primary international law principles governing treaty interpretation are codified in the Vienna Convention on the Law of Treaties, *concluded on* May 23, 1969, 1155 U.N.T.S. 331 (Vienna Convention), which both the United Kingdom and Argentina have ratified.[2]

In resolving the dispute, the arbitral tribunal is not directed to defer to, let alone give effect to, any judgment of the local court. Nor may the local court review the arbitrators' decision. Instead, the "arbitration decision shall be final and binding on both Parties." Treaty art. 8(4), App. 10a.

B. BG's Investment In Argentina

Petitioner BG is a U.K. company that made a major investment in Argentina's natural gas sector.[3] In the early 1990s, Argentina privatized its state gas monopoly, Gas del Estado. Pet. App. 101a-02a. The company's assets were distributed among multiple new private entities. These included MetroGAS, which received an exclusive, thirty-five-year license to distribute natural gas in Buenos Aires and certain adjoining areas. *Id.* 103a.

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[2] *See* Status of the Vienna Convention on the Law of Treaties, U.N. Treaty Collection, http://treaties.un.org/pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en (last visited Aug. 23, 2013).

[3] The factual recitation is drawn from the arbitral tribunal's findings of fact. *See generally* Pet. App. 101a-31a.

Argentina then sought to sell to foreign investors a controlling interest in MetroGAS and in the other private sector successors to Gas del Estado. *Id.* 102a-03a. To encourage that investment, as well as the investment needed to update the country's aging infrastructure, Argentina pegged its currency to the U.S. dollar at a one-to-one exchange rate and established a regulatory framework to convince foreign investors that the gas sector was stable. The framework included: a law requiring gas tariffs (*i.e.*, revenues for gas distribution companies) to be calculated so as to provide a reasonable rate of return commensurate with investments of similar risk, and in line with international market indicators; a decree stating that gas tariffs would be calculated in U.S. dollars, thereby protecting tariffs against a devaluation of the local currency; guarantees against arbitrary modification of tariffs or license terms; and a stabilization mechanism permitting gas providers to obtain increased tariffs if economic conditions changed. *Id.* 105a-10a. These protections were incorporated into MetroGAS's license. *Id.* 110a-17a.

Relying on this regulatory framework, BG participated in a consortium that purchased a majority interest in MetroGAS. *Id.* 104a. BG owned 45.11% of the Argentine company when it commenced the arbitration. *Id.* 105a.

C. The Argentine Crisis

Starting in 1998, and culminating in 2001, Argentina suffered an economic crisis. It responded by enacting a series of measures that eviscerated the regulatory framework on which the investments of BG (and others) rested. *Id.* 126a-29a. Among other things, Argentina converted petitioner's U.S. dollar-

based gas tariffs into Argentine peso-based tariffs at a rate of one peso per dollar. At the time, the market exchange rate ranged between three and four pesos to the dollar. *Id.* 127a.

These changes were devastating to BG's investment in MetroGAS. First, the value of MetroGAS's revenues plummeted because the tariffs it was earning for distributing gas became worth only a fraction of their former value. Meanwhile, MetroGAS had borrowed money on international capital markets to finance its investments and operations in Argentina, and those debts (denominated in currencies more stable than the Argentine peso) retained their full value. Thus, almost overnight, MetroGAS's debts swamped its corresponding income, effectively destroying BG's investment. In one year, the rate of return on MetroGAS's operations fell from eight percent to negative one hundred and forty-two percent. *Id.* 129a-30a.

As discussed, Argentina had entered into the Treaty and other BITs – all of which guaranteed investors protection from unfair and inequitable measures. But to prevent aggrieved parties from securing relief under those BITs, Argentina adopted decrees sharply curtailing investors' ability to vindicate their rights in local courts (which in turn is a precondition to arbitration under the Treaty and many other Argentine BITs). *Id.* 242a. First, the President issued a decree staying all suits and injunctions alleging harm as a result of the measures described above. *Id.* 166a-67a. Second, Argentina established a renegotiation process designed to alleviate the economic effects of the measures, but barred any

licensee who litigated against Argentina from participating. *Id.* 169a-70a.

D. BG's Dispute Under The Treaty

Numerous investors brought arbitration claims against Argentina under the various Argentine BITs. Facing severe penalties if it resorted to the Argentine courts, BG filed its notice of arbitration under the Treaty on April 25, 2003. *Id.* 94a.

BG sought compensation for the effects of the Argentine measures that destroyed its investment and restricted it from both pursuing judicial relief and benefiting from the renegotiation process. BG alleged that by dismantling the regulatory framework that induced its investment – including by curtailing access to judicial redress – Argentina: (1) breached Article 5 of the Treaty by expropriating the value of BG's shareholding in its consortium and in MetroGAS, and by impairing BG's rights under the MetroGAS license; and (2) breached Article 2(2) of the Treaty by failing to provide BG with fair and equitable treatment, protection, and security, by taking unreasonable and discriminatory measures, by failing to observe obligations entered into with regard to BG's investments, and for the acts of its judiciary. *Id.* 132a.

Argentina was entitled to respond by submitting the dispute to its own courts, *see* Treaty art. 8(1), App. 8a-9a, but it chose not to do so. Pet. App. 163a. Because the parties did not agree on a different arbitral system, the dispute was submitted to UNCITRAL arbitration. Treaty art. 8(3), App. 9a-10a; *see also* Pet. App. 97a.

The arbitration proceeded under the UNCITRAL Rules. Under Article 16(1), which allows the parties to

set the place of arbitration, the parties agreed to site the arbitration in Washington, DC. Under Article 7(1), which provides that each party shall select one member of a three-member panel, who will in turn appoint the third, the parties appointed arbitrators. Pet. App. 97a.

The arbitrators were eminent in the fields of public international law and international arbitral procedure and jurisdiction. They were: Professor Albert Jan van den Berg, Professor of Law (Arbitration Chair) at Erasmus University, Rotterdam (appointed by petitioner); Professor Alejandro M. Garro, an Argentine national and Senior Research Scholar, Parker School of Foreign and Comparative Law, Columbia University (appointed by respondent); and, as the jointly selected presiding arbitrator, Mr. Guillermo Aguilar Alvarez, former Principal Legal Counsel for Mexico in the negotiation of the North American Free Trade Agreement (NAFTA) and current lecturer in international investment law at Yale Law School.

Argentina participated actively in the arbitration. Particularly relevant here, Argentina expressly invoked and relied upon Article 21 of the UNCITRAL Rules – which gives the tribunal the power to determine its own jurisdiction – in requesting that the arbitrators enter an order dismissing BG's claim for lack of jurisdiction. Argentina argued, *inter alia*, that under the terms of the Treaty, BG could initiate arbitration only after eighteen months of litigation in an Argentine court. *Id.* 162a-63a.

After more than four years of proceedings, multiple written submissions from each side, and an eight-day hearing involving fourteen witnesses, *id.*

99a-101a, the panel issued a 139-page award finding for BG on both jurisdiction and the merits, *id.* 304a-06a. The award was unanimous.

The tribunal analyzed Argentina's jurisdictional objection at length, considering in detail the applicable Treaty language, the controlling principles of international law, and the measures Argentina had taken to impair access to judicial redress. *Id.* 161a-71a. The tribunal acknowledged that parties ordinarily would be required to litigate for eighteen months before resorting to arbitration, but determined:

> As a matter of treaty interpretation, however, Article 8(2)(a)(i) cannot be construed as an absolute impediment to arbitration. Where recourse to the domestic judiciary is unilaterally prevented or hindered by the host State, any such interpretation would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, allowing the state to unilaterally elude arbitration, which has been the engine of the transition from a politicized system of diplomatic protection to one of direct investor-State adjudication.

Id. 165a-66a.

The tribunal then considered the measures that Argentina had taken to impede investors such as BG from obtaining redress, and concluded that the Executive Branch of the Argentine government had "directly interfer[ed] with the normal operation of its courts," including by "excluding litigious licensees from the renegotiation process." *Id.* 170a. The tribunal concluded that:

> a serious problem would loom if admissibility of Claimant's claims were denied thus allowing Respondent at the same time to:
>
> a) restrict the effectiveness of domestic judicial remedies as a means to achieve the full implementation of the Emergency Law and its regulations;
>
> b) insist that the Claimant go to domestic courts to challenge the very same measures; and
>
> c) exclude from the renegotiation process any licensee that does bring its grievance to local courts.

Id. 171a. The tribunal thus found BG's claims to be "admissible" under the Treaty. *Id.*[4]

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[4] Having determined that Article 8 did not require BG to comply with the litigation precondition under these extreme circumstances, the tribunal found it unnecessary to address BG's alternative arguments in favor of the tribunal's jurisdiction. For example, it did not decide whether, under the Treaty's most-favored-nation provision, BG was exempt from pursuing litigation. Pet. App. 171a. BG had argued that the most-favored-nation clause required Argentina to afford BG the same treatment as Argentina granted U.S. investors under the U.S.-Argentina BIT. *Id.* 163a; *see* Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. VII(3), Nov. 14, 1991, S. Treaty Doc. No. 103-2 (1993) (authorizing an investor to "consent in writing to the submission of the dispute for binding arbitration" after attempted consultation and negotiation, without litigation). The majority of tribunals deciding the issue have held that the most-favored-nation clause in the Treaty (and other Argentine BITs) renders the litigation precondition inoperative. *See, e.g.*, Nat'l Grid Plc v.

On the merits, the tribunal found for BG on its fair and equitable treatment and certain other claims, but rejected the expropriation claim. It held that Argentina's measures "entirely altered the legal and business environment" and had "reversed commitments towards BG," violating Article 2(2) of the Treaty, which guarantees fair and equitable treatment and non-discrimination against foreign investors. *Id.* 241a-42a, 305a. The tribunal awarded BG $185,285,485.85 – the difference between the fair value of its investment in MetroGAS before and after the measures – plus interest, costs, and fees. *Id.* 305a-06a.

II. Principles Governing The Confirmation And Vacatur Of International Arbitration Awards Rendered In The United States

There are two major components to the international legal regime governing arbitration. The primary treaty governing the recognition and enforcement of international arbitral awards is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention), June 10, 1958, 21 U.S.T. 2517.[5] By

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Argentine Republic, UNCITRAL, Decision on Jurisdiction, ¶¶ 53-94 (June 20, 2006), *available at* http://italaw.com/links.htm.

[5] The Convention presently has over one hundred and forty member states and became effective in the United States on December 29, 1970. *See Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Aug. 21, 2013).

contrast, efforts to vacate arbitral awards are governed by the domestic law of the nation in which the award was entered. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir. 2004). That is, by agreeing on an arbitral seat, the parties agree that any judicial challenge to the validity of the award will be governed by the law of that jurisdiction.

Congress implemented the New York Convention in Chapter 2 of the Federal Arbitration Act (FAA). 9 U.S.C. §§ 201-08. The statute provides for the confirmation of arbitral awards governed by the Convention. *See id.* § 202.[6]

"The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk*, 417 U.S. at 520 n.15. The Convention thus embodies the international community's commitment to arbitration, and it calls on "national courts to subordinate domestic notions of

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[6] In an action to enforce an award under the Convention in the United States, "[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207. These defenses, enumerated in Article V of the Convention, are narrow and include that the arbitrators decided an issue not submitted to them, New York Convention art. V(1)(c), and that confirmation of the award would be contrary to the public policy of the confirming state, *id.* art. V(2)(b).

arbitrability to the international policy favoring commercial arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 (1985). "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate" efforts to facilitate international commerce, "but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantage." *Scherk*, 417 U.S. at 516-17.

As discussed, the New York Convention addresses only the enforcement of awards; it does not provide any basis for vacating an award. An unsuccessful party to an arbitration that was conducted in the United States and is subject to the Convention may petition a U.S. court to vacate the award on one of the grounds specified in Chapter 1 of the FAA. *See Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 22-23 (2d Cir. 1997).

The FAA establishes an "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce." *Mitsubishi Motors*, 473 U.S. at 631. Congress permitted courts to overturn arbitral awards only in the limited circumstances specified in Section 10 of the FAA. As relevant here, a district court may vacate an award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

Under Section 10, judicial review of any decision within the arbitrators' competence is highly deferential and weighted in favor of the enforcement of arbitral awards. Courts must resolve "any doubts

concerning the scope of arbitral issues . . . in favor of arbitration," *Mitsubishi Motors*, 473 U.S. at 626 (citation omitted), and vacate awards only in cases of "egregious departures from the parties' agreed-upon arbitration" or "extreme arbitral conduct," *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008); *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) ("[R]eview under § 10 [of the FAA] focuses on misconduct rather than mistake.").

This Court has recognized a narrow exception to that general rule: deference to the arbitrators is not necessarily warranted when a challenge to the arbitrators' jurisdiction poses a substantive "question of arbitrability" concerning "the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter . . . ." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). The gateway matters in this category include: (1) whether an arbitration agreement exists at all; and (2) whether an arbitration clause applies to a particular subject matter. *See id.* at 84; *see also Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2856-57 (2010). If the challenge raises such questions of substantive arbitrability, courts are directed to resolve the question "independently" unless they find clear and unmistakable evidence of the parties' intent to assign the issue to the arbitrators. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). In every other circumstance – including when the challenge concerns "procedural arbitrability, *i.e.*, whether . . . conditions precedent to an obligation to arbitrate have been met" – the matter is presumptively "for the arbitrators to decide," and subject to the ordinary

deferential standard of review under Section 10 of the FAA. *Howsam*, 537 U.S. at 85 (citation omitted).

III. Proceedings Below

A. Proceedings In The District Court

Respondent filed a petition in the U.S. District Court for the District of Columbia seeking to vacate the award (the Vacatur Petition). BG cross-moved to confirm the award under the FAA and the New York Convention.[7]

Argentina set forth five challenges to the award under the FAA, only one of which is relevant here: that by allowing the case to proceed to arbitration without first requiring eighteen months of litigation, "[t]he Arbitrators exceeded their authority by disregarding terms of [sic] parties' [arbitration] agreement." Vacatur Petition at 9 ¶ 41, No. 08-cv-485-RBW (D.D.C. Mar. 21, 2008), ECF No. 1. Argentina argued that by not requiring compliance with the litigation precondition, "the Tribunal has construed the disputed agreement in a completely irrational way." *Id.* at 11 ¶ 49. Argentina therefore requested

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[7] Argentina's Vacatur Petition identified the basis of the district court's subject matter jurisdiction as Sections 10(a) and 11 of the FAA. *See* Vacatur Petition at 2 ¶ 5, No. 08-cv-485-RBW (D.D.C. Mar. 21, 2008), ECF No. 1. However, the FAA does not confer subject matter jurisdiction over controversies touching arbitration. *Hall Street Assocs.*, 552 U.S. at 581-82. The district court correctly concluded that it instead had jurisdiction under 9 U.S.C. § 203, which confers jurisdiction over proceedings involving awards falling under the New York Convention. Pet. App. 68a-76a.

that the award be vacated under Section 10(a)(4) of the FAA, *inter alia*.

In pressing that argument, Argentina recognized that the parties had entered into an "agreement to arbitrate in the present case." Rep. to Mem. of P. & A. at 5, No. 08-cv-485-RBW (D.D.C. Feb. 20, 2009), ECF No. 40. Argentina further conceded that "the Arbitral Tribunal has the principal power to rule upon its jurisdiction." Tr. Hr'g at 4, No. 08-cv-485-RBW (D.D.C. Sept. 28, 2010), ECF No. 55; *see also* Rep. to Mem. of P. & A, *supra*, at 10 ("It is a well known principle that arbitral tribunals have competence to decide their own competence."). Argentina nonetheless asked the district court to "second guess" the tribunal's "decision as to its authority" because "the terms of the consent to arbitration by Argentina were not respected." Tr. Hr'g, *supra*, at 4.

The district court confirmed the award. The court recognized that in light of Argentina's concession that the arbitrators have primary authority to determine their jurisdiction, "any extensive judicial review of the panel's interpretation of the Investment Treaty would be contrary to the Supreme Court's ruling in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)." Pet. App. 42a-43a. The tribunal's ruling could lawfully be overturned only if the tribunal "'strayed from interpretation and application of the agreement and effectively dispensed [its] own brand of industrial justice.'" *Id.* 78a (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 (2010) (alterations omitted)).

Applying that standard, the court held that the tribunal was "authorized, if not compelled" by the Treaty to do exactly what it had done: interpret the

Treaty in accordance with international law to determine "that a strict textual interpretation of Article 8(2)(a)(i) would result in an 'absurd and unreasonable result' because Argentina had promulgated 'emergency legislation . . . whose purpose was to bar recourse to the courts by those whose rights were felt to be violated.'" *Id.* 80a. Because "the panel correctly turned to the text of Article 8(2)(a)(i) of the Investment Treaty and relevant international law sources in attempting to discern its jurisdiction to hear BG's claims, and because it relied upon a colorable, if not reasonable, interpretation of these provisions in concluding that the matter was arbitrable," the court concluded that it was "without authority to disturb the panel's conclusions." *Id.*

B. The Court Of Appeals' Decision

Argentina appealed. It again acknowledged that BG and Argentina had entered into an arbitration agreement, to which the Treaty's litigation requirement was a precondition. *E.g.*, Resp't D.C. Cir. Br. 10-11 ("Arbitration agreements are contractual and should be enforced in accordance with their terms. The parties' agreement requires disputes to be submitted to a tribunal in Argentina for 18 months, which BG failed to do."); *see also id.* 15, 16, 18, 19 n.9, 20, 21, 22, 24, 27, 28. Argentina furthermore did not dispute the district court's treatment of its concession that the tribunal had the "principal power to rule upon its jurisdiction." *See* Pet. App. 42a. To the contrary, Argentina "agree[d]" with BG's assessment that only "egregious departures from the parties' agreed-upon arbitration" would be grounds for vacatur – thus embracing the standard that applies when arbitrators resolve matters within their competence. Resp't D.C.

Cir. Reply Br. 10; *see also id.* 16 (arguing that rather than interpret the agreement, the arbitrators imposed their "own brand of industrial justice"). Argentina instead reprised its argument from the district court that the tribunal's interpretation of the arbitration precondition was so egregiously wrong that it was tantamount to ignoring the terms of the parties' agreement.[8]

The D.C. Circuit agreed that the "parties' agreement establish[es] a precondition to arbitration" through the litigation requirement. Pet. App. 2a. It *sua sponte* concluded, however, that Argentina had not expressly conceded in the district court that the tribunal's jurisdictional ruling should be reviewed under the deferential standards of the FAA. *Id.* 12a-13a. And again acting *sua sponte*, the court of appeals held that the question of whether BG was required to comply with the Treaty's litigation precondition was actually an issue of "arbitrability" that is presumptively for a U.S. court to decide. *Id.* 10a. It concluded that "[b]ecause 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." *Id.* 15a.

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[8] Argentina never disputed that arbitrators presumptively address preconditions to arbitration such as the Treaty's litigation requirement. Argentina argued for the first time in its Reply Brief on appeal that the Treaty overcame that presumption by demonstrating the parties' intent for "the local courts" of Argentina to decide the issue. Resp't D.C. Cir. Reply Br. 13-14.

The court stated that its *de novo* standard of review followed from this Court's holding in *First Options* that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." 514 U.S. at 944 (citation omitted). The court of appeals did not explain why it believed that compliance with the litigation precondition in Article 8 of the Treaty was the type of substantive arbitrability question that would trigger a presumption against arbitrability. Instead, it began with the proposition that the "'gateway' question in this appeal is arbitrability," and stated that the presumption against arbitrability of that question applied for that reason alone. Pet. App. 10a.

The court of appeals found insufficient evidence to overcome the presumption in favor of judicial resolution because, in its view, the Treaty did "not directly answer whether the contracting parties intended a court or the arbitrator to determine questions of arbitrability . . . ." *Id.* 14a. The court also speculated that the parties would have contemplated that the litigation precondition would be enforced by a U.S. court rather than the arbitrators because it requires litigation (albeit in an Argentine court, which is without any power to issue a binding decision). *Id.* 15a.

The court of appeals acknowledged that the Treaty incorporates the UNCITRAL Rules, which assign the arbitral tribunal the authority to resolve any disputes about its jurisdiction. *Id.* 13a. Indeed, the court acknowledged that the UNCITRAL Rules provide the sort of clear and unmistakable evidence that would satisfy even a heightened standard for

determining substantive arbitrability challenges. *Id.* 14a. But the court interpreted the Treaty to provide that those rules were irrelevant on the theory that they "are not triggered until after an investor has first . . . sought recourse, for eighteen months, in a court . . . ." *Id.*

Having determined that the arbitrators' jurisdictional ruling was not entitled to deference, the court of appeals stated that it would interpret the Treaty independently. *Id.* 15a. In contrast with the arbitral tribunal's extensive analysis, *see supra* at 13-14, the D.C. Circuit addressed that question in only two short paragraphs, deeming it dispositive that the Treaty "is explicit" in requiring eighteen months of litigation before arbitration. *Id.* 18a. The court: (1) did not identify or apply the controlling sources of international law (*e.g.*, the Vienna Convention); (2) did not explain why the arbitrators' interpretation of the Treaty was incorrect; (3) did not consider whether Argentina's emergency measures altered the result; and (4) did not consider BG's alternative bases for the tribunal's jurisdiction. Instead, the court of appeals concluded simply that "BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration . . . ." *Id.* 19a-20a.

The court of appeals thus reversed the decision of the district court and entered an order requiring

vacatur of the award. *Id.* 20a.[9] The court denied BG's petitions for rehearing and rehearing en banc. Pet. App. 307a. This Court granted certiorari. 133 S. Ct. 2795 (2013).

SUMMARY OF THE ARGUMENT

The D.C. Circuit's judgment must be reversed for two independent reasons. First, the court of appeals erred in interpreting the FAA to require that a U.S. court, rather than the arbitrators, presumptively determines compliance with the Treaty's litigation requirement. In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002), this Court held that such preconditions to arbitration are subject to the FAA's ordinary rule that the arbitrators decide disputes between the parties. *See also John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 559 (1964). The holding in *Howsam* specifically precludes the D.C. Circuit's contrary view that the Treaty's precondition to arbitration is a question of substantive arbitrability that courts presumptively resolve under the Court's prior decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

This case not only is controlled by *Howsam*'s holding, but also demonstrates the wisdom of the Court's rationale. The arbitral tribunal is more expert

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[9] If this Court affirms the decision below, then on remand the district court would presumably address BG's properly preserved arguments that neither the district court nor the court of appeals has yet considered, including that Argentina's petition to vacate the award was untimely, and that the most-favored-nation clause of the Treaty renders the litigation precondition inoperative.

than a U.S. court in interpreting the Treaty on the basis of the controlling principles of international law. Argentina's jurisdictional objection is also inextricable from the merits of BG's arbitration claim, including BG's challenge to the very measures that obstructed its access to the Argentine courts.

The court of appeals believed that the U.S. courts had primary decisional competence over all arbitrability questions under the Treaty. That view is misguided. No provision of the Treaty anticipates any role for the courts of the nation that hosts the arbitration (here, the United States). Even the Argentine courts have no power to decide anything finally. The Treaty grants the arbitral tribunal alone the power to issue a "final and binding" ruling. Any other rule would have defied common sense and would have erected a significant barrier to the very foreign investment that the Treaty was adopted to encourage. Investors will not risk hundreds of millions of dollars in investment unless they are sure that disputes will be resolved by a neutral and expert tribunal, not the local judicial arm of its government opponent.

In enacting the FAA and then subscribing to the New York Convention, Congress was aware that the essential premise of international arbitration is that a tribunal can be trusted to resolve transnational disputes efficiently, independently, and expertly. Each time domestic courts adopt rules that permit judicial second-guessing of arbitral awards, they encourage obstreperous parties – none of whom is more infamous than Argentina – to launch collateral litigation. The result not only undermines the orderly functioning of the arbitral system, but raises

substantial doubts concerning the efficacy of the entire arbitral regime.

Second, and wholly apart from any presumption regarding the allocation of decisional authority, the parties agreed that the arbitral tribunal would resolve its jurisdictional objection. Argentina entered into the Treaty against the backdrop of the settled principle that arbitrators determine their own jurisdiction. The Treaty embraces that principle by providing that with respect to any dispute – including a dispute over jurisdiction – only the arbitral tribunal may issue a "final and binding" ruling.

Moreover, the Treaty provides that the arbitration will be conducted under the UNCITRAL Rules, unless the parties expressly agree otherwise. Those Rules empower the tribunal to decide jurisdictional disputes. The great majority of courts to consider the question have correctly concluded that a party grants arbitrators the power to decide jurisdictional questions by agreeing to an arbitral system that grants arbitrators that power. The D.C. Circuit's contrary view that the UNCITRAL Rules were not invoked until after BG complied with the litigation precondition makes no sense: irrespective of whether or not the court of appeals agreed with Argentina's jurisdictional objection, the fact remains that under the Treaty, only the arbitrators were vested with the power to make that decision.

Argentina confirmed that understanding in its conduct of both the arbitration and the subsequent challenge to the award. Argentina asked the tribunal to decide its objection, invoking the provision of the UNCITRAL Rules authorizing the arbitrators to determine their jurisdiction. In subsequently seeking

to overturn the award in federal court, Argentina conceded that the tribunal had the principal authority to decide its jurisdiction.

Because the arbitrators had the authority to determine that BG was not required to comply with the litigation precondition, the FAA does not permit a U.S. court to second guess the merits of that ruling. As the district court easily concluded, there is no question that the tribunal consulted the correct materials and applied the correct principles of law, and made its decision on that basis. There is no ground to overturn the tribunal's ruling.

ARGUMENT

This Court should approach warily Argentina's attempt to overturn the international arbitration award in BG's favor. Argentina is infamous for its history of agreeing to arbitrate international commercial disputes, then contesting adverse arbitral awards by every possible judicial means, and then if it still loses, simply refusing to abide by the rulings of the courts to which it submitted the case – particularly, rulings of the American federal courts. "Argentina's strategy can be 'to use all means available to obstruct and delay the arbitration proceedings,' which could exhaust the plaintiff's patience and ward off other potential claimants from bringing cases." Matt Moffett, *Besting Argentina in Court Doesn't Seem To Pay*, Wall St. J. (Apr. 20, 2012), http://online.wsj.com/article/SB10001424052702303425504577356262654410468.html.

The same conduct underlying BG's claim in this case also gave rise to more than thirty other investment treaty arbitrations, resulting so far in four

awards in favor of investors that are no longer subject to any challenge – none of which Argentina has satisfied. Among these was an arbitration instituted under the very same Treaty at issue here by the energy company National Grid (which also did not comply with the litigation precondition). After the district court rejected Argentina's challenge to the award and granted National Grid's cross-motion to confirm the award, and the D.C. Circuit affirmed, this Court denied Argentina's petition for certiorari. *Argentine Republic v. Nat'l Grid Plc*, 637 F.3d 365 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 761 (2011). Nevertheless, Argentina still refuses to recognize this Court's order establishing a final judgment in this case and pay the award, without explanation.

Indeed, Argentina's general disdain for the U.S. judiciary is legendary. For example, in ongoing litigation over the rights of various Argentine bondholders in the Second Circuit, "Argentina's officials have publicly and repeatedly announced their intention to defy any rulings of this Court and the district court with which they disagree." *NML Capital Ltd. v. Republic of Argentina*, No. 12-909, 2013 WL 4487563, at *1 (2d Cir. Aug. 23, 2013). Argentina's refusal to recognize the valid judgments of this nation's courts illustrates its "willful defiance of [its] obligations . . . to honor the judgments of a federal court," *EM Ltd. v. Republic of Argentina*, 720 F. Supp. 2d 273, 304 (S.D.N.Y. 2010), which "is saddling the federal court system in the United States with years of difficult litigation, all because of [Argentina's] adamant refusal to honor the obligations it has incurred pursuant to law." *Id.* at 301. Argentina fights in our courts, but has passed legislation that it will not pay, or settle, U.S. federal court

judgments. *Id.*[10] And while other modern nations have commercial assets around the globe, Argentina repatriates its own to ensure that no judgments can be enforced.[11]

Yet here Argentina affirmatively seeks the assistance of the U.S. federal courts in overturning the arbitral award issued in favor of BG. This Court should not encourage Argentina – and other litigants

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[10] In response to Argentina's pervasive refusal to pay awards issued in favor of U.S. investors, the Administration has gone so far as to strip Argentina of its status as a beneficiary developing country under the U.S. Generalized System of Preferences (GSP). *See* Proclamation To Modify Duty-Free Treatment Under the Generalized System of Preferences and for Other Purposes, 77 Fed. Reg. 18,899, 18,899 (Mar. 29, 2012) ("I have determined . . . that it is appropriate to suspend Argentina's designation as a GSP beneficiary developing country because it has not acted in good faith in enforcing arbitral awards in favor of United States citizens . . . .").

[11] *See, e.g.*, *El Gobierno se protege de los embargos* [The Government Is Protecting Itself from Attachment], La Nación (Arg.) (Feb. 5, 2004), http://www.lanacion.com.ar/570271-el-gobierno-se-protege-de-los-embargos (reporting boasting by Argentina's cabinet chief that reserves of Argentina's Central Bank on deposit in New York banks had been withdrawn, funds on deposit in the New York branch of Banco Nación had been repatriated, and salaries of Argentine officials posted to other countries would be deposited in Argentina or paid in the form of cash sent via diplomatic pouch, which has immunity); *El Nación no teme por las acciones en el exterior* [Banco Nación Does Not Fear Legal Actions in Other Countries], El Cronista (Arg.) (Feb. 16. 2004), http://www.cronista.com/impresageneral/El-Nacion-no-teme-por-las-acciones-en-el-exterior-20040217-0045.html (reporting statements made by the president of Banco Nación that the institution had taken every step necessary to ensure that no asset of the Bank would be attached by Argentina's creditors).

that might consider following its abusive model – by announcing a legal rule that undermines the authority of the parties' chosen arbitral tribunal. For the reasons that follow, the judgment of the court of appeals should be reversed.

I. Under The FAA, It Is The Arbitral Tribunal's Presumptive Responsibility To Determine The Application Of A Procedural Precondition To Arbitration, Such As The Domestic Litigation Provision In Article 8 Of The Treaty.

This Court granted certiorari to decide whether the tribunal, or instead a U.S. court, has the primary responsibility to determine whether BG was precluded from arbitrating its dispute with Argentina as a result of BG's non-compliance with a precondition to arbitration set forth in Article 8 of the Treaty. Under the FAA and this Court's precedents, that responsibility presumptively lies with the arbitrators.

1. In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 941 (1995), the respondents asserted that they were not individually bound to arbitrate a dispute when only their wholly owned investment company had executed an arbitration agreement. This Court held that under the FAA, a court presumptively had the responsibility to decide that question; the arbitrators' ruling on the issue was therefore not entitled to deference. *Id.* at 947. The Court reasoned: "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *Id.* at 943 (citations omitted). Further, "[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 944 (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)).

The Court recognized that its decision reverses the ordinary presumption that the arbitrators will determine "*whether* a particular merits-related dispute is arbitrable . . . ." *Id.* at 944 (internal quotation marks omitted). It reasoned that its unique treatment of this gateway dispute was appropriate because the question of *who* decides arbitrability ordinarily "is rather arcane," and a party "might not focus upon that question or upon the significance of having arbitrators decide their own powers." *Id.* at 945.

First Options did not define what gateway matters present a "question of arbitrability" triggering the presumption of judicial determination. The Court addressed that question in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). There, the petitioner submitted an arbitration claim before the National Association of Securities Dealers (NASD), alleging that she had received bad investment advice from the respondent (Dean Witter). *Id.* at 81. Dean Witter sued to enjoin the arbitration, arguing that the matter was not arbitrable because it was submitted too late under the NASD rules. *Id.* at 82.

The Tenth Circuit held that a court should decide Dean Witter's objection. It read *First Options* to hold that "application of the NASD rule presented a question of the underlying dispute's 'arbitrability'; and the presumption is that a court, not an arbitrator, will ordinarily decide an 'arbitrability' question." *Id.* According to the court of appeals, *First Options*

created a "stringent test for the courts to apply in cases where the parties disagree over who should decide the arbitrability issue," with any ambiguity resolved in favor of courts. *Dean Witter Reynolds, Inc. v. Howsam*, 261 F.3d 956, 964 (10th Cir. 2001).

This Court reversed, explaining that the court of appeals had overread *First Options*. The Court explained that although courts presumptively decide "questions of arbitrability," that phrase does not refer to every "potentially dispositive gateway question," but instead "has a far more limited scope." 537 U.S. at 83. The "narrow circumstance[s]" presenting a question of *substantive* arbitrability, presumptively resolved by a court, include whether a party is bound at all by a particular arbitration clause and whether an arbitration clause applies to a particular type of controversy. *Id.* at 84. By contrast, "'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.'" *Id.* at 85 (emphasis altered) (quoting Revised Uniform Arbitration Act § 6(c), cmt. 2, 7 U.L.A. 12-13 (Supp. 2002)). This division of responsibility reflected "the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter," so that "reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* at 83-84.

As a result, the Court held that the applicability of the NASD time bar was presumptively for the arbitrators to resolve. The Court reasoned that the time limit did not constitute a "question of

arbitrability," but was instead "an 'aspect of the controversy which called the grievance procedures into play.'" *Id.* at 85 (alterations omitted) (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 559 (1964)).

As a clear example of an issue of "procedural arbitrability," the Court in *Howsam* cited the holding of *John Wiley*, 376 U.S. at 557, that arbitrators should presumptively decide "whether the first two steps of a grievance procedure were completed, where these steps are prerequisites to arbitration." 537 U.S. at 84. In *John Wiley*, the agreement between an employer and a union included two preconditions to arbitration: the parties had to hold a conference among the affected employee, a union steward, and the employer or an officer of the employer; and then hold a second conference between an officer of the employer and a representative of the union. 376 U.S. at 555-56. Arbitration was permitted only "in the event that the grievance shall not have been resolved or settled" in one of those two steps. *Id.* at 556. After the agreement between the employer and the union was signed, an unforeseen event occurred: the employer was absorbed in a merger, and the newly merged entity denied that it was bound by the agreement (which the union disputed). *See id.* at 545.

In a subsequent dispute, the union bypassed the first two stages of the grievance procedure and submitted a matter directly to arbitration, arguing that the employer's "consistent refusal to recognize the Union's representative status after the merger made it utterly futile – and a little bit ridiculous to follow the grievance steps as set forth in the contract." *Id.* at 557 (internal quotation marks omitted). The employer, for

its part, argued that the union's failure to abide by the preconditions to arbitration rendered the dispute nonarbitrable. *Id.* at 556. This Court held, however, that the jurisdictional dispute concerned a question of procedural arbitrability that was properly resolved by the arbitrator. *Id.* at 557.

2. *Howsam* and *John Wiley* compel reversal of the D.C. Circuit's holding that a U.S. court rather than the arbitral tribunal presumptively decides whether BG was required to comply with the Treaty's litigation precondition. According to *Howsam*, absent contrary agreement, the "question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the question of arbitrability, is an issue for judicial determination"; all other challenges, including whether "conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." *Howsam*, 537 U.S. at 83, 85 (citations and internal quotation marks omitted).

This Court's precedent is therefore clear: absent clear and convincing evidence of a contrary agreement, a dispute concerning compliance with a precondition to arbitration must be decided by the arbitrators. Indeed, the precondition to arbitration in Article 8 of the Treaty closely parallels the NASD time bar at issue in *Howsam*. Just as arbitrators presumptively determine whether arbitration was initiated too late, they likewise determine whether arbitration was initiated too early. *Id.* at 85.

The "narrow circumstances" described in *Howsam* as presenting a question of substantive arbitrability to be decided by courts are not present here. First, there is no doubt that Argentina consented to arbitrate investment disputes with U.K. investors: it executed

the Treaty with the United Kingdom, and the Treaty mandates that arbitrators – not courts – will have the final say in any investment dispute between Argentina and U.K. investors. Second, BG is a qualifying U.K. investor and the subject matter of the parties' dispute in this case falls within the arbitration agreement defined in Article 8 of the Treaty. As a result, substantive "question[s] of arbitrability" are not at issue. The only issue is one of timing – whether, in this case, BG was required to satisfy the litigation precondition before commencing arbitration – which is squarely an issue of procedural arbitrability presumptively reserved for arbitrators.

The facts the Court emphasized in *Howsam* in support of the presumption in favor of arbitral resolution are likewise present in this case. The arbitrators are "comparatively more expert about the meaning of" Article 8 of the Treaty, and "comparatively better able to interpret and apply it." *Cf. id.* at 85. The arbitrators are experts in international law and arbitral jurisdiction, and were appointed for that very reason. *See supra* at 12. They have vastly more experience with BITs than any U.S. court, as well as substantial experience applying principles of international law (including the Vienna Convention) to the interpretation of treaties. Moreover, like the NASD rules incorporated into the parties' agreement in *Howsam*, the UNCITRAL Rules incorporated into the Treaty provide that arbitrators determine the scope of their jurisdiction. *See* 537 U.S. at 86; *see also infra* at 48-49.

3. The D.C. Circuit's efforts to distinguish *Howsam* and *John Wiley* are unpersuasive. Its ruling is inconsistent with the published precedents of every

other circuit to consider the question, all of which uniformly interpret *Howsam* and *John Wiley* to establish a categorical presumption that an arbitral tribunal addresses a party's compliance with a precondition to arbitration. *See, e.g.*, *Dialysis Access Ctr., LLC v. RMS Lifeline, Inc.*, 638 F.3d 367 (1st Cir. 2011); *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388 (6th Cir. 2008); *Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs., Inc.*, 623 F.3d 476 (7th Cir. 2010); *Int'l Bhd. of Elec. Workers, Local Union No. 545 v. Hope Elec. Corp.*, 380 F.3d 1084 (8th Cir. 2004).

The court of appeals dismissed *Howsam* in a footnote. *See* Pet. App. 18a n.6. It opined that "the question of arbitrability" in *Howsam* "arose from a rule, promulgated by the National Association of Securities Dealers," which was also the agency conducting the arbitration. *Id.* But that factual distinction is irrelevant. *Howsam*'s reasoning turned on the type of issue to be resolved (*i.e.*, "substantive" versus "procedural" arbitrability), not on who promulgated the requirement that was allegedly not fulfilled. This Court has not hesitated to apply *Howsam* to arbitration agreements outside the NASD context. *See PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407 n.2 (2003) (holding, per *Howsam*, that application of a remedial limitation in an arbitration agreement should be decided by an arbitrator even though that interpretation might render the agreement unenforceable).

Nor can *Howsam* be distinguished on the court of appeals' theory that the question of arbitrability in that case (but not here) was intertwined with the facts underlying the merits of the dispute, making the tribunal more expert than a court in resolving the

jurisdictional challenge. *Contra* Pet. App. 18a n.6. In fact, neither *Howsam* nor any subsequent decision of this Court contemplates that courts will decide case by case whether jurisdictional and merits questions were intertwined. That would be a recipe for indeterminacy and inconsistent results in a field that uniquely requires certainty. It would also be a ready roadmap for parties opposing arbitration to initiate collateral court proceedings that would eviscerate the efficiencies of the arbitral process. *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008) (noting "arbitration's essential virtue of resolving disputes straightaway" and the desire to avoid "full-bore legal and evidentiary appeals"). Instead, this Court pointed to the fact that procedural arbitrability questions – including whether "conditions precedent to an obligation to arbitrate have been met" – frequently will be intertwined with the merits of an arbitration dispute as a reason for adopting a *categorical* rule that such questions are presumptively for the arbitrator. *See Howsam*, 537 U.S. at 85.

In any event, as the tribunal found, the facts underlying Argentina's invocation of the litigation precondition *are* intertwined with petitioner's case on the merits. Argentina's denial of access to its court system was relevant both to the tribunal's analysis of the precondition to arbitration (the gateway issue), and to its analysis of Argentina's substantive breaches of the Treaty (the merits of the case). *See* Pet. App. 165a-71a, 232a-42a, 283a-84a. For example, the findings that Argentina interfered with its courts' adjudication of property rights, and that it punished investors who sought redress in local courts, were central to both the tribunal's jurisdictional determination, *see supra* at 13-14, and its finding that

Argentina breached the substantive protections owed to petitioner, *see* Pet. App. 242a.

There also is no basis for the D.C. Circuit's view that it was better qualified than the tribunal to interpret the Treaty. Argentina and the United Kingdom knew when entering into the Treaty that in the event of an investor-state arbitration, they could do exactly what Argentina did here: choose arbitrators with expertise in the international law governing the Treaty and give the tribunal a comprehensive presentation of all of the relevant issues during a proceeding much lengthier than the summary confirmation procedure under the FAA, and with a full-blown evidentiary process.

The court of appeals relied on the fact that the Treaty calls for resort to the Argentine courts in the first instance, Treaty art. 8(1), App. 8a-9a, in support of its ruling that the parties to the Treaty expected a court to have the final word with respect to disputes concerning the litigation precondition. But the Treaty does not contemplate that the local courts will decide any question of arbitral jurisdiction. The litigation requirement permits a non-binding decision on the merits of the dispute. By contrast, any effort to vacate the arbitral award for lack of jurisdiction will take place in the state chosen by the parties to host the arbitral proceeding. The investor will almost never agree to site the proceedings in the respondent nation – including because of the prospect of interference by the local judiciary. Proceedings to vacate an award under the BIT thus will be governed by the domestic law of the host nation (here, the FAA). *See supra* at 17-18.

In any event, the Argentine courts have no power to issue a binding ruling on any question, including with respect to compliance with the litigation precondition. Even assuming a decision theoretically could be rendered within eighteen months, *but see* Pet. App. 170a-71a, Article 8 provides that if the parties "remain in dispute," then an investor may submit the matter to arbitration, Treaty art. 8(2), App. 9a. Thus, if BG had disagreed with the decision rendered by Argentine courts, the matter still would have been submitted to arbitration, which would uniquely be final and binding upon the parties – with no provision in the Treaty calling for the arbitrators to defer in any way to the Argentine court's decision. *See id.* art. 8(4), App. 10a.

The Treaty thus creates only a procedural opportunity for the Argentine courts; it does not assign to the judiciary any substantive responsibility. Imagine, for example, that Argentina had not participated in the arbitration but instead had exercised its right to place the dispute before the Argentine courts, and imagine further that those courts had promptly held that BG could not pursue the arbitration without eighteen months of litigation – perhaps even enjoining BG from proceeding to UNCITRAL arbitration. Under the plain terms of the Treaty, if BG disagreed with the Argentine court's rulings (which it obviously would), "the Parties" would "still [be] in dispute," *id.* art. 8(2)(b), App. 9a, and so BG would have had the right to have the arbitrators decide that question anew.

It is not at all surprising that the Treaty is written in this way. Argentina would have recognized that a U.K. company such as BG would be

substantially less willing to invest hundreds of millions of dollars in Argentina if the investor's only protection against the government destroying that investment were that very government's own courts. If the arbitrators were not permitted to determine their own jurisdiction, investors would find themselves in exactly that position. For example, the local courts could frustrate the Treaty-mandated remedy by interpreting the Treaty to require the active pursuit of litigation for eighteen months, but then indefinitely stay that litigation until the termination of emergency measures. Alternately, the courts could enforce a hypothetical emergency decree providing that an investor could not initiate litigation until it first posted a cash bond in the full amount of its claim. Moreover, even assuming that the courts were neutral and fair, the political branches of the government could interfere with the administration of justice by stripping the courts of jurisdiction, staying litigation, or otherwise acting to prevent the submission of disputes to a court. No rational investor would agree to such a regime, especially in a state (such as Argentina) with an uneven history of respect for the rule of law.

The court of appeals' analysis of *John Wiley* is even less persuasive. Like the staged dispute resolution mechanism mandated by the agreement in *John Wiley*, Article 8 of the Treaty imposes procedural preconditions to arbitration. And like the merger in *John Wiley*, Argentina's enactment of emergency measures that sharply restricted access to courts bears on both the issue of procedural arbitrability and on the merits of the dispute.

Nevertheless, the court of appeals distinguished *John Wiley* on the supposed ground that it arose under the National Labor Relations Act, while this case arises under the FAA and the New York Convention, and involves a BIT. Pet. App. 16a-17a. But no less than labor arbitrations, this case is subject to the FAA's "'emphatic federal policy in favor of arbitral dispute resolution.'" *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (quoting *Mitsubishi Motors*, 473 U.S. at 631). This Court has expressly held that even in commercial cases, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Indeed, in *Howsam* – a broker-dealer dispute that had nothing to do with labor relations – the Court applied *John Wiley*'s procedural arbitrability holding.

The court of appeals further distinguished *John Wiley* on the basis that the litigation precondition in the Treaty is different from the informal dispute resolution mechanisms at issue in *John Wiley*. Pet. App. 19a. However, that ignores the reasoning of *John Wiley*, which never suggested that the nature of a particular pre-arbitration dispute resolution mechanism was relevant to whether a court or an arbitrator should determine its applicability or fulfillment. Instead, *John Wiley* was concerned with whether the procedural arbitrability question was likely to be intertwined with the merits so that it would be sensible for the arbitrators to resolve both questions. *See John Wiley*, 376 U.S. at 557. Here, that test is met.

The court of appeals also identified no principled reason why the law would entrust to arbitrators the

decision whether an "informal" negotiation precondition was met, but trust only a court to decide whether the parties had adequately engaged in pre-arbitration litigation. In addition, there is no credible reason to presume that in a treaty between two foreign sovereigns, which did not specify a seat for arbitrations, the parties would have expected a U.S. court to second-guess an arbitral tribunal's determination of arbitrability. *See supra* at 39; *infra* at 55-56.

4. The D.C. Circuit equally erred in asserting that *First Options* supports its ruling that the application of Article 8 presents a "'gateway' question" of "arbitrability." Pet. App. 10a. In fact, the ruling below replicates the precise type of error that this Court reversed in *Howsam*. Like the Tenth Circuit in *Howsam*, the D.C. Circuit here overread *First Options* by requiring a heightened showing of the parties' intent to arbitrate, even though Article 8 of the Treaty does not raise a substantive "question of arbitrability" in the narrow sense that this Court has defined that term.

Further, the present dispute does not implicate the twin rationales of *First Options* in adopting a presumption in favor of judicial determination of the narrow question of "who (primarily) should decide arbitrability." 514 U.S. at 944-45. First, "a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute," and a judicial determination regarding arbitrability preserves the value of that right. *Id.* at 942. But there is no question that Argentina agreed to arbitrate (the Treaty constitutes a standing offer to do so), so there is no risk, unlike in *First Options*, of forcing a

party to arbitrate that never agreed to do so. Moreover, Argentina cannot claim that it has any right to have a court decide the merits because, at most, Article 8 entitles Argentina to an eighteen-month window during which BG litigates the case – while reserving to the arbitral tribunal alone the right to issue a final and binding decision.

Second, *First Options* reasoned that the issue of who decides arbitrability is "rather arcane," so that that parties "might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers." *Id.* at 945. But it is unlikely that Argentina and the United Kingdom simply failed to consider who would determine arbitrability, particularly when they expressly agreed upon the UNCITRAL Rules absent a specific agreement to the contrary by the parties to a particular dispute. While that issue might be "arcane" to those unfamiliar with international arbitration, these two countries have each negotiated dozens of BITs, all at arm's length with sophisticated counterparties. It strains credulity to assume that these sovereign nations – each employing a team of highly experienced negotiators and each facing potential claims for hundreds of millions of dollars – did not "focus upon . . . the significance of having arbitrators decide the scope of their own powers." *Id.*

In this context, as discussed further below, it makes far more sense to conclude that the Treaty was adopted against the settled international norm of "competence-competence," *i.e.*, the presumption that arbitrators have the power to determine their own jurisdiction. Argentina recognized the applicability of that principle in the district court. *See supra* at 23.

That concession was sound, for as a leading text explains:

> The competence-competence doctrine is almost universally accepted in international arbitration conventions, national legislation, judicial decisions, institutional rules and international arbitral awards. Authority in each of these sources recognizes with relative unanimity some version of a competence-competence doctrine. As a consequence, the basic proposition that an international arbitral tribunal presumptively possesses jurisdiction to consider and decide on its own jurisdiction can be considered a universally-recognized principle of international arbitration law.

1 Gary B. Born, *International Commercial Arbitration* 855-56 (2009).

5. The D.C. Circuit's holding that courts should presumptively interpret and apply preconditions to arbitration, such as the staged dispute resolution procedure in Article 8 of the Treaty, has "set the United States courts on a collision course with the international regime embodied in thousands of BITs," which assumes that arbitrators will resolve such procedural arbitrability issues. Professors & Practitioners Cert. Br. 15. Indeed, almost all BITs include staged grievance procedures requiring either a period of negotiation, mediation, or litigation before the commencement of arbitration, including a

significant number of BITs entered into by the United States, as well as the NAFTA.[12]

If Argentina's position were to prevail, dissatisfied parties will have a new way to challenge in court otherwise fair and final arbitrations by arguing that preconditions to arbitration were not satisfied. This "would result in wasteful duplication, unnecessary use of judicial resources, and significant delay." U.S. Council for Int'l Bus. Cert. Br. 22. When, as here, the applicability of preconditions overlaps with the merits of the dispute, the decision would "open[] the door to the full-bore legal and evidentiary appeals that can rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process, and bring arbitration theory to grief in post-arbitration process." *Hall Street Assocs.*, 552 U.S. at 588 (internal quotation marks and citations omitted).

In all likelihood, parties will not risk the inefficiency and unpredictability of a rule permitting courts to second-guess arbitral tribunals. Thus, investors will simply stop agreeing to site arbitrations in the United States. Ultimately, the nation's standing in the international business community would suffer. "[A]ttitudes reflected in U.S. judicial decisions . . . are keenly studied by the global arbitration community. Where those decisions deviate from international arbitral norms supportive of arbitration, the United States' reputation as a venue . . . can be seriously diminished." Am. Arb. Ass'n Cert. Br. 2-3. Indeed, "[t]he D.C. Circuit's decision has already begun to attract scrutiny of and skepticism

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[12] *See* Pet. for Cert. 19-20 & nn.5-7.

about how U.S. courts treat international awards rendered in the United States." *Id.* at 21.

This is an outcome worth avoiding. In enacting the FAA and acceding to the New York Convention, the United States has committed itself to respect and enforce arbitral rulings in compliance with international norms. This Court should not countenance a rule that frustrates that policy.

II. The Treaty Demonstrates, And The Parties In Any Event Agreed, That The Arbitral Tribunal Would Finally Determine Whether Petitioner's Non-Compliance With The Litigation Precondition Precluded Arbitration.

As discussed in Part I, *supra*, a challenge to an award founded on a party's failure to comply with a precondition to arbitration is a matter presumptively for the arbitrators, not the courts. Wholly apart from any presumption, the facts establish that the parties in this case intended to preserve that division of authority. That conclusion follows from: (1) the text of the Treaty; (2) the Treaty's structure, purpose, and context; and (3) the parties' conduct during and after the arbitration. As a result, even if the D.C. Circuit were correct in finding that this Court's holdings in *Howsam* and *John Wiley* were inapposite, the court of appeals still had no justification for reviewing *de novo* the tribunal's determinations with respect to the litigation precondition. Doing so frustrated the parties' expressed intentions.

1. The terms of the Treaty demonstrate that Argentina intended for the arbitral tribunal to decide all gateway issues in a final and binding manner. Argentina negotiated and executed the Treaty –

including its arbitration provisions – against the background understanding that the arbitral tribunal would determine its own jurisdiction. As discussed at length *supra* at 39-41, the text of Article 8 vests only the arbitral tribunal with the power to resolve all disputes finally, including questions relating to compliance with a precondition to arbitration. Treaty art. 8(4), App. 10a. The Treaty thus establishes a process that includes eighteen months of local litigation as a precondition to arbitration, but strips that litigation of any legal significance if no decision is issued in that time period or if the aggrieved investor in any way disagrees with the conclusions of the local courts. Under the terms of the arbitration agreement, therefore, arbitral tribunals *alone* have the power to resolve investor-state disputes – including challenges to arbitrability – and are free to ignore the rulings of a domestic court in the process. *See id.* On the other hand, there is no provision permitting the local court to review the arbitrators' decision.

Perhaps the clearest and most unmistakable evidence that the Treaty incorporates – and does not displace – the settled norm that arbitrators determine their own jurisdiction is its specification that arbitration would be conducted pursuant to the UNCITRAL Rules unless the parties affirmatively agree on another procedure. *Id.* art. 8(3), App. 9a-10a. Those rules expressly and unequivocally grant the tribunal the power to decide any objection to its jurisdiction. *See supra* at 7.[13]

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[13] The result is not changed by the fact that the parties in an individual dispute under the Treaty could hypothetically agree to

When the parties to an arbitration agreement adopt a set of arbitral rules assigning to the arbitrators the power to determine their own jurisdiction, the parties thereby agree to assign the arbitrators that role. This conclusion follows from the core premise that with arbitration agreements, "as with any other contract, the parties' intentions control . . . ." *Mitsubishi Motors*, 473 U.S. at 626. Thus, when parties – and especially sophisticated parties that understand the significance of a set of arbitral rules – agree to incorporate those rules into their agreement, the only result consistent with the intent of the parties is to enforce those rules according to their terms.[14]

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conduct the arbitration under a system other than the UNCITRAL Rules. The only other arbitral system mentioned by the Treaty – ICSID – also grants the arbitral tribunal the power to determine its own jurisdiction. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 41(1), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 ("The Tribunal shall be the judge of its own competence."). But in any event, in every contract providing for a certain arbitral system, the parties are free after the dispute arises to agree to a different set of rules. The dispositive fact is that absent some further separate agreement by the parties, a dispute under the Treaty will be subject by default to the UNCITRAL Rules.

[14] *E.g.*, *Oracle America, Inc. v. Myriad Group A.G.*, No. 11-17186, 2013 WL 3839668, at *5 (9th Cir. July 26, 2013) (finding incorporation of the UNCITRAL Rules to be clear and unmistakable evidence that the parties agreed to arbitrate arbitrability); *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 72-74 (2d Cir. 2012) (finding incorporation of the UNCITRAL Rules to be clear and unmistakable evidence); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th

In this case, it is impossible to conclude otherwise: by selecting the UNCITRAL Rules (absent an express agreement to the contrary), the Treaty plainly requires all jurisdictional disputes to be resolved in the arbitration; and by providing that the decisions of the arbitrators will be final and binding, the Treaty

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Cir. 2012) (finding incorporation of the AAA Rules to be clear and unmistakable evidence); *Thai-Lao Lignite (Thai.) Co. v. Gov't of Lao People's Democratic Republic*, 492 Fed. App'x 150, 151 (2d Cir. 2012) (finding that the arbitral tribunal could rule on its own jurisdiction given the parties' incorporation of the UNCITRAL Rules); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011) ("By incorporating the AAA Rules, the parties agreed to allow the arbitrator to determine threshold questions of arbitrability."); *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 394 (2d Cir. 2011) (finding incorporation of the UNCITRAL Rules to be clear and unmistakable evidence); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006) (finding incorporation of the AAA Rules to be clear and unmistakable evidence); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332-33 (11th Cir. 2005) (finding incorporation of the AAA Rules to be clear and unmistakable evidence); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (finding incorporation of the ICC Rules to be clear and unmistakable evidence). *But cf. DK Joint Venture 1 v. Weyand*, 649 F.3d 310, 317 (5th Cir. 2011) (holding that "where a party attacks the very existence of an agreement," AAA Rules incorporated into that agreement are irrelevant (internal quotation marks omitted)); *China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 288-89 (3d Cir. 2003) (holding that incorporation of the China International Economic and Trade Arbitration Commission Rules was not clear and unmistakable evidence); *Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 779 (10th Cir. 1998) (holding that there was no clear and unmistakable evidence of an intention to arbitrate arbitrability, despite the parties' agreement to arbitrate under the AAA Rules).

clearly and unmistakably insists that the decisions of the arbitral tribunal should not be subject to *de novo* review.

Two recent examples from the Second Circuit illustrate the correct approach to this question. In *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 394 (2d Cir. 2011), the court of appeals assumed *arguendo* that a challenge to the arbitrators' jurisdiction went to the existence of an arbitration agreement itself, and therefore fell within the narrow circumstances in which clear and unmistakable evidence is required to support an intent to arbitrate arbitrability. The court nevertheless concluded that the incorporation of the UNCITRAL Rules supplied that evidence, explaining that "[b]y signing the BIT, Ecuador agreed to resolve investment disputes through arbitration under the UNCITRAL rules," and therefore "consented to sending challenges to the 'validity' of the arbitration agreement to the arbitral panel." *Id.*

Similarly, in *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 70 (2d Cir. 2012), Thailand challenged the scope of the parties' agreement to arbitrate by arguing that the claimant's investments were not "approved investments" under the relevant BIT. Applying the "clear and unmistakable evidence" standard, the court held that "Thailand's adoption of the UNCITRAL rules providing that the tribunal has 'the power to rule on objections that it has no jurisdiction' is clear and unmistakable evidence of their intent to arbitrate issues of arbitrability . . . ." *Id.* at 73. Accordingly, the court ruled that "a district court considering whether to confirm the award must

review the arbitrators' resolution of such questions with deference." *Id.* at 74.

In this case, Argentina similarly agreed to be bound by the UNCITRAL Rules in arbitrations commenced by U.K. investors. Pet. App. 13a-14a. That fact should have been determinative: Argentina's jurisdictional objection was a matter for the arbitrators, whether it was characterized as a failure to satisfy a precondition to arbitration (*Howsam*), or a challenge to the existence or scope of the arbitration agreement itself (*First Options*). Moreover, by expressly agreeing that the decisions of the arbitrators would be "final and binding," the parties eliminated any lingering doubts as to the effect of the incorporation of the UNCITRAL Rules. Not only did the arbitrators get the first bite at the apple, they were intended to have the only bite.

Indeed, the D.C. Circuit did not disagree. To the contrary it seemingly accepted that the express incorporation of the UNCITRAL Rules would establish "clear and convincing evidence" of the parties' intention to give the arbitral tribunal the power to decide its own jurisdiction. Pet. App. 14a. The court of appeals, however, read the Treaty's litigation precondition as establishing a "temporal limitation" to the application of the Rules – *i.e.*, it concluded that the parties' agreement to use the Rules did not come into effect until after eighteen months of litigation in the Argentine courts. *Id.*

That reasoning begs the question. The point of Article 21(1) of the UNCITRAL Rules is to ensure that the arbitral tribunal will resolve all gateway issues, and for such resolution to be final and binding. However, if one follows the logic of the court of

appeals, the arbitral tribunal's decision with respect to the litigation precondition will only be final and binding if a court agrees with the tribunal's decision. If the court thinks that the arbitral tribunal decided the question incorrectly, then the UNCITRAL Rules never became effective and the decision of the tribunal is irrelevant.

At bottom, the D.C. Circuit's circular reasoning cannot be reconciled with its specific conclusion that the litigation requirement is a precondition to arbitration. *See supra* at 21. When BG submitted its notice of arbitration under Article 8 of the Treaty, BG and Argentina agreed to arbitrate. At that point, there was no "temporal limitation" on the tribunal's authority. As others have noted, "[a]ny 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 Cert. Br. 20.

The D.C. Circuit also erred in its comparison of Articles 8 and 9 of the Treaty. Article 9 regulates disputes between the state parties to the Treaty and calls for the creation of an *ad hoc* tribunal in the event that diplomatic resolution fails. Treaty art. 9(1)-(2), App. 11a. The final sentence of Article 9 states that "[t]he tribunal shall determine its own procedure." *Id.* art. 9(5), App. 12a. According to the D.C. Circuit:

> This provision indicates that the contracting parties were aware of how to provide an arbitrator with the authority to determine a "question of arbitrability," and suggests that the absence of such

> language in Article 8(1) and (2) was intentional.

Pet. App. 14a-15a (citations omitted).

The D.C. Circuit simply misunderstood the meaning of the Treaty's reference to "procedure." In the context of Article 9, the reference to "procedure" relates to the manner in which the arbitrators would conduct the arbitration, not to the court's review of such arbitration. While it is possible that a tribunal constituted under Article 9 would adopt procedures that give the tribunal the power to determine arbitrability challenges, that power does not appear within Article 9 itself. In contrast, Article 8 expressly states that a tribunal would possess the authority to resolve all questions – without reservation – finally and bindingly. There is simply no textual basis for the D.C. Circuit's conclusion that Article 9, but not Article 8, vests arbitral tribunals with the power to determine questions of arbitrability.

2. The essential purpose of the Treaty's dispute resolution provisions confirms that it vests the arbitral tribunal with decision-making authority over jurisdictional objections. The right to arbitration provides would-be investors with the security that their Treaty rights will be enforced by an impartial tribunal, not subject to the vagaries of potentially biased or incompetent local courts. *See supra* at 7; Professors & Practitioners Cert. Br. 11-12 (noting that international arbitration is "the feature that makes these treaties so essential an element of the international economic system" because they "relieve[] investors of any concern that the courts of host countries will be unable or unwilling to provide justice in a dispute between a foreigner and the

government"). The Treaty's requirement that all questions pertaining to arbitral jurisdiction be resolved by the arbitral tribunal, and not by local courts, is essential to the Treaty's key objective: "to create favourable conditions for greater investment by investors of one State in the territory of the other State." Treaty recitals, App. 1a. Argentina no doubt recognized that that goal would be undermined if the Treaty were read to allow the domestic courts of a third state (whose identity will vary from case to case) to review the arbitral tribunal's decisions *de novo*.

In addition, Argentina would have recognized that the arbitral tribunal was the most competent authority to decide its jurisdiction under the Treaty. Allocation to arbitral tribunals of the authority to resolve investor-state disputes finally and bindingly is most consistent with aligning "(1) decisionmaker with (2) comparative expertise." *Howsam*, 537 U.S. at 85. In fact, the parties to this arbitration appointed arbitrators with expertise in the subject matter and law involved in the underlying dispute. The tribunal comprised three eminent jurists, each of whom had considerable experience and expertise in international law, treaty interpretation, and the resolution of foreign investment disputes in Latin America. *See supra* at 12; Am. Arb. Ass'n Cert. Br. 11-12. They, and not the courts, were the "decisionmaker with comparative expertise . . . ." *Howsam*, 537 U.S. at 85.

These arguments have even greater force when it is recognized that the question of relative competence involves a comparison between the tribunal and a court in an unknowable third country. As discussed, disputes under BITs are almost never arbitrated in a contracting state; instead, the parties typically select a

neutral site. In turn, any effort to vacate an award will proceed in the domestic courts of the seat of arbitration under its domestic law. This case is a perfect example: Argentina and BG (a U.K. company) selected the United States as the seat for their arbitration. Argentina then moved in federal district court to vacate the award under the FAA. It is implausible to believe that Argentina contemplated that the U.S. federal courts (which are never mentioned in the Treaty) would be better suited to interpreting its treaty with the United Kingdom than would be an expert tribunal that Argentina participated in appointing.

3. If there were any remaining ambiguity, it is resolved by Argentina's own conduct in proceeding with the arbitration and its subsequent challenge to the tribunal's jurisdictional ruling. In other words, whatever the background understanding in international arbitration, and no matter what the terms of the Treaty provide and its purposes illustrate, Argentina at the very least agreed to submit its jurisdictional objection to the tribunal for decision.

When it received BG's notice of dispute, Argentina did not initiate any action in its own courts to litigate either the merits of the dispute or the jurisdiction of the arbitral tribunal. Instead, it participated in the constitution of the tribunal. The parties then jointly designated the United States as a seat for the arbitration. Even then, Argentina did not initiate an action in a U.S. court under the FAA seeking to enjoin the arbitration on the ground that the tribunal lacked jurisdiction. *See In re Am. Express Fin. Advisors Securities Litig.*, 672 F.3d 113, 141 (2d Cir. 2011) ("If the parties to this appeal have not consented to

arbitrate a claim, the district court was not powerless to prevent one party from foisting upon the other an arbitration process to which the first party had no contractual right.").

Instead, Argentina did the opposite: it presented its jurisdictional objection to the arbitrators. More specifically, it invoked the arbitrators' authority to determine their own jurisdiction under Article 21 of the UNCITRAL Rules. At no point did Argentina suggest to the arbitrators that a court had the power to decide its jurisdictional challenge, and that it made its argument to the arbitral tribunal only out of an excess of caution. Argentina thereby, and again, consented to the tribunal resolving Argentina's jurisdictional objection – finally and bindingly.

Argentina maintained the same posture when it raised its jurisdictional objection in its petition to vacate the award under the FAA. Argentina *affirmatively conceded* that "[i]t is a well known principle that arbitral tribunals have the competence to determine their own competence." Rep. to Mem. of P. & A. at 10, No. 08-cv-485-RBW (D.D.C. Feb. 20, 2009), ECF No. 40. Argentina accordingly acknowledged that the tribunal "has the principal power to rule upon its jurisdiction." Pet. App. 42a & n.8. Argentina's argument was merely that the tribunal contravened Section 10(a)(4) of the FAA, which permits vacatur only in cases of excess of arbitral authority as determined by the application of a deferential standard of review. *See supra* at 19-20. Expressly relying on Argentina's concession, the district court correctly found that its review of the tribunal's jurisdictional determination was deferential. Pet. App. 42a.

In its subsequent brief on appeal, Argentina did not dispute that it had conceded that the tribunal had the principal authority to determine its own jurisdiction. Instead, it continued to argue that the arbitrators' ruling was so outside the bounds of a permissible interpretation of the Treaty that it must be overturned. *See, e.g.*, Resp't D.C. Cir. Reply Br. 5 ("The Tribunal . . . exceeded its authority by allowing BG to arbitrate and such departure from the parties' agreed upon terms is an extreme arbitral conduct [sic] that warrants vacatur."); *id.* at 8 ("Under 9 U.S.C. § 10(a)(4) an arbitral award may be vacated, among other reasons, if 'the arbitrators exceeded their powers' . . . ."); *id.* at 10 ("BG submits in its Initial Brief that an 'egregious departures [sic] from the parties' agreed-upon arbitration' [sic] is a ground for vacatur. Argentina agrees and for that reason this [sic] judicial review is ripe and meritorious.").

Nevertheless, the D.C. Circuit concluded *sua sponte* that Argentina did not in fact concede that the tribunal had the power to rule on its own jurisdiction. That conclusion is unfounded. Argentina's submissions are as clear as its conduct: both confirm that Argentina submitted its jurisdictional challenge to arbitration. And the conclusion is in any event beside the point – for the reasons already given, no concession by Argentina was necessary.

This Court has, in similar circumstances, found that a party consented to an arbitral tribunal's resolution of a jurisdictional challenge. In *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), the petitioner challenged an arbitral tribunal's ruling that the parties' agreement permitted class arbitration. It was unsettled whether that question is

presumptively for the arbitrators or instead for a court to decide. This Court held that the case did not raise the question because the petitioner had consented to the arbitrators' authority by asking the tribunal to decide the issue. "Indeed, Oxford submitted that issue to the arbitrator not once, but twice – and the second time after *Stolt-Nielsen* flagged that it might be a question of arbitrability." 133 S. Ct. at 2068 n.2.

To be sure, by submitting a question to arbitration, a party does not automatically and in every case consent to the arbitrators' authority to decide that question. In *First Options*, non-signatories to an arbitration agreement argued that the dispute was not arbitrable. They presented that question in the first instance to the arbitrators, who disagreed. This Court held that "merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue," when: (1) the presence of a related corporation in the arbitration was "an obvious explanation for the [party's] presence before the arbitrators," and; (2) appellate case law in the jurisdiction at the time indicated that the issue could be presented to the arbitrators "without losing the[] right to independent court review." *First Options*, 514 U.S. at 946. By contrast, Argentina agreed to a set of arbitral rules containing a provision assigning jurisdictional determinations to the arbitrators and then invoked that provision in asking the arbitrators to decide its objection. Further, Argentina never reserved its right to argue to the courts that the tribunal had no authority to rule on its own jurisdiction; to the contrary, Argentina acknowledged that the tribunal had such power. *See supra* at 57-58.

III. The District Court Properly Applied A Deferential Standard Of Review To The Tribunal's Jurisdictional Determination.

The district court concluded that Argentina's jurisdictional challenge was properly within the scope of matters referred to arbitration, and thus reviewed the tribunal's decision under the deferential standard required by Section 10 of the FAA and this Court's precedents. Applying that standard, the district court refused to vacate, and instead confirmed, the award. Pet. App. 21a-91a. That decision was correct, and Argentina has not preserved in this Court any fact-bound challenge to it.

The tribunal rendered its unanimous, 138-page award after four years of pleadings and an eight-day hearing. The award addresses in depth, and ultimately dismisses, Argentina's argument that petitioner's non-submission of the dispute to Argentine courts for eighteen months renders its claims inadmissible. *Id.* 161a-71a. The tribunal found that Argentina had "directly interfer[ed] with the normal operation of its courts" in order to "prevent judicial adjudication and enforcement of property rights," such that requiring petitioner to litigate prior to commencing arbitration would produce an "absurd and unreasonable result" in contravention of the principles of international law governing treaty interpretation (the Vienna Convention). *Id.* 165a-71a; *see supra* at 13-14. The tribunal thus concluded that the fact that the petitioner did not litigate in Argentina for eighteen months was not a bar to arbitration. Pet. App. 171a.

The district court properly applied the standard of review set out in the FAA and in this Court's precedents. The district court began by recognizing

that "judicial review of arbitral awards is extremely limited" and that courts do not "sit to hear claims of factual or legal error by an arbitrator in the same manner that an appeals court would review the decision of a lower court." *Id.* 67a (internal citations omitted). The district court also recognized the "'emphatic federal policy in favor of arbitral dispute resolution' – a policy that 'applies with special force in the field of international commerce.'" *Id.* (quoting *Mitsubishi Motors*, 473 U.S. at 631).

Against that framework, the district court then addressed Argentina's argument that the award should be vacated under Section 10(a)(4) of the FAA because the arbitrators "exceeded their powers" in permitting petitioner to proceed with arbitration without first litigating in Argentine courts. *Id.* 78a. The district court rejected that argument:

> [T]he panel correctly turned to the text of Article 8(2)(a)(i) of the Investment Treaty and relevant international law sources in attempting to discern its jurisdiction to hear BG Group's claims, and it relied upon a colorable, if not reasonable, interpretation of these provisions in concluding that the matter was arbitrable. Under Section 10(a)(4) and controlling case law, the Court is without authority to disturb the panel's conclusions.

Id. 80a.

That is precisely the approach that the FAA and this Court's precedents require of a district court when reviewing decisions on matters submitted to

arbitration. *See, e.g.*, *Oxford Health Plans*, 133 S. Ct. at 2068 ("Under the FAA, courts may vacate an arbitrator's decision only in very unusual circumstances." (citation omitted)); *AT&T Mobility LLC*, 131 S. Ct. at 1752 ("[R]eview under § 10 focuses on misconduct rather than mistake."); *Hall St. Assocs.*, 552 U.S. at 586 (recognizing that the grounds for vacatur in the FAA "address egregious departures from the parties' agreed-upon arbitration" and "extreme arbitral conduct"). The district court's decision should not have been disturbed.

CONCLUSION

For the foregoing reasons, the court of appeals' decision should be reversed.

Respectfully submitted,

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APPENDIX

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE REPUBLIC OF ARGENTINA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

[The equally authoritative Spanish version of the Treaty is omitted.]

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina;

Desiring to create favourable conditions for greater investment by investors of one State in the territory of the other State;

Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;

Have agreed as follows:

ARTICLE 1

Definitions

For the purposes of this Agreement:

(a) "investment" means every kind of asset defined in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made and admitted in accordance

with this Agreement and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares in and stock and debentures of a company and any other form of participation in a company, established in the territory of either of the Contracting Parties;

(iii) claims to money which are directly related to a specific investment or to any performance under contract having a financial value;

(iv) intellectual property rights, goodwill, technical processes and know-how;

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments. The term "investment" includes all investments, whether made before or after the date of entry into force of this Agreement, but the provisions of this Agreement shall not apply to any dispute concerning an investment which arose, or any claim concerning an investment which was settled, before its entry into force;

(b) "returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees;

(c) "investor" means:

(i) in respect of the United Kingdom:

(aa) natural persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom; and

(bb) companies, corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12;

(ii) in respect of the Republic of Argentina:

(aa) any natural person, who is a national of the Republic of Argentina in accordance with its laws on nationality; and

(bb) any legal person constituted according to the laws and regulations of the Republic of Argentina or having its seat in the territory of the Republic of Argentina;

(d) "territory" means the territory of the United Kingdom of Great Britain and Northern Ireland or of the Republic of Argentina, as well as the territorial sea and any maritime area situated beyond the territorial sea of the State concerned which has been or might in the future be designated under the national law of the State concerned in accordance with international law as an area within which the State concerned may exercise rights with regard to the sea-bed and subsoil and the natural resources; and any territory to which this Agreement may be

extended in accordance with the provisions of Article 12.

ARTICLE 2

Promotion and Protection of Investment

(1) Each Contracting Party shall encourage and create favourable conditions for investors of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.

(2) Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and constant security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

ARTICLE 3

National Treatment and Most-favoured-nation Provisions

(1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State.

(2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State.

ARTICLE 4

Compensation for Losses

Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot or resulting from arbitrary action by the authorities in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State. Resulting payments shall be freely transferable.

ARTICLE 5

Expropriation

(1) Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party on a non-discriminatory basis and against prompt,

adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, the provisions of paragraph (1) of this Article shall apply.

ARTICLE 6

Repatriation of Investment and Returns

(1) Each Contracting Party shall in respect of investments guarantee to investors of the other Contracting Party the unrestricted transfer of their investments and returns to the country where they reside.

(2) Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed between the investor and the

Contracting Party in whose territory the investment was made and in accordance with the procedures established by that Contracting Party. Unless otherwise agreed by the investor transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

(3) Each Contracting Party shall have the right in exceptional balance of payments difficulties and for a limited period to exercise equitably and in good faith powers conferred by its laws and procedures to limit the free transfer of investments and returns. Such limitations shall not exceed a period of eighteen months in respect of each application to transfer and shall allow the transfer to be made in instalments within that period but the transfer of at least fifty per cent of the capital and of the returns shall be permitted by the end of the first year. In no circumstances may such limitations be imposed on the same investor after a period of three years from the start of the first such limitation. Pending the transfer of his capital and returns, the investor shall have the opportunity to invest them in a manner which will preserve their real value until the transfer occurs.

(4) Notwithstanding the provisions of paragraph (3) of this Article, each Contracting Party shall, in any event, guarantee to the investors of the other Contracting Party, the unrestricted transfer of dividends, which have been distributed to shareholders and paid out of the export earnings of the company concerned.

ARTICLE 7

Exceptions

The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the investors of either Contracting Party or to the investors of any third State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from

(a) any existing or future customs union, regional economic integration agreement or similar international agreement to which either of the Contracting Parties is or may become a party, or

(b) the bilateral agreements providing for concessional financing concluded by the Republic of Argentina with Italy on 10 December 1987 and with Spain on 3 June 1988 respectively, or

(c) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

ARTICLE 8

Settlement of Disputes Between an Investor and the Host State

(1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled shall be submitted, at the request of one of the Parties to the dispute, to the decision of the competent

tribunal of the Contracting Party in whose territory the investment was made.

(2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

(a) if one of the Parties so requests, in any of the following circumstances:

(i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;

(ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;

(b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

(3) Where the dispute is referred to international arbitration, the investor and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965[1] (provided that both Contracting Parties are

[1] Treaty Series No. 25 (1967), Cmnd. 3255.

Parties to the said Convention) and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) an international arbitrator or *ad hoc* arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the Parties to the dispute shall be bound to submit it to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The Parties to the dispute may agree in writing to modify these Rules.

(4) The arbitral tribunal shall decide the dispute 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. The arbitration decision shall be final and binding on both Parties.

(5) The provisions of this Article shall not apply where an investor of one Contracting Party is a natural person who has been ordinarily resident in the territory of the other Contracting Party for a period of more than two years before the original investment was made and the original investment was not admitted into that territory from abroad. But, if a dispute should arise between such an investor and the other Contracting Party, the Contracting Parties agree

to consult together as soon as possible so that they can reach a mutually acceptable solution.

ARTICLE 9

Disputes between the Contracting Parties

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through the diplomatic channel.

(2) If a dispute between the Contracting Parties cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

(3) Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.

(4) If within the periods specified in paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting

Party or if he too is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

(5) The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceedings; the cost of the Chairman and the remaining costs shall in principle be borne in equal parts by the Contracting Parties. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties, and this award shall be binding on both Contracting Parties. The tribunal shall determine its own procedure.

ARTICLE 10

Subrogation

(1) If one Contracting Party or its designated Agency makes a payment under an indemnity given in respect of an investment in the territory of the other Contracting Party, the latter Contracting Party shall recognise the assignment to the former Contracting Party or its designated Agency by law or by legal transaction of all the rights and claims of the Party indemnified and that the former Contracting Party or its designated Agency is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as the Party indemnified.

(2) The former Contracting Party or its designated Agency shall be entitled in all circumstances to the same treatment in respect of the rights and claims acquired by it by virtue of the assignment and any payments received in pursuance of those rights and claims as the Party indemnified was entitled to receive by virtue of this Agreement in respect of the investment concerned and its related returns.

(3) Any payments received in non-convertible currency by the former Contracting Party or its designated Agency in pursuance of the rights and claims acquired shall be freely available to the former Contracting Party for the purpose of meeting any expenditure incurred in the territory of the latter Contracting Party.

ARTICLE 11

Application of other Rules

If the provision of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement or if any agreement between an investor of one Contracting Party and the other Contracting Party contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

ARTICLE 12

Territorial Extension

At the time of the entry into force of this Agreement, or at any time thereafter, the provisions of this Agreement may be extended to such territories for whose international relations the Government of the United Kingdom are responsible, as may be agreed between the Contracting Parties in an Exchange of Notes.

ARTICLE 13

Entry into Force

Each Contracting Party shall notify the other in writing of the completion of the constitutional formalities required in its territory for the entry into force of this Agreement. This Agreement shall enter into force on the date of the later of the two notifications.

ARTICLE 14

Duration and Termination

This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other. Provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of fifteen years after the date of termination and without prejudice to the application thereafter of the rules of general international law.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done in two originals at London this 11th day of December 1990 in the English and Spanish languages, both texts being equally authoritative.

For the Government of the United Kingdom of Great Britain and Northern Ireland:	For the Government of the Republic of Argentina:
DOUGLAS HURD	D. CAVALLO