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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This case presents a familiar pattern for the Court. The court of appeals' ruling is indefensible. So the respondent has advanced an alternative ground for deciding the case in its favor that is not encompassed by the Question Presented and was not pressed in or passed upon by the court of appeals. Even if this Court were to decide that argument, it lacks merit.

The D.C. Circuit obviously erred in holding that courts rather than arbitrators presumptively determine compliance with preconditions to arbitration. *See* Part I.A, *infra*. Argentina has waived its newfound argument that the eighteen-month litigation provision (Local Litigation Provision) of the U.K.-Argentina bilateral investment treaty (Treaty)[1] is a condition on the existence of the parties' arbitration agreement, not a precondition to commencement of arbitration. *See* Part I.B, *infra*.

Argentina's new argument also fails for two independent reasons: it is wrong and it is irrelevant. The Local Litigation Provision is indistinguishable from the measures that this Court has determined are procedural preconditions to arbitration. *See* Part II.A, *infra*. In any event, no matter how the provision is characterized, the parties intended that the expert

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[1] 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, App. 1a-15a.

arbitral tribunal, not a U.S. court, would determine its application. *See* Part II.B, *infra*.

I. The Court Should Resolve This Case By Reversing The D.C. Circuit's Holding That Courts Do Not Defer To Arbitrators' Determination Of Jurisdictional Disputes Over Preconditions To Arbitration.

A. Petitioner's opening brief and the briefs of its supporting *amici* establish that the D.C. Circuit's holding that courts presumptively decide disputes over the application of preconditions to arbitration cannot be reconciled with this Court's decisions in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002), and *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964). *See* Pet. Br. Part I; AAA Br. 8-9; USCIB Br. 4-6; Professors and Practitioners Supporting Pet. Br. 25-28. In *Howsam*, in particular, the Court emphasized that "conditions precedent to an obligation to arbitrate . . . are for the arbitrators to decide." 537 U.S. at 85. By contrast, there are only "narrow circumstance[s] where contracting parties would likely have expected a court to have decided [a] gateway matter." *Id.* at 83.

Famous for refusing to abide by adverse rulings of U.S. courts, *see* Pet. Br. 28-30, Argentina has now abandoned the rationale of the D.C. Circuit's ruling in its favor. Argentina does weakly attempt to recharacterize the ruling below, asserting that the D.C. Circuit actually held that compliance with the Local Litigation Provision is a prerequisite to the existence of an arbitration agreement. Resp. Br. 14-15. In fact, the court of appeals reasoned that "Article 8(2) sets the conditions by which such a dispute may be submitted to international

arbitration." Pet. App. 3a. The D.C. Circuit then held that a court, rather than an arbitrator, determines whether a party has complied with such "a precondition to arbitration." *Id.* 15a. The court of appeals distinguished this Court's decisions in *Howsam* and *John Wiley* on the ground that they were essentially limited to their facts, rather than on the ground – now urged by Argentina – that those cases involved existing arbitration agreements. *Id.* 16a-18a, 18a n.6.

Argentina unsuccessfully urged the same revisionist reading of the D.C. Circuit's decision at the certiorari stage as the basis for this Court to deny review. *Compare* BIO 1 *with* Cert. Reply 2-3. Argentina now argues that the D.C. Circuit "decided for itself whether the antecedent legal question – 'who decides arbitrability' – was for the arbitrators or the courts." Resp. Br. 14 (quoting Pet. App. 15a). But Argentina takes those three words from the decision ("who decides arbitrability") out of context. The court actually said:

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

Pet. App. 15a.

Because the D.C. Circuit held that courts rather than arbitrators presumptively determine compliance with a "precondition to arbitration," *id.*, and that holding squarely conflicts with this Court's

precedents, the court of appeals' judgment should be reversed. That conclusion resolves this case.

B. Argentina principally argues that the judgment should be affirmed on the alternative ground that the Local Litigation Provision is a precondition to the existence of an arbitration agreement between the parties. Resp. Br. 31-32. Argentina, however, offers no reason for this Court to depart from its settled practice of not deciding issues not fairly encompassed by the Question Presented, particularly when they were not presented or decided below.

Argentina's new argument was neither "pressed in" nor "passed upon by" the court of appeals, a condition intended to ensure that this Court does not decide difficult questions in the first instance. *See Glover v. United States*, 531 U.S. 198, 205 (2001) (declining to consider the United States's "various arguments for alternative grounds to affirm the Court of Appeals" because "they were neither raised in nor passed upon by the Court of Appeals. In the ordinary course we do not decide questions neither raised nor resolved below. As a general rule, furthermore, we do not decide issues outside the questions presented by the petition for certiorari." (citing *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992))). Instead, this Court "would apparently be the first court in the Nation to determine" whether a condition to arbitration in an investment treaty determines the existence of an arbitration agreement. *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992).

Indeed, this would be the least appropriate circumstance for this Court to decide such an argument, because Argentina affirmatively asked the

D.C. Circuit to treat the Local Litigation Provision as a precondition to arbitration. *See, e.g.*, Resp. C.A. Reply Br. 4 ("The award . . . has simply failed to enforce the terms of the arbitration agreement that required as a condition precedent to arbitration prior recourse to the local courts."); *see also, e.g.*, *id.* at 5; Resp. C.A. Br. 17.

Argentina did argue below that it had not "consented" to arbitration. But that argument did not preserve the distinct claim that satisfaction of the Local Litigation Provision is a matter of substantive, rather than procedural, arbitrability. This Court has previously observed that, "[l]inguistically speaking," virtually any procedural objection can be characterized as a condition on a party's consent to arbitrate. *Howsam*, 537 U.S. at 83. The defendant in *Howsam*, for example, could rightly have claimed that it did not consent to dispute claims made outside the limitations period. Likewise, the employer in *John Wiley* could have insisted that it did not consent to arbitrate complaints that had not been through the union grievance system.

More fundamentally, Argentina did not challenge the arbitrators' jurisdiction to decide the arbitrability of the parties' dispute. Argentina submitted its jurisdictional claim to the tribunal. Then, in its federal court challenge to the award, Argentina contested the merits of the tribunal's jurisdictional ruling but did not dispute the arbitral tribunal's power to determine its own jurisdiction. Instead, Argentina accepted that an arbitration agreement existed; acknowledged that "an arbitral decision may be set aside only in the 'narrow circumstances' foreseen in Section 10" of the FAA, Resp. C.A. Br. 21

n.11; and argued that the tribunal's award fell within those narrow circumstances because the "Arbitrators exceeded their authority by disregarding the terms of the parties' agreement," Petition to Vacate or Modify Arbit. Award (Vacatur Petition) at 9 ¶ 41, No. 08-cv-485-RBW (D.D.C. Mar. 21, 2008), ECF No. 1; *see* 9 U.S.C. § 10(a)(4) (authorizing vacatur "where the arbitrators exceeded their powers"). *See, e.g.*, Resp. C.A. Reply Br. 4-5 ("The *terms of the arbitration agreement between Argentina and BG* included an obligation to submit any dispute to local courts for 18 months before the parties can bring their claims to arbitration. . . . The Tribunal disregarded the intentions of the parties in this regard, and the terms of the Arbitration Agreement." (emphasis added)).

II. Even If The Court Goes Beyond The Question Presented To Address Argentina's New Theory, The Judgment Must Be Reversed.

Were the Court to elect to go beyond the Question Presented and the arguments raised and decided below, it should nevertheless conclude that the Local Litigation Provision is a procedural "precondition to arbitration" presumptively addressed by arbitrators. In any event, Argentina's effort to affix a different label to the provision is irrelevant. The parties intended and understood that the arbitral tribunal, not a court, would determine the provision's effect, such that the tribunal's ruling would be subject to deferential review under the FAA.

A. The Local Litigation Provision Is A Procedural Precondition To Arbitration.

1. In Article 8 of the Treaty, Argentina guarantees qualifying U.K. investors that their claims will be resolved by arbitration, subject to the precondition that those claims will first be submitted to the Argentine courts for up to eighteen months before arbitration commences. Treaty art. 8, App. 9a-11a. The question in this case is who decides whether Argentina's conduct deprived it of the right to invoke the Local Litigation Provision. The better view is that the arbitrators have that authority, and that the Local Litigation Provision (when it applies) is a precondition to the arbitrators' decision of the merits of the investor's claim, not to their jurisdiction over the case. The Treaty thus specifies that the tribunal shall "decide the dispute," and that its "decision shall be final and binding on the parties." *Id.* art. 8(4), App. 10a.

By contrast, the Treaty does not contemplate that any other forum could decide that (or any other) question arising under the Treaty. The only possible alternative forum would be the local Argentine courts, which the Treaty specifies cannot issue a decision that binds the investor. *Id.* art. 8(2)(a)(ii), App. 9a. Argentina's counter-argument seems to rest on the assumption that the Local Litigation Provision should be read in isolation, perhaps because it appears prior to the specification of the arbitrators' authority. But Article 8 as a whole makes clear that the only final decision maker for Treaty disputes is the arbitral tribunal.

Through the Treaty, Argentina thus provided BG a standing offer to have any Treaty disputes resolved

by arbitration, an offer BG accepted by submitting its notice of claim. Resp. Br. 31; *see Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 392 (2d Cir. 2011) (the difference between BIT awards and other commercial arbitration awards "proves to be a distinction without a difference, since [the state], by signing the BIT, and [the investor], by consenting to arbitration, have created a separate binding agreement to arbitrate"). The option having been exercised, BG then elected not to comply with the Local Litigation Provision because (*inter alia*) it considered Argentina to have forfeited its right to rely on that provision given its decision to punish investors that pursued local litigation. Pet. App. 165a-71a. The parties then disputed whether BG was correct or whether it was instead required to comply with the precondition. The arbitral tribunal was the body with authority to decide that issue.

2. Argentina cannot seriously contest that the Local Litigation Provision is indistinguishable from the time limits and the staged grievance procedure that this Court has squarely held raise questions of "procedural arbitrability" that are presumptively decided by arbitrators, rather than the courts. *See Howsam*, 537 U.S. at 85; *John Wiley*, 376 U.S. at 557. Argentina's only response is that in those cases the parties had entered into an arbitration agreement, whereas it maintains here that its "consent" to arbitrate was contingent on satisfaction of the Local Litigation Provision. Resp. Br. 17. But that is nothing more than an attempt to reargue *Howsam* and *John Wiley*. In *Howsam*, the precondition provided that no dispute "shall be eligible for submission to arbitration . . . where six (6) years have elapsed from the occurrence or event giving rise to

the . . . dispute." 537 U.S. at 81. The party opposing arbitration argued that any assertion that an arbitration agreement existed was "*ipse dixit* [that] simply begs the question whether the parties consented to arbitrate certain (as here, stale) disputes. That question turns on the parties' expressed intent, which is embodied in the" timeliness rule. Brief for Respondent, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (No. 01-008), 2002 WL 1728503, at *15 & n.1. In *John Wiley*, the agreement provided that arbitration was permissible only "in the event that the grievance shall not have been resolved or settled" by other procedures. 376 U.S. at 556. In both cases, this Court rejected the argument that the conditions went to the existence of an agreement to arbitrate the particular dispute. *Howsam*, 537 U.S. at 85; *John Wiley*, 376 U.S. at 557.

3. The fact that there is no distinction between Argentina's "consent" theory and the arguments rejected in *Howsam* and *John Wiley* establishes that Argentina's actual argument is that those precedents simply do not apply in the context of arbitration agreements formed by exchange of instruments of consent, such as BG's acceptance of the Treaty's standing offer to arbitrate. On Argentina's view, *every* precondition to arbitration in such circumstances implicates the formation of an arbitration agreement. Argentina thus contends that BG's explicit and unequivocal acceptance of Argentina's offer to arbitrate in the Treaty was actually a "counter-offer, which Argentina rejected." Resp. Br. 16.

That argument lacks merit. First, Argentina's position is counterfactual as there was nothing in BG's notice of consent that expressed a rejection of any aspect of Argentina's arbitration offer. Second, there is no textual support for Argentina's position that compliance with the Local Litigation Provision is necessary before BG could consent to arbitration with Argentina under the Treaty. At most, there is an ambiguity: is the Local Litigation Provision a prerequisite to the investor's right to exercise the option or simply a prerequisite to the commencement of the arbitration proceedings? Under the Vienna Convention on the Law of Treaties, any such ambiguity must be resolved in a manner consistent with the Treaty's "object and purpose."[2] That object and purpose is expressed in the Treaty's preamble, which states that the purpose of the Treaty is to "create favourable conditions for greater investment" and that the "protection under international agreement of such investments will be conducive" to that end. Treaty recitals, App. 1a.

Parties plainly may agree to procedural preconditions to the commencement of arbitration (as in *John Wiley*) or limitations periods (as in *Howsam*). For example, offers for the sale of consumer goods (such as computer software) may specify that the purchaser agrees to arbitrate any resulting dispute. Those provisions may require some prior procedural step, such as nonbinding conciliation. But there is no serious argument that if the purchaser declines to

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[2] Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

engage in conciliation, no arbitration agreement exists and the purchaser can file suit in court. Yet that is the inevitable consequence of Argentina's position.

There is a logical dividing line in the context of such agreements between a substantive condition on the creation of an arbitration agreement (presumptively decided by the courts) and a procedural precondition to commencement of the arbitration (presumptively decided by the arbitrators). The relevant question is whether, if the condition failed, the dispute instead would be resolved in court. In other words, does the condition determine whether the parties "consented to arbitration" *rather than* the default civil apparatus for deciding their dispute? If the alternative would be litigation in court, then permitting the arbitrators to determine compliance with the condition would assume their authority to decide the case. But if the parties contemplated no other decision maker for their dispute, they have accepted the arbitrators' authority to decide whether the condition must be satisfied.

Here, it is undisputed that once the arbitration option is exercised, *only* the arbitrators are empowered to decide whether a qualifying investor has exercised its option to arbitrate under the Treaty. There is no other decision maker. The only theoretical alternative is the local Argentine courts. But the Treaty provides that the outcome of the local litigation cannot have *any* effect on the complaining party's right to an arbitral ruling. Absolutely nothing that occurred in the Argentine courts could have any effect on BG's right to submit its claim to

binding arbitration; no matter what the local courts ruled, BG would have the unqualified right to an arbitral decision. As Argentina concedes, "[t]he Treaty does not require exhaustion of local remedies." Resp. Br. 3. Indeed, the most that Argentina can say is that a decision of a local court – in the event it even made one within the eighteen-month period – "could inform the terms of the arbitration." *Id.* 33. It is unclear what the arbitrators would learn from such a ruling, given that the local courts have no particular experience with or expertise in interpreting the Treaty. But in any event, a requirement "that local courts be afforded the *first* say in a dispute, before an arbitration may be commenced," *id.*, is the very definition of a procedural step prior to the commencement of the arbitration, not a condition on Argentina's agreement that the arbitrators would be the decision makers.

That in this case the parties' arbitration agreement was in effect is easily illustrated. Imagine that after filing a notice of claim under the Treaty, BG had sued Argentina in federal district court in the United States. Argentina plainly would have the right to compel arbitration under the FAA, based on the fact that the parties had agreed to arbitrate their disputes. *See* 9 U.S.C. § 4. In such a case, BG could not have defended against that motion on the ground that no arbitration agreement existed because it had not submitted its dispute to the Argentine courts. Instead, Argentina would have had the right to move in the arbitration to dismiss the claim for failure to satisfy the Local Litigation Provision, just as it did in this case.

The consequences of Argentina's contrary reading are implausible. Imagine that Argentina adopted an emergency decree – similar to the one in this case – indefinitely staying all local proceedings on investors' claims, and the national courts issued a ruling interpreting the period of required litigation under the Treaty to extend until the conclusion of the stay. Or imagine that Argentina issued a decree requiring an investor to post an impossibly high bond before submitting its claim to the local courts. In both instances, according to Argentina, its national courts would have the power, by enforcing those provisions, to prevent access to arbitration because no arbitration agreement could be formed absent local litigation, and the arbitral tribunal would be powerless to rule otherwise.

B. Even If The Local Litigation Provision Raises A Question Of "Substantive Arbitrability," Any Presumption That A U.S. Court Would Decide Its Application Is Overcome.

Argentina hopes that by relabeling the Local Litigation Provision as raising a question of "substantive arbitrability" it can rely on the presumption that courts determine the existence of an arbitration agreement. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). That presumption is, however, rebuttable – and it is rebutted in this case by the background understanding of treaty arbitration, the terms of this specific Treaty, and the parties' conduct.

Argentina and the U.K. entered into the Treaty against the backdrop of a settled expectation that disputes about arbitrators' jurisdiction – including

disputes about the existence of an enforceable arbitration agreement – will be submitted to, and resolved by, arbitrators. Argentina proves the point by citing the rulings of several arbitral tribunals on whether an investor must comply with a local litigation provision. *See* Resp. Br. 35 n.15. Indeed, no other national court has, to BG's knowledge, ever decided this question de novo in the history of investment-treaty arbitration.[3]

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[3] Argentina's insistence that it is settled that international practice "favors some form of judicial review" of arbitral rulings on threshold jurisdictional questions, Resp. Br. 24 (quotation omitted), is misguided. The FAA does provide for judicial review of arbitral rulings. But this Court has consistently enforced Congress's determination that those rulings shall be accorded deference in order not to discourage efficient resort to arbitration.

Argentina further errs in cherry picking examples from courts in some other jurisdictions to claim that there is a "consistent State practice" of reviewing any arbitral ruling on jurisdiction. Resp. Br. 26 n.7. It omits that if this arbitration happened to be conducted under the ICSID procedures, which the Treaty also contemplates, judicial review of the tribunal's jurisdictional ruling would be forbidden in all of those jurisdictions. U.S. Br. 3, 18. But even outside the ICSID context, as the United States acknowledges, U.S. Br. 24, there is no international consensus on this question. The reason is simple: "[e]ach primary jurisdiction may decide for itself the grounds on which to vacate awards, and under what standard of review," Resp. Br. 8, and nations differ in their approach to review of arbitral awards.

Argentina does not identify any other jurisdiction that (consistent with this Court's interpretation of the FAA in *Howsam*) distinguishes between issues of substantive and procedural arbitrability, yet would determine de novo whether BG was required to comply with the Local Litigation Provision.

The doctrine of competence-competence embodies the understanding that arbitral tribunals will determine their own jurisdiction, subject to the principles of judicial review established by domestic law governing arbitration awards. "States expect an arbitral tribunal – and if necessary, a reviewing court – to enforce conditions on a State's consent to form an investor-state agreement." U.S. Br. 21; *see* Pet. Br. 44-45; Resp. Br. 26-28.

That is no surprise. The parties to an investment-treaty arbitration (including the state party) are able to appoint to the arbitral tribunal arbitrators who are experts in the subject matter and law involved, as well as the sovereignty issues

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So the foreign decisions it cites provide no guidance here; following them would require overruling *Howsam* and deviating from the statute Congress enacted. Some nations would review the arbitral ruling in this case de novo because they reject the approach of the FAA altogether, including in domestic commercial cases; others, such as the United Kingdom, apply de novo review to all "jurisdictional" rulings, including those relating to procedural preconditions that under the FAA and *Howsam* are unquestionably within the tribunal's power to decide. *See, e.g.*, Arbitration Act, 1996, c. 23, § 67 (U.K.). Similarly, the Model UNCITRAL Law cited by Argentina is just that – a "model" – which some domestic courts have interpreted as imposing an entirely different standard of review on jurisdictional questions than the FAA. By contrast, key arbitration-friendly jurisdictions such as France would (as in *Howsam*) defer to arbitral rulings on procedural preconditions to arbitration. *See, e.g.*, Cour d'appel [CA] [regional court of appeal] Paris, 1e ch. C, Mar. 4, 2004, *Nihon Plast v. Takata-Petri*, Rev. Arb. 2005, 143 (holding that failure to comply with a precondition to arbitration in a multi-tiered dispute resolution clause was a matter for the arbitrators to decide finally).

routinely involved in the resolution of foreign-investment disputes. As the United States concedes:

> Deferential review is also appropriate in light of arbitrators' expertise in international law in general and the resolution of investor-state disputes in particular. Arbitrators' expertise typically extends to threshold objections to arbitration. Because the limitations on which such objections would be based are set forth in the investment treaty itself, objections to the tribunal's authority ordinarily involve treaty interpretation – as do the bulk of the merits-based disputes the tribunal must resolve.

U.S. Br. 27.

Indeed, BG's claim on the merits is entirely bound up with Argentina's jurisdictional objection. The arbitrators found that Argentina violated the principles of international law expressly incorporated into the Treaty by interfering with BG's access to relief if it commenced the litigation process. *See* Pet. App. 232a-42a.

The tribunal is accordingly the "decisionmaker with . . . comparative expertise" in resolving disputes between investors and states. *See Howsam*, 537 U.S. at 85. And that split of relative competence is a reason to grant arbitrators in investment treaty cases *more* deference than is afforded in the commercial context, not less – especially when it is recognized that the comparison ex ante is between an expert tribunal on the one hand and a court in an unknowable third country on the other. *See* Pet. Br. 55-56.

Further, an essential premise of an investment treaty is that foreign companies are unlikely to risk hundreds of millions of dollars in investments without access to the impartial forum of arbitration for the resolution of disputes. *See* Professors and Practitioners Supporting Pet. Br. 6-7. But allowing local courts to keep the gates to that impartial forum closed would dramatically undermine the investor confidence that the promise of neutral arbitration is intended to ensure. *See* Treaty recitals, App. 1a.

The course of the parties' conduct demonstrates that they understood that under the Treaty, the arbitral tribunal would resolve Argentina's invocation of the Local Litigation Provision. When BG submitted its claim, Argentina did not commence litigation of the dispute in Argentina (seeking, for example, declaratory relief), even though it had the right to do so under the Treaty. Pet. App. 162a-63a. Nor did Argentina seek to enjoin the arbitration in any other court – as would have been expected given its current position. Instead, Argentina accepted, in accordance with the terms of the Treaty, that the parties' dispute would be arbitrated under the UNCITRAL Rules established as the default rules under the Treaty. *See* Treaty art. 8(3), App. 9a-10a. In accordance with those rules, it negotiated a seat for the arbitration and participated in selecting arbitrators. Pet. Br. 56. And it submitted its jurisdictional objection to the arbitrators under the UNCITRAL rule that specifically gives the tribunal the power to decide jurisdictional objections. *Id.* 12, 57.

In subsequently seeking to have the award overturned in federal court under the FAA,

Argentina did not assert that the arbitral tribunal lacked jurisdiction to determine its own jurisdiction over the dispute. Instead, it acknowledged 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.

Finally, this case 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; *see* Pet. Br. 43–44. First, there is no risk of depriving Argentina of "a court's decision about the merits of its dispute," *First Options*, 514 U.S. at 942, because the Treaty reserves to the arbitral tribunal alone the right to issue a final and binding decision on the merits of investor-state disputes under the Treaty. Second, while the issue of who decides arbitrability may be "rather arcane" to those unfamiliar with international arbitration, neither Argentina nor the United Kingdom falls into that category. *See* Pet. Br. 44.

In sum, however the Local Litigation Provision is construed, the parties plainly agreed that the arbitrators would resolve the issue of compliance with it. Under this Court's precedents, therefore, the arbitrators' determination is entitled to deference.

III. There Is No Merit To The Proposal Of The United States That U.S. Courts Review De Novo All Objections To Arbitrability Raised By A State That Implicate "Consent" To Arbitration, Whether Or Not The Objection Is Procedural Or Substantive.

The United States has filed an *amicus* brief that – like Argentina's submission – effectively urges the Court to hold that its decisions in *Howsam* and *John Wiley* are inapplicable to this case. But whereas Argentina's argument would extend to all agreements formed by exchange of instruments, the Solicitor General's submission seeks a special rule for the cases involving state parties' jurisdictional objections to arbitration under a bilateral or multilateral investment treaty. U.S. Br. 19. According to the Solicitor General, every question of arbitrability that implicates the state party's "consent" to arbitrate – irrespective of whether the objection is procedural or substantive in nature – must be decided de novo. *Id.* 21-22.

Although not acknowledged by the government, the special rule it proposes for judicial review of a state party's jurisdictional objections has never been adopted by any U.S. court, or indeed (so far as can be determined) by any court in the world, and certainly not by any jurisdiction that serves as a frequent seat of arbitration. The rule is not only novel but entirely newfound, as the Solicitor General did not propose it in the government's invitation brief at the certiorari stage. The United States's (unstated) reason for urging this substantial departure from past precedent is obvious: it would exempt the United States from the Court's precedents in the many

instances in which it is a state "party to numerous investment treaties and free trade agreements incorporating investment chapters . . . , which typically provide for investor-state arbitration." U.S. Br. 1. The United States simply wants to preserve for itself every possible avenue of appeal in the event that it one day loses a jurisdictional dispute in an investment treaty arbitration.

Preliminarily, even if this Court were to adopt the Solicitor General's proposed standard, the proper judgment would be to reverse the D.C. Circuit, rather than to remand the case as he suggests. For the reasons given in Part II, *supra*, the relevant question is whether the state party "consented" to having the dispute resolved by arbitration *rather than* the ordinary processes of civil litigation in local courts. In this case, the Local Litigation Provision cannot fairly be characterized as a condition on Argentina's "consent" to arbitration. There is no serious argument that Argentina contemplated that a dispute with an investor would instead be resolved by the judiciary. As discussed, the Treaty guarantees *every* qualifying investor the right to demand that its claims will be decided by neutral arbitration. Without that assurance, foreign parties would be far less likely to invest in the first place. All the provision requires is that the investor wait for up to eighteen months while the matter is pending in a local court.

In any event, the Solicitor General's proposal lacks even the slightest merit. Its argument rests on the false premise – rejected by this Court in *Howsam* – that every condition related to "consent" determines the existence *vel non* of an arbitration agreement.

The Court's decisions establish that "preconditions to arbitration" do *not* determine the existence of an arbitration agreement and that a court presumptively does *not* review such objections de novo. Importantly, the United States does not dispute that the Local Litigation Provision is properly characterized as a precondition to arbitration. *See* Part II.A, *supra*. When, as here, the dispute is over a precondition to arbitration, arbitrators decide such questions of procedural arbitrability. *See* Part I, *supra*.

The argument of the United States is also directly contrary to the FAA. When, as in this case, an arbitration is "subject to the New York Convention, . . . judicial review of arbitral awards in the form of set-aside proceedings [is] governed by the law of the seat of arbitration." U.S. Br. 18. Under the FAA, the courts deferentially review rulings (including jurisdictional rulings) that the parties have agreed to submit to arbitration. This Court has squarely held – in a decision that the United States does not even acknowledge – that the statutory standard of review is binding in all cases. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008).

Further, nothing in the FAA, including Chapters 2 and 3 (on the New York and Panama Conventions), even hints at the application of a different regime for the review of state parties' objections to investment-treaty arbitrations. The only statute that does provide for special treatment of certain investment treaty cases – 22 U.S.C. § 1650a – bars *any* judicial review of awards rendered under the ICSID system

and makes an ICSID award equivalent to a final judgment of a state court.

That protection of Argentina's sovereignty does not require de novo judicial review is obvious from the fact that the Treaty also authorizes arbitration under the ICSID Rules, which preclude any judicial review whatsoever, including for jurisdictional assertions by state parties. U.S. Br. 3, 18. Argentina frequently submits disputes to ICSID arbitration; indeed, under many of its bilateral investment treaties, including those with the United States and France, the investor has the absolute right to select the ICSID system.[4] There is no logical reason that principles of sovereignty would require de novo review in this case but not those. The only issue is whether the Treaty establishes a precondition to arbitration, and that issue has nothing to do with Argentina's sovereignty.

The United States also gives no reason to conclude that it is more respectful of Argentina's sovereignty for a U.S. court to decide such a question de novo, rather than deferring to the ruling of an arbitral tribunal that Argentina participated in selecting and which was appointed for its expertise in such issues. The sovereign act that should be afforded paramount respect is Argentina's decision to sign the Treaty and thereby attract U.K. investment

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[4] *See, e.g.*, Treaty Between the United States and the Argentine Republic Concerning the Reciprocal Encouragement of Trade and Investment, U.S.-Arg., Nov. 14, 1991, S. Treaty Doc. No. 103; Agreement on the Reciprocal Promotion and Protection of Investments, Arg.-Fr., July 3, 1991, 1728 U.N.T.S. 281.

through promises that include the state's submission to international arbitration – even if Argentina now regrets that sovereign decision. *See, e.g.*, Case of the S.S. "Wimbledon" (Japan v. U.K.), 1923 P.C.I.J. (ser. A) No. 1, at 25 (Aug. 17) (recognizing that entering into treaties are exercises, and not abdications, of state sovereignty). Respect for sovereignty thus requires the proper construction of the Treaty, and the arbitral tribunal is the expert body chosen by the parties to do so.

Moreover, a ruling of a U.S. court second-guessing the arbitrators' ruling can equally be said to impinge upon the sovereign interest of the other party to the Treaty – the United Kingdom – to whom Argentina promised that it would arbitrate its disputes with U.K. nationals. To the extent respect for state parties' sovereign interests calls for *some* measure of judicial review, that is of course already provided by the FAA.

The standard proposed by the United States is deeply flawed for other reasons as well. There is no need for a distinct legal regime that would be applied only to the narrow sub-subclass of cases involving judicial review of arbitrators' jurisdictional rulings under bilateral and multilateral investment treaties. This Court's precedents adopt a presumptive allocation of responsibility between arbitrators and the federal courts. If the state parties expressly provide that a treaty requirement is a condition to the offer of arbitration, that fact might overcome a presumption that arbitrators decide its application. But that issue is entirely hypothetical because this is not such a case.

The standard proposed by the federal government would be unworkable. Indeed, despite having filed two briefs, the Solicitor General cannot decide whether the single provision *in this case* satisfies its proposed standard. The Solicitor General provides no guidance whatsoever regarding what principles of international law would guide the determination whether a particular requirement goes to a state party's "consent" to arbitration, in contrast to "non-consent-based jurisdictional and other threshold requirements." U.S. Br. 25. Nor does the United States even indicate how those unsettled principles might be identified objectively rather than made up by the lower courts. There is no reason to burden the U.S. courts with making such determinations, particularly when (as will often be the case) the United States is not even a signatory to the particular treaty.

CONCLUSION

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

Respectfully submitted,

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