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

BRIEF OF *AMICI CURIAE* PRACTITIONERS AND PROFESSORS OF INTERNATIONAL ARBITRATION LAW IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici are practitioners and professors of law engaged in the field of international arbitration.[1] They are identified in Appendix A.

The interest of *Amici* in connection with this case is to assist the Court in deciding the issue before it in a manner that upholds and is consistent with well-established principles of international arbitration. *Amici* agree with the result reached by the Court of Appeals—that the arbitrators' decision regarding their jurisdiction to hear and decide the underlying dispute in this case is subject to *de novo* review by the court—and strongly disagree with the contrary views expressed by the petitioner and its *amici*, which reflect a fundamental misunderstanding of the proper allocation of jurisdictional power between arbitrators and courts. *Amici* on this brief believe it is important for the Court to be aware of their considered analysis and views on the important issue before the Court: whether a challenge to an arbitration tribunal's assertion of jurisdiction is reviewable independently by a court.

SUMMARY OF THE ARGUMENT

1. The BIT is an international treaty and thus, under the Vienna Convention, must be construed in accordance with the plain meaning of its words. The BIT is an

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this brief. The parties have consented to this filing.

agreement between two sovereign nations (Argentina and the United Kingdom). It is not an agreement between the parties to the arbitration in this case (Argentina and BG Group PLC ["BG Group"]). The BIT therefore is not, and does not contain, an agreement by Argentina to arbitrate disputes with potential investors. It contains an *offer* to arbitrate such disputes, which can be accepted by an investor only upon its compliance with the terms of the offer. Such terms include the requirement that the investor first seek redress in an Argentine court. Because BG Group did not fulfill that requirement, Argentina did not consent to arbitrate BG Group's claims. Absent such consent, the arbitrators lacked jurisdiction to hear or decide the case, as the Court of Appeals correctly held.

The provision in the BIT that a dispute shall first be submitted to an Argentine court constitutes a choice of *forum*. It therefore entails issues of Argentina's *consent* to arbitrate absent the required initial resort to the court—*i.e.*, issues of *substantive* jurisdiction—which are for a court, not arbitrators, to decide. Because the provision at issue is forum-related, it is fundamentally different from *procedural* pre-conditions in an agreement to arbitrate that are not forum-related, such as statutes of limitation. For example, a time limitation would bar parties from seeking relief, after the expiration of the time period, in any forum, court or arbitration tribunal. By contrast, a provision requiring resort to a court is jurisdictional.

2. Under the well-established principle of international arbitration known as "competence-competence"—which is incorporated into the UNCITRAL arbitration rules, the UNCITRAL model law on international arbitration, and the laws of countries that frequently serve as the seat of international arbitrations (including the United Kingdom, a signatory to the BIT)—the arbitrators had

jurisdiction to decide *in the first instance* whether they had jurisdiction to hear and decide the case. However, it is equally well-established that the arbitrators' jurisdictional decision was subject to *de novo* review by the court (except in exceptional cases such as proceedings under the 1965 Washington Convention governing ICSID arbitrations, *see* Resp. Br. at 8 n.1). If a court determines, as the Court of Appeals did in this case, that the arbitrators lacked jurisdiction, their award, having been rendered in the absence of power to do so, must be vacated.

3. When an arbitration tribunal's jurisdiction to hear and decide a case depends on whether a party has agreed to arbitrate, United States law, consistent with international law, holds that the arbitrators' jurisdictional ruling is subject to *de novo* review by the court, as the Court of Appeals held in this case. This Court has consistently so held.

ARGUMENT

I. Under the BIT's Unambiguous Terms, Argentina Did Not Consent to Arbitrate BG Group's Disputes

The only source of BG Group's claim to a right to arbitrate its dispute with Argentina is a bilateral investment treaty ("BIT") between Argentina and the United Kingdom. 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, 1765 U.N.T.S. 33 (the "Treaty").

An international treaty must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of

its object and purposes." Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention"), art. 31.1. The parties and other *amici* agree that the Treaty in this case must be so interpreted. *See, e.g.,* Pet. Br. at 8 ("The primary international law principles governing treaty interpretation are codified in the Vienna Convention"); Resp. Br. at 44-45 (to the same effect); U.S. Br. at 17 (quoting art. 31.1).

The first step in analyzing the Treaty is to recognize that it is an agreement between two sovereign nations (Argentina and the United Kingdom), not between Argentina and any potential investor (such as BG Group) that might invoke the Treaty's protections. Therefore, as commentators and the United States Solicitor General agree, when a BIT contains dispute resolution provisions that include the possibility of arbitration with an investor, such provisions do not constitute a nation's agreement to arbitrate, but rather an *offer* to arbitrate, which can give rise to an agreement only if an investor accepts the terms of the offer. U.S. Br. at 16, citing Jeswald W. Salacuse, *The Law Of Investment Treaties* 381 (2010); Christopher F. Dugan et al., *Investor-State Arbitration* 222 (2008); Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* 437 (2010).

The terms of the offer to arbitrate disputes with investors contained in the Treaty are unambiguous. The first clause in the article concerning the resolution of disputes between an investor and a host state, article 8(1), states that disputes "between an investor [BG Group] of one Contracting Party [United Kingdom] and the other Contracting Party [Argentina] . . . *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." Pet. Br. App. 8a-9a (emphasis added).[2] In this case, that would be an Argentine court. The Treaty then states two "cases" in which the dispute shall be submitted to arbitration. Art. 8(2), Pet. App. 9a. Only the first such case is relevant in this appeal (the second one being agreement of the Contracting Party and the investor to submit the dispute to arbitration, which did not occur). The first case is triggered in any of two "circumstances": (i) if 18 months have elapsed *after the dispute was submitted to the Argentine court* without that court having given a final decision, or (ii) the court has given its final decision "but the Parties are still in dispute." *Id.*

As is clear from the ordinary meaning of the words used in the Treaty, the submission of the dispute to the Argentine court under article 8(1) is a mandatory requirement, in the absence of which neither of the circumstances stated in article 8(2)(a) of the Treaty could arise. Because, as stated, the Treaty constitutes an *offer* to arbitrate on the terms stated in the Treaty, the investor's failure to submit the dispute to the Argentine court was not a valid acceptance of the offer, and thus, no agreement to arbitrate disputes between Argentina and BG Group ever came into existence.[3]

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2. The text of the Treaty is included as an appendix to Petitioner's brief, pp. 1a to 15a. We refer to that appendix as "Pet. Br. App. ___." We refer to Petitioner's separate appendix containing the decisions below as "Pet. App. ___."

3. Article 9 of the Treaty, which concerns disputes between the contracting parties (*i.e.*, Argentina and the United Kingdom), further confirms this interpretation of article 8. Article 9 contains

BG Group and its *amici* argue that the requirement in the BIT to first litigate in an Argentine court is materially identical to certain procedural pre-conditions to arbitration, which, certain circuit courts have held, present questions of procedural jurisdiction for the arbitrators to decide. *E.g.*, Pet. Br. at 36-37; *Amicus* Br. of American Arbitration Association ("AAA") at 7 and n.4, citing *Dialysis Access Center, LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 383 (1st Cir. 2011); *Lumbermens Mut. Cas. Co. v. Broadspite Mgmt. Servs., Inc.*, 623 F.3d 476, 481 (7th Cir. 2010); *Int'l Brotherhood of Elec. Workers v. Hope Elec. Corp.*, 380 F.3d 1084, 1099 (8th Cir. 2007); and *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 391-93 (6th Cir. 2008). This argument is unpersuasive for several reasons.

First, the BIT provision in this case requires initial resort to a *court*, and thus constitutes a choice of *forum*. A requirement that a claimant first seek redress in court cannot be construed as a procedural condition that arbitrators can decide with finality. Such a requirement raises a serious issue as to whether the party against which arbitration was commenced consented to arbitrate that

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no requirement of resort to a local court; rather, it provides that, if the parties cannot resolve their dispute "through the diplomatic channel," then the dispute "shall upon the request of either Contracting Party be submitted to an arbitral tribunal." Pet. Br. App. 11a. Thus, article 9 constitutes an *agreement* to arbitrate, whereas article 8 constitutes an *offer* to do so upon fulfillment of specified terms. As the Court of Appeals noted (Pet. App. 14a), the contracting parties knew how to express an *agreement* to arbitrate when they wished to do so (in article 9); therefore, their decision to limit resort to arbitration in article 8 was intentional and should be given effect.

dispute at all, and thus presents an issue of substantive arbitrability that a court may and must decide *de novo* (*see* Point III). Such a requirement thus is materially different from procedural conditions, *e.g.*, requiring the passage of time (a "cooling-off period"), negotiation, or mediation, compliance with which is not designated to a specific forum to decide. None of the pre-conditions in the cases on which petitioner and its *amici* rely concerned a requirement to litigate in *court* rather than, or prior to, arbitration, or involved a challenge to the very existence of an agreement to arbitrate. Here the requirement is a limitation *ratione materiae*¸ *i.e.*, on the arbitrators' subject-matter jurisdiction, and not a procedural condition to recourse to arbitration.

Second, the provision at issue is contained in a treaty between two sovereign nations, not between the parties to the dispute. As a result, the provision is deemed to constitute an *offer* to arbitrate on the terms stated in the treaty, not an agreement to arbitrate in the absence of compliance with such terms, as discussed above. Moreover, article 8(2) defines the types of disputes that the sovereign states consent to arbitrate: those which were not finally resolved within eighteen months by the competent tribunal of the Contracting Party or which still exist when a final decision of that tribunal has been made.

Third, and consistent with the preceding point, all three sovereign parties to the North American Free Trade Agreement ("NAFTA"), Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993)—the United States, Canada and Mexico—have taken the position that, unless a claimant investor complies with certain pre-arbitration requirements set forth in Article 1121 of that treaty,

no agreement to arbitrate arises with respect to the respondent State.[4] *See, e.g.*, *Tembec Inc. v. United States*, Objection to Jurisdiction of Respondent United States of America, at 35-38, UNCITRAL (Feb. 4, 2005), and *Methanex Corp. v. United States*, Memorial on Jurisdiction and Admissibility of Respondent United States of America, at 70-78, UNCITRAL (Nov. 13, 2000) (stating United States position); *Mondev Int'l Ltd. v. United States*, Case No. ARB(AF)/99/2, Rejoinder on Competence and Liability of Respondent United States of America, at 61-62, ICSID (Oct. 1, 2001) (stating Canada's and Mexico's position).

If the NAFTA requirements, which do not require prior resort to a *court*, are nevertheless deemed by all three sovereign states as precluding their consent to arbitrate if those requirements are not met, even more so should the provision in the Argentina-UK BIT—which expressly requires resort to a court—be construed as precluding Argentina's consent to arbitrate if that requirement is not met. The D.C. Circuit correctly held that, absent compliance with that requirement, Argentina did not consent to arbitrate. Pet. App. 19a-20a.

4. NAFTA Article 1121 provides in substance that a claimant must deliver to the disputing party and include in the arbitration claim a written consent to arbitration in accordance with the terms of the treaty and a written waiver of the right to initiate or continue any other dispute resolution proceeding in any other forum except for a proceeding for injunctive or other extraordinary relief.

II. The Principle of "Competence-Competence" Allows Arbitrators To Decide Their Jurisdiction in the First Instance, But Their Decision Is Subject to Judicial Review

The principle of competence-competence, as generally understood, is that an arbitral tribunal has the authority to determine its own jurisdiction. *See*, *e.g.*, George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 Yale J. of Int'l Law 1, 14 (2012) (hereinafter, "Bermann"). That principle is incorporated into the Arbitration Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules"). The Treaty in this case provides that, if a party to the dispute properly refers a matter to arbitration and the parties do not agree on the procedures to be followed within three months thereafter, then the arbitration shall be conducted under the UNCITRAL Rules then in force.[5] Treaty art. 8(3), Pet. Br. App. 9a-10a. Article 21.1 of those rules states in relevant part: "The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement."

Under international law, the purpose of this provision, and of similar provisions in the rules of other international

5. The UNCITRAL Arbitration Rules adopted in 1976 were in force at the time BG Group sought arbitration in 2003 (those rules are available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitration_rules.html) (last visited Oct. 24, 2013). The UNCITRAL Arbitration Rules were amended in 2010. The 2010 amendments did not substantively change the jurisdictional provision cited in the text (which is found in article 23.1 of the 2010 rules). In this brief we refer to the 1976 version of the UNCITRAL Rules, unless otherwise indicated.

arbitration bodies, is to allow the arbitration to proceed, even in the face of a party's challenge to the arbitral tribunal's jurisdiction, without being interrupted, at the "gateway" or initial stage of the arbitration, by the party's application to a court to determine the jurisdictional issue. *See*, *e.g.*, Bermann at 13-14. That purpose was served in this case. Argentina challenged the arbitrators' jurisdiction to hear and decide the case on the ground that, as discussed in Point I above, Argentina never consented to arbitrate the dispute with BG Group. Consistent with the principle of competence-competence, Argentina did not seek a court's ruling on the jurisdictional issue at that initial stage of the arbitration; the tribunal decided that it did have jurisdiction and proceeded to hear and decide the case on the merits.

But, the issue of the arbitrators' jurisdiction does not end there. A party that unsuccessfully challenged the arbitrators' jurisdiction before the arbitrators has an absolute right to raise that challenge in court following the issuance of the arbitrators' award, and the court has both the power and the obligation to review that challenge *de novo*. This principle is embodied in the laws of nations in which international arbitrations are frequently held (including France, England, Germany, and Sweden), as well as in the UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006) (the "Model Law"). The Model Law is a model code that "reflects a worldwide consensus on the principles and important issues of international arbitration practice." Model Law, Explanatory Note ¶ 2. Legislation based on the Model Law has been adopted by 66 countries and eight states in the United States.[6]

6. The full text of the Model Law, the Explanatory Notes thereon by the United Nations Secretariat, and the countries

Under the Model Law, "[t]he competence of the arbitral tribunal to rule on its own jurisdiction (i.e. on the foundation, content and extent of its mandate and power) is, of course, subject to court control." UNCITRAL Model Law, Explanatory Note ¶ 26. *See also* UNCITRAL Model Law art. 34(2)(a)(i) (a party may challenge an arbitration award on the ground that there was no valid agreement to arbitrate); Jan Paulsson, Nigel Rawding , et al. (eds.), *The Freshfields Guide to Arbitration Clauses in International Contracts, Third* 37 (Kluwer Law International 2010) (under the UNCITRAL Model Law, the court's role includes "deciding upon any challenge to the jurisdiction of the tribunal").

As one well-known treatise states, "the 'competence-competence' rule, whereby the courts cannot rule on the arbitrators' jurisdiction until the arbitrators themselves have had the opportunity to do so, can only exist because the courts are able to review the arbitrators' jurisdiction once the award has been made." Emmanuel Gaillard and John Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* ¶ 1558, at 884 (Kluwer Law International 1999). *See also* Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration* 443, ¶ 7.12 (Oxford Univ. Press 2009) ("it is recognized in the Model Law (and in most, if not all, national systems of law) that whilst any challenge to the jurisdiction of an arbitral tribunal may be dealt with *initially* by the tribunal itself, the final decision on jurisdiction rests with the relevant national court") (italics in original).

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and states that have enacted legislation based on it, are available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (last visited Oct. 24, 2013).

BG Group's *amici* warn that the Court of Appeals' decision to review the arbitrators' jurisdictional ruling "is out of line with most international authority and a dangerous precedent for both investment and commercial arbitration," *Amicus* Br. of U.S. Council for Int'l Business at 25, and that the decision threatens the United States' standing as a seat for international arbitration, *Amicus* Br. of AAA at 18. One such *amicus* cites France as a "prime example" of a nation that promotes its standing as a seat for international arbitration through "the non-interventionist attitude" of its courts. *Id.* at 19.

These warnings are without any substance, because the review function performed by the Court of Appeals in this case was not only consistent with, but also required by, the courts of the supposedly most arbitration-friendly nations. As the Third Circuit stated in *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 289 (3d Cir. 2003), "international law overwhelmingly favors some form of judicial review of an arbitral tribunal's decision that it has jurisdiction over a dispute." This is certainly the case in France, for example, supposedly the "prime-example" of an arbitration-friendly nation:

> If a party seeks to have the award annulled in a French court following an arbitration, it may raise each and every possible challenge to the existence and enforceability of the arbitration agreement. Moreover, it can expect the court to address those challenges without any deference to jurisdictional findings the arbitral tribunal may have previously made. Although French law postpones full judicial inquiry into arbitral jurisdiction until after an award has

> been issued, it obviously is not indifferent to the principle of consent or to the legitimacy concerns that underlie it.

Bermann at 19.[7] *See also* Guido Carducci, *The Arbitration Reform in France: Domestic and International Arbitration Law*, 28 Arbitration Int'l 125, 153-54 (2012) (under the most recent reform of the French arbitration law, enacted in 2011, one of the exclusive grounds on which a party may seek to vacate an arbitration award, unless both parties have expressly waived such a challenge, is that "the arbitral tribunal incorrectly declared that it had or lacked jurisdiction over the case").

English courts also so hold with respect to arbitrations held in England. *E.g.*, *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov't of Pakistan*, [2010] UKSC 46, [12], [30-31] (appeal taken from Eng.) (English courts independently decide whether agreement to arbitrate exists, without deference to arbitrators' prior ruling); *see also* Johan Steyn, *England's Response to the UNCITRAL Model Law of Arbitration*, 10 Arb. Int'l 1, 5 (1994) ("Arbitrators are entitled, and indeed required, to consider whether they will assume jurisdiction. But that decision does not alter the legal rights of the parties, and the court has the last word.");

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7. Thus, Professor Bermann, co-counsel for and one of the constituent members of the "professors and practitioners" who filed an *amicus* brief in support of reversal, supports the main thrust of this *amicus* brief in support of affirmance, namely, that an arbitral tribunal's ruling on a party's claim that it did not consent to arbitrate is subject to *de novo* review ("without any deference" to the arbitrators' decision) in the courts of the nation in which the arbitration took place.

and Resp. Br. at 24-25 (citing *Dallah* and noting that it is consistent with prior English court decisions).

Just this week, the Court of Appeal of Singapore reaffirmed and followed this principle, vacating an arbitration award as to certain parties who had not agreed to arbitrate. *PT First Media TBK v. Astro Nustantara Int'l BV, et al.*, [2013] SGCA 57, [162-164]. The court stated that *Dallah* "represents the leading statement on the standard of curial review to be applied under the New York Convention," *id.* at [163]. It therefore affirmed "the exercise of *de novo* judicial review" by Singapore courts and stated that "the tribunal's own view of its jurisdiction has no legal or evidential value before a court that has to determine that question." *Id.* The court concluded that it was "entitled, indeed obliged, to undertake a fresh examination" of the objection to the arbitrators' jurisdiction. *Id.* at [164].

In Germany, where the doctrine is known as "kompetenz-kompetenz," Bermann at 14 n.44, legislation provides that parties may not agree in advance "to assign final decision on the validity or enforceability of the arbitration agreement to the arbitrators," *id.* at 21, thus making clear that a court must have the final say on that issue.

In Sweden, legislation provides that, although arbitrators may initially rule on their own jurisdiction to decide the dispute, such a determination is subject to court review. Section 2 of the Swedish Arbitration Act (SFS 1999:116) states in relevant part: [8]

8. The English translation of this act is available at http://www.sccinstitute.com/?id=23746 (last visited Oct. 30, 2013)

> Arbitrators may rule on their own jurisdiction to decide the dispute. The aforesaid shall not prevent a court from determining such a question at the request of a party. The arbitrators may continue the arbitral proceedings pending the determination by the court.
>
> Notwithstanding the fact that the arbitrators have determined, in a decision rendered during the proceedings, that they have jurisdiction to resolve the dispute, such decision is not binding.

In sum, under the competence-competence doctrine as embodied in the UNCITRAL Rules and Model Law, and widely followed by nations that promote the resolution of disputes via arbitration, arbitrators have jurisdiction to make an *initial* ruling on their own jurisdiction and to proceed with the arbitration on the merits; but, once the arbitrators have issued a final award, the competence-competence principle does not restrict a court's authority to review *de novo* the arbitrators' jurisdictional ruling.

III. The Court of Appeals' Decision Is Consistent with this Court's Prior Decisions that Courts, Not Arbitrators, Ultimately Decide Whether the Parties Agreed to Arbitrate

The Court of Appeals' holding that the BIT provision requiring an investor to first seek redress in a local court presented an issue of substantive arbitrability for the court, not the arbitrators, to ultimately decide is entirely consistent with this Court's jurisprudence.

As the Court has consistently stated, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). *See also First Options of Chicago v. Kaplan*, 514 U.S. 938, 943 (1995) ("arbitration is simply a matter of contract between the parties").

Which forum—court or arbitration tribunal—ultimately decides whether a party has agreed to arbitrate a dispute, *i.e.*, whether the arbitrators have jurisdiction to decide that issue? The answer turns on whether the parties agreed "to submit the arbitrability question itself to arbitration." *First Options*, 514 U.S. at 943. In deciding this question, courts "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 Technologies, supra,* at 649) (brackets in original). The Court reaffirmed this rule in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) ("the 'question of arbitrability, is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise") (quoting *AT & T Technologies*, 475 U.S. at 643).

In *Howsam*, the Court refined this principle, applying presumptions as to the parties' likely intent to have a court or the arbitrators decide the issue of arbitrability. In the "narrow circumstances where contracting parties would likely have expected a court to have decided the gateway matter [of arbitrability]," *id.* at 83, the issue is one of "substantive arbitrability" for the courts to decide, *id.* at

85 (quoting Revised Uniform Arbitration Act of 2000, § 6, comment 2, 7 U.L.A., at 13). By contrast, "procedural questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." *Id.* at 84 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) (internal quotations omitted, italics in original)). Such procedural issues include "allegation[s] of waiver, delay, or a like defense to arbitrability." *Howsam* at 84 (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (brackets in original)).

The D.C. Circuit followed the above principles in deciding, correctly, that Argentina's challenge to the arbitrators' jurisdiction presented a question of *substantive* arbitrability for the courts to decide. The circuit court stated that the BIT "provides a prime example of a situation where the 'parties would likely have expected a court' to decide arbitrability." Pet. App. 15a (quoting *Howsam* at 83). As that court further stated, "[i]t would be odd to assume that where the gateway provision *itself* is resort to a court, the parties would have been surprised to have a court, and not an arbitrator, decide whether the gateway provision should be followed." Pet. App. 15a (italics in original).

Additional factors support the D.C. Circuit's conclusion that the arbitrability issue in this case is substantive rather than procedural. First, the requirement to initially seek redress in the host nation's court is independent from, and not intertwined with, the merits of the dispute. Pet App. 17a-18a and n.6; *cf. Howsam* at 85 (issue of timeliness of claim arose under an NASD rule, which the parties reasonably would expect NASD arbitrators, rather

than a court, to construe). Second, the issue in this case arises under a treaty between sovereign nations, not an agreement between the parties to the arbitration; thus, no agreement to arbitrate at all came into being in the absence of the required initial resort to the local court. *See* Point I above. Third, this case involves a dispute between a foreign sovereign state and a foreign entity, to which international arbitration norms should apply, and does not entail United States policy considerations favoring arbitral dispute resolution either generally, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 631 (1985), or in the context of a federal statute such as the Labor Management Relations Act, 29 U.S.C. § 151 *et seq.*, as in *John Wiley*, *supra*.

Finally, there is no clear and unmistakable evidence in the BIT or elsewhere, as required by *First Options* and *Howsam*, that the parties agreed to submit the arbitrability question to the arbitrators. Neither the BIT nor the principle of competence-competence, which speaks only to the arbitrators' authority to make a first and not a final determination as to their jurisdiction, provides such evidence. Further, that the BIT contemplated arbitration under the UNCITRAL Rules under certain circumstances does not constitute clear and unmistakable evidence, in any event. As discussed above, even if the UNCITRAL Rules had been properly triggered, they do not constitute clear and unmistakable evidence that the parties to the BIT intended arbitrators to decide the arbitrability issue (*see* Point II above). The competence-competence principle, which those rules incorporate, presumes ultimate court control; it does not do away with it. The defense in this case involves a *forum*-based challenge to the arbitrators' jurisdiction, which goes to the heart of whether a party

consented to arbitrate and thus is fundamentally different from the waiver and estoppel defenses at issue in the cases on which BG Group and its *amici* rely (as discussed in Point I above).

The current draft of the Restatement (Third) of the U.S. Law of International Commercial Arbitration, Tentative Draft No. 2 (April 16, 2012) ("Restatement"), confirms that U.S. courts review arbitrators' jurisdictional rulings *de novo* when the existence of an agreement to arbitrate is at issue, as in this case. It provides that "a court reviews de novo (1) the existence of the arbitration agreement." Restatement § 4-12(d). In the comment to that section, the Restatement further clarifies that, "[w]hen the existence of the arbitration agreement is at issue, the parties cannot avoid court review by clearly and unmistakably submitting the question to arbitration in their original arbitration agreement, but instead may only submit the issue to the tribunal by a separate and subsequent agreement (including a post-dispute agreement)." *Id.*, Comment *d.* Thus, under the Restatement, the fact that the Treaty contemplates arbitration under the UNCITRAL Rules does not defeat Argentina's right to *de novo* court review of the arbitrators' ruling as to whether an arbitration agreement ever came into existence.

Accordingly, the D.C. Circuit properly followed this Court's precedents in holding that the question of Argentina's consent to arbitrate was for the courts to decide; and it also properly concluded that Argentina did not consent to arbitrate in this case given BG Group's failure to first seek redress in the Argentine court.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX — *AMICI CURIAE* PRACTITIONERS AND PROFESSORS OF INTERNATIONAL ARBITRATION LAW

Amici Curiae Practitioners and Professors of International Arbitration Law[1]

Michael M. Collins SC is an Irish barrister who was been a Senior Counsel since 1994. He is also admitted to the Bars of England & Wales, New York and the U.S. Supreme Court. He practices from 4 Arran Square in Dublin and Monckton Chambers, London in the fields of commercial law, European Union law and arbitration and appears regularly before the High Court and Supreme Court of Ireland and the Court of Justice of the European Union. He is a graduate of University College Dublin with Master's degrees in both economics and law and a graduate of the University of Pennsylvania with a Master's degree in law. He has extensive experience of arbitration both as counsel and arbitrator including international commercial arbitration. He is one of Ireland's representatives on the ICC Commission on Arbitration, a member of the International Centre for Dispute Resolution Panel of Arbitrators, former President of Arbitration Ireland and the External Examiner in Arbitration to the Honourable Society of King's Inns, Dublin of which he is a Bencher. He is a Fellow and Director of the International Academy of Trial Lawyers in the United States and is a former Chairman of the Bar Council of Ireland. He is currently Adjunct Professor of Law at University College Dublin Law School. A fuller biographical summary of Mr. Collins

1. The affiliations of *amici* are shown for identification purposes only. They have joined in and submit this brief as individuals.

appears at http://www.monckton.com/barrister/35/michael-collins-sc (last visited Oct. 30, 2013).

Yves Derains is a former Secretary General (1977-1981) of the International Court of Arbitration of the ICC Court and Director of the ICC's Legal department; Chairman (since 2010) of the ICC Institute of World Business Law; former Chairman of the Comité Français de l'Arbitrage; co-author, with Eric Schwartz, of *A Guide to the ICC Rules of Arbitration,* 2nd Edition (Kluwer Law Int'l 2005); and author of many other publications in the field of international arbitration. He has over 40 years of experience as an international arbitrator, including as chairman or member of panels in more than 400 commercial or investment arbitrations carried out under the rules of the ICC, ICSID, UNCITRAL, AAA and many other international arbitration bodies. He is a founding partner of the law firm Derains & Gharavi. A fuller biographical summary of Mr. Derains, including his publications, appears at http://www.derainsgharavi.com/lawyers/yves-derains/ (last visited Oct. 30, 2013).

Bo G.H. Nilsson is a partner of the Swedish law firm Lindahl in Stockholm. He is a former Chairman of the Swedish Arbitration Association, the Swedish member of the International Court of Arbitration of the ICC, one of Sweden's appointees to the Panel of Arbitrators of the International Center for Settlement of Investment Disputes and a member of the Board of the Arbitration Institute of the Finland Chamber of Commerce. A fuller biographical summary of Mr. Nilsson appears at http://www.lindahl.se/en/our-people/bo-g-h-nilsson/#./?&_suid=138308622019306917100118509001 (last visited Oct. 30, 2013).

Appendix

Alan S. Rau holds the Mark G. and Judy G. Yudof Chair in Law at the University of Texas Law School. He teaches and writes in the areas of Contracts and Alternative Dispute Resolution, particularly Arbitration. He is co-author of *Processes of Dispute Resolution: The Role of Lawyers* (4th ed. 2006) and *ADR and Arbitration: Statutes and Commentary* (West, 2000), and the author of numerous articles, including most recently "*Arbitral Jurisdiction and the Dimensions of Part 'Consent'*" (Arbitration International, 2008); "*Fear of Freedom*" (American Review of International Arbitration, 2008); "*The Arbitrator and Mandatory Rules*" (American Review of International Arbitration, 2008), "Evidence and Discovery in American Arbitration: The Problem of 'Third Parties'" (American Review of International Arbitration, 2009); and "Understanding (and Misunderstanding) 'Primary Jurisdiction'" (American Review of International Arbitration, 2011). He serves as an Advisor to the American Law Institute project on the Restatement of the Law of International Commercial Arbitration, and on the panels of the American Arbitration Association, the British Columbia International Arbitration Centre, and the Tribunal Arbitral du Sport in Lausanne. He has been a visiting faculty member at the University of Toronto, China University of Political Science and Law in Beijing, Willamette University College of Law, the University of Geneva, and the Universities of Paris-I and Paris-II. A fuller biographical summary of Professor Rau appears at http://www.utexas.edu/law/faculty/rauas/ (last visited Oct. 30, 2013).

Jesper Tiberg is a partner of the Swedish law firm Lindahl in Stockholm. He is a member of the ICC's Swedish Arbitration reference group and has practiced law

for over 20 years. He is specialized in commercial dispute resolution and has considerable experience as counsel and arbitrator in various arbitrations seated in Sweden. He is ranked amongst the leading litigation lawyers in Sweden by Chambers Europe. A fuller biographical summary of Mr. Tiberg appears at http://www.lindahl.se/en/our-people/jesper-tiberg/#./?&_suid=13830858318460186621852924423 51 (last visited Oct. 30, 2013).

Anthony Trace QC, an English barrister, has been Queen's Counsel since 1981 and is a member of Maitland Chambers, one of the leading sets of barristers' chambers in the United Kingdom. He has a substantial practice in international arbitration, including service as arbitrator. He is one of the "Stars at the Bar" in the Chambers UK Directory, and in 2013 he won Commercial litigation "Silk of the year" in the inaugural Legal 500 UK Awards. He is also called to the Bar of the British Virgin Islands and is on the Panel of QCs which advise the Hong Kong Government. He has been involved in many leading international disputes all over the world, particularly in South America, the US, Europe, Africa, China and Hong Kong. A fuller biographical summary of Mr. Trace appears at http://www.maitlandchambers.com/our-people/barristers-profile/anthony-trace (last visited Oct. 30, 2013).

Jorge E. Viñuales is the Harold Samuel Professor of Law and Environmental Policy at the University of Cambridge. He has published widely in his specialty areas, most recently his books Foreign Investment and the Environment in International Law (Cambridge University

Press, 2012), Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards (Cambridge University Press, 2013, co-edited with P.-M. Dupuy), and Diplomatic and Judicial Means of Dispute Settlement (Martinus Nijhoff, 2012, co-edited with L. Boisson de Chazournes and M. G. Kohen). Professor Viñuales has wide experience as a practitioner. He has worked on many cases under ICSID, UNCITRAL, ICC or LCIA rules, including several high profile inter-State, investor-State, and commercial disputes, and he regularly advises companies, governments, international organisations or major NGOs on different matters of environmental law, investment law, and public international law at large. Professor Viñuales was educated in France (Doctorat - Sciences Po, Paris), the United States (LL.M. - Harvard Law School), Switzerland (Licence and Diplôme d'études approfondies in international relations - HEI; LL.B. – Universität Freiburg; Licence and Diplôme d'études approfondies in political science – Université de Genève), and Argentina (LL.B. – UNICEN). His native language is Spanish and he is fluent in English, French and Italian.

Michael Waibel is a University Lecturer in Law at Jesus College, University of Cambridge, UK and a Fellow of the Lauterpacht Centre for International Law. In 2008, the American Society for International Law awarded him the Francis Deak prize for his AJIL article "*Opening Pandora's Box: Sovereign Bonds in International Arbitration*." The European Society of International Law awarded him their 2012 book prize for his monograph *Sovereign Defaults before International*

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