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IN THE SUPREME COURT OF THE UNITED STATES

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BG GROUP PLC, :

Petitioner : No. 12-138

v. :

REPUBLIC OF ARGENTINA :

- - - - - x

Washington, D.C.

Monday, December 2, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

THOMAS GOLDSTEIN, ESQ., Washington, D.C.; on behalf of Petitioner.

GINGER D. ANDERS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting vacatur and remand.

JONATHAN I. BLACKMAN, ESQ., New York, New York; on behalf of Respondent.

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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 12-138, BG Group v. The Republic of Argentina.

Mr. Goldstein.

ORAL ARGUMENT OF THOMAS GOLDSTEIN

ON BEHALF OF THE PETITIONER

MR. GOLDSTEIN: Mr. Chief Justice, and may it please the Court:

We ask you to resolve this case narrowly by reaffirming that an arbitrator rather than a court presumptively resolves a dispute over a precondition to arbitration. That holding would decide the question presented and would resolve the circuit conflict in government 99 percent of the cases in the lower courts.

Argentina wants you to decide a different issue. Its position in this Court is that there is no arbitration agreement with my client in the first place, so it says a precondition to that non-existent agreement is irrelevant. Now --

JUSTICE SOTOMAYOR: Mr. Goldstein, do you take the position that parties can't, by contract say, this particular precondition is -- goes to my -- to the parties' consent to arbitrate?

1 MR. GOLDSTEIN: We do not take that
2 position. If a party were to say that, as the
3 governments in NAFTA have done, as the Solicitor
4 point -- Solicitor General points out is the language of
5 the U.S. South Korea Bilateral Investment Treaty, unlike
6 this one, we think it would be settled that a Court
7 would resolve the dispute.

8 JUSTICE SOTOMAYOR: All right. So if the
9 issue is what did the parties -- as I see it -- what did
10 the parties intend on this question, why isn't the first
11 options Howsam divide the one that we should follow in
12 this setting? The Solicitor General is suggesting that
13 we shouldn't follow that. We should give some sort of
14 heightened deference to the foreign state, but I'm not
15 sure why, because the issue is always about what did the
16 parties intend. And if the issue is always about that,
17 don't we look at the text? The custom and practice of
18 the industry? The behavior between the parties? Don't
19 we look at all of the factors we normally look at in
20 deciding whether something goes to a substantive or
21 procedural issue?

22 MR. GOLDSTEIN: Yes. So let me see if I --

23 JUSTICE SOTOMAYOR: All right. So it's not
24 that we hold absolutely that in every situation a
25 precondition is subject to an arbitral decision. We

1 look to those -- to the issue of consent, don't we?

2 MR. GOLDSTEIN: Well, a couple of things
3 about that. You do -- you have held in *Howsam* that if
4 there is a precondition to arbitration, it is
5 presumptively decided by the arbitrators rather than the
6 courts, so that --

7 JUSTICE SOTOMAYOR: Maybe that's why the
8 government is saying we shouldn't treat it as a
9 presumption. We should just treat it as --

10 MR. GOLDSTEIN: All right. Maybe I can help
11 by locating the parties' different arguments in this
12 case because there are a lot of them. We have said, of
13 course, that we think you should decide the question
14 presented. Argentina wants you to go beyond the
15 question presented, we can talk about whether that's
16 appropriate.

17 If you did decide the question of consent, I
18 think you would do it in a three-part opinion and some
19 of the parts are contested and some aren't. This is how
20 I would write the opinion. Part one would say look at
21 our decision in *Howsam* and it's undisputed here that if
22 this was an ordinary contract case, just between two
23 American companies, then BG Group would win because this
24 looks just like a procedural precondition. It's like
25 the John Wiley staged grievance procedure, and I don't

1 think the other side argues against that.

2 Then the other side has given you two
3 different arguments for why you wouldn't apply Howsam
4 and why you might have a different analytical framework.

5 The first argument, we could call it part 2
6 of the opinion, is the argument of the United States.
7 And what the United States says is look, the difference
8 between this and Howsam is it's an international case.
9 And what's different in international cases is that when
10 you dealt with Howsam, you dealt with a set of
11 expectations between parties agreeing to arbitrate that
12 may not apply in the international context and so maybe
13 it's different.

14 Now, this -- and the reason they say that
15 it's different is that an international case, when it's
16 cited in the United States, is governed by the New York
17 Convention. And in a New York Convention case, whether
18 it's a commercial case, whether it's an international
19 treaty arbitration case, what the rule of judicial
20 review is, and that's what we're looking at here, do the
21 arbitrators finally decide the question or does a court
22 on judicial review decide it?

23 In a New York Convention case, you look to
24 the law of the citeus. Here, the United States, the
25 Federal Arbitration Act. So I take the Solicitor

1 General's position to be this: Look, when you have
2 Argentina arbitrating against a company from the United
3 Kingdom, then the Argentine company and -- excuse me --
4 Argentina and the UK Company don't have any ex-ante
5 understanding about whether the dispute will be finally
6 resolved by a court or instead the arbitrators because
7 who knows where the arbitration would occur. Here it
8 occurred in the United States.

9 Our answer is that this objection answers
10 itself. It's true that they don't have a specific
11 judicial system, that it will be ahead of time when they
12 sign the treaty. Argentina signs a treaty with the
13 United Kingdom. They don't know whether a dispute over
14 this precondition will be resolved de novo or instead,
15 it will be resolved deferentially because they don't
16 know where the arbitration will occur, but they do know
17 that the applicable law will be the citeus of the
18 arbitration. And there is precedent on this.

19 The government's argument here is about
20 international arbitration governed by the New York
21 Convention. There are 149 signatories to the New York
22 Convention. There have been thousands of challenges to
23 arbitral awards under the New York Convention. And we
24 are unaware of any precedent from any country ever that
25 says we are going to not apply our domestic system set

1 of rules, here the Howsam first options lines, because
2 this is an international case. We know that --

3 JUSTICE ALITO: I'm not sure that this
4 argument helps you, but it's your argument. But this
5 arbitration took place in the United States because the
6 parties agreed that's where it would take place, right?

7 MR. GOLDSTEIN: Correct.

8 JUSTICE ALITO: So your -- your argument is
9 that by agreeing that the arbitration would take place
10 in the United States, they bought into U.S. arbitration
11 law, no international modification?

12 MR. GOLDSTEIN: That's correct. And that is
13 what has been true in every New York Convention case
14 ever decided in the United States and so far as we are
15 aware, every case decided by every New York Convention
16 signatory because they have -- they are accepting a body
17 of rules. When you were trying to confirm or overturn
18 the award, they agreed to put it here. That's how it --

19 JUSTICE ALITO: See, I would have thought
20 that there would -- there'd be an argument for saying
21 that the first options principle shouldn't apply to
22 international -- or to a bilateral investment treaty.
23 The whole point of these treaties, as I understand it,
24 is to take these disputes out of the courts because of
25 distrust, at least of the courts of the country against

1 which the claim is asserted, and -- and put it in an
2 international tribunal where some sort of standard
3 international principles would apply, but that's -- you
4 don't like the idea.

5 MR. GOLDSTEIN: No, that's part 3 of the
6 opinion. I just haven't gotten there. Here's the
7 reason why, and that is, the government's argument about
8 the New York Convention doesn't have anything to do with
9 investment treaties. It's about the New York
10 Convention. And so it applies a company from Japan,
11 chooses a company from Ecuador, and they arbitrate in
12 the United States. So the government's position has
13 very wide-ranging consequences for any international
14 arbitration in the United States.

15 Now, Argentina does make the argument that
16 you've described, and this is the next part of the
17 opinion. If we got past the government's position,
18 which I don't think has any precedent for having a
19 special international rule, we come to Argentina's
20 argument. And Argentina says this: Look, the reason
21 this isn't *Howsam* is that this is a unilateral contract,
22 effectively, and that is, we put our treaty out there
23 and now BG Group has to do something in order to create
24 an arbitration agreement in the first place. Because we
25 don't have an arbitration agreement with them, we have a

1 consented arbitration, then because of that, call it a
2 precondition, call it whatever you want, because an
3 arbitration agreement hasn't formed, the arbitrators
4 have no power to decide anything and, therefore, you
5 can't defer to their judgment.

6 We would never expect them to have the power
7 to decide anything Argentina says because there's no
8 arbitration agreement at all. So that's the next part
9 of the opinion, and it will get to the points you
10 raised, Justice Alito.

11 JUSTICE ALITO: Could I ask you just a -- a
12 practical question and maybe the answer to this is
13 obvious. Is it too late now for you to begin litigation
14 in Argentina? Wait 18 months and then pursue
15 arbitration?

16 MR. GOLDSTEIN: It is not. There is a
17 principle of laches, but there is an equivalent
18 principle of equitable tolling. So it's true that we
19 could go there. I do think ultimately, it's a point in
20 our favor because it shows how pointless this exercise
21 is.

22 We'll recall, of course, that while we could
23 leave -- we could file a claim in the Argentine courts,
24 the Argentine courts, of course, would have the power to
25 do nothing at all. They couldn't bind us. They

1 couldn't bind Argentina. They wouldn't have to decide
2 the case in the first place and then we would be back
3 here.

4 And the question is, if you have a provision
5 like that, which is effectively go wait in the Argentine
6 courts, does anybody seriously think that that
7 determines your consent to arbitrate, when it is that
8 that act, going and sitting, can't have any effect on
9 the case whatsoever. Do we really --

10 CHIEF JUSTICE ROBERTS: Well, that's not
11 true. There are numerous statutory regimes where
12 Congress has decided, for example, it's valuable to give
13 people a period of time to negotiate or discuss before
14 you can go into -- into court. I mean, the EEOC and
15 other sorts of things saying, let's everybody, you know,
16 step back. You have to negotiate for six months or you
17 can't sue for another eight months. And a lot of times
18 nobody think that's going to change anything, but you
19 can understand Argentina or any other country saying,
20 look, before we're going to arbitrate, you know, try our
21 courts, you may find -- you may be surprised, right?

22 MR. GOLDSTEIN: We would be. But, Mr. Chief
23 Justice, my point isn't that it's not important. I'll
24 give them that it's important; they negotiated for it.
25 My point is that whether it's important or not doesn't

1 tell you if it's a procedural step or a substantive step
2 in terms of their agreeing to arbitrate with us.

3 JUSTICE KENNEDY: Well, then, let me just
4 make clear where we are. Suppose we, or at least I,
5 were to conclude that the court of appeals was right,
6 that it is for the Judicial Branch to decide whether
7 there is an arbitration agreement and duty to arbitrate.
8 Then I were to further conclude that, given Argentina's
9 position, they have waived the judicial requirement and
10 that this arbitration should proceed. I can't reach
11 that second question because it wasn't raised.

12 MR. GOLDSTEIN: Justice Kennedy, the way you
13 would resolve that issue I believe is to get to
14 Argentina's argument that it did not consent to
15 arbitration, that there is no arbitration agreement in
16 the first place, you would have to go outside the
17 question presented to begin with. Remember, the
18 question presented that you granted certiorari on to
19 resolve a very distinct circuit conflict at the urging
20 of the arbitration community was: What do we do if we
21 have an arbitration agreement and this is a precondition
22 to arbitration?

23 If you were going to decide the antecedent
24 question, the question before that, is there an
25 arbitration agreement at all, which is my part three, it

1 is the argument that Argentina is raising in this Court,
2 then I think you have to carry it all the way through.

3 JUSTICE KENNEDY: Well, let me just put it.
4 I think there is -- this is a close case. I think there
5 is substantial merit, the United Kingdom court is
6 correct and that the court of appeals here is correct as
7 to the authority of the Court to decide the issue. I
8 also think that they are probably wrong on the merits,
9 but I cannot reach that second question. It wasn't
10 presented.

11 MR. GOLDSTEIN: I agree with you,
12 Justice Kennedy, that if you were asking me did the D.C.
13 Circuit correctly interpret the treaty and decide, I
14 misunderstood you. You have asked me, look, I see the
15 D.C. Circuit's decision, which is three sentences long
16 on the question of whether they can invoke this waiting
17 period, and I see the arbitrators, they're the experts.
18 It's much more substantial. If you accept the United
19 States' argument to remand this case, which neither of
20 the parties think you should, then it could be -- you
21 could suggest to the D.C. Circuit it could reopen it.

22 But otherwise I'm going to agree with you,
23 Justice Kennedy. I am a believer that you should stick
24 with the question presented and the arguments that are
25 properly presented to you.

1 Let me try, then, to deal with your point ab
2 out the United Kingdom court and the point about how
3 courts decide if there is an arbitration agreement. We
4 actually agreed that you -- you are obviously a court --
5 you need to decide if there is an arbitration agreement
6 here. You do decide that de novo.

7 The point that I want to get to in the part
8 three of an opinion that I am imagining is that there
9 clearly is an arbitration agreement here, and I am going
10 to come to that in one second. I will just bracket the
11 point about the United Kingdom. Remember that, as I
12 said with the New York convention, the United Kingdom
13 has one system for reviewing arbitral awards,
14 Switzerland has another, we have another one. What you
15 need to look to I think is your own body of law because
16 each one of those systems is because of not some great
17 principle --

18 JUSTICE GINSBURG: Mr. Goldstein, you have
19 given us three parts for an opinion.

20 MR. GOLDSTEIN: Yes.

21 JUSTICE GINSBURG: Is it your position
22 essentially that under this bilateral agreement, the
23 case is to be decided by an arbitrator, not by a court
24 in Argentina or the United States? So the question is
25 when an arbitrator will decide the case. And so the

1 question of when doesn't say whether it's an agreement
2 or not. It just says, did you sue too early, you
3 started too early?

4 Is that your essential position, that this
5 bilateral agreement says arbitration is the way this
6 dispute gets decided, and everything on the way to that
7 is what you call a preliminary question, but essentially
8 the parties have agreed that their disputes will be
9 resolved by arbitration?

10 MR. GOLDSTEIN: Yes. And can I maybe take
11 you to the treaty itself and explain what I think are
12 the questions for courts and what I think are the
13 questions for the arbitrators, because I actually think
14 it's pretty clear from the treaty. It's in our blue
15 brief in the appendix.

16 Justice Ginsburg, the answer to your
17 question is yes, and I will explain how that plays out
18 under the treaty. So this is the agreement that
19 Argentina made with the United Kingdom, and the dispute
20 resolution starts at Page 8A, it's Article VIII.

21 Now, there are three conditions in this
22 agreement on Argentina's consent to arbitrate. It does
23 have to agree and we had to do something. We had to
24 invest. And those three conditions are set out in the
25 first sentence of the dispute resolution provision. It

1 says, and I am now on Article VIII, Roman I: "Disputes
2 with regard to an investment," so this arbitration
3 provision is only going to apply to an investment, which
4 is a defined term under the treaty, "which arises within
5 the terms of the agreement." So it has to be a treaty
6 claim. "Between an investor of one contracting party
7 and the other contracting party." So that is it has to
8 be a U.K. investor suing an -- seeking to arbitrate
9 against an Argentine company. And those are -- if those
10 things aren't true, there is no arbitration agreement.

11 Now, that, that language I just read to you
12 is from the local litigation provision and then the
13 treaty says the exact same body of disputes are eligible
14 substantively for arbitration.

15 CHIEF JUSTICE ROBERTS: That's -- it seems
16 to me that this is a difficulty for you, the structure
17 of the treaty. I mean, if you just end it after one,
18 nobody would say, oh, they must be contemplating
19 arbitration or arbitration is in the background. They
20 would say, look, you have got a dispute, if you don't
21 resolve it you bring it in court.

22 MR. GOLDSTEIN: Right.

23 CHIEF JUSTICE ROBERTS: Nothing about
24 arbitration even in the background. Then they say: If
25 you want to go to arbitration, you can. So when you

1 look at just the structure, it seems to suggest that
2 Article I, 8(1) is not part of the arbitration
3 provision. It stands there and says, this is what you
4 do, and then the arbitration kicks in later.

5 MR. GOLDSTEIN: I'll agree with that, but I
6 just don't think you can ignore the rest of it. So let
7 me explain why that's true. So as I said, those three
8 conditions apply to the arbitration provisions. So I'm
9 at the top of 9A: "The aforementioned disputes" --
10 those are the ones that meet the three conditions --
11 "shall be submitted to international arbitration."

12 And then, Mr. Chief Justice, it turns
13 immediately to the relationship between the local
14 litigation and the arbitration. It's common ground that
15 in the example that you gave, if you had just part one
16 -- and I just think it's really important by you,
17 Mr. Chief Justice, and that is, if this provision said,
18 go litigate in the local courts come what may, this
19 would be a completely different case. But this
20 provision is wildly different from that. It says: Go
21 to the local courts; whatever they do, it makes no
22 difference. It cannot stop the case, it can't change
23 the issues that will be arbitrated, it can't have any
24 effect on the arbitrator's decisions. It is exactly
25 like a waiting period, which exists in every

1 international --

2 CHIEF JUSTICE ROBERTS: Your argument would
3 be better there if this was Article VIII, you know,
4 arbitration of disputes or, you know, parties can
5 arbitrate but first they must do this. No, it just says
6 settlement of disputes. The first thing is you can go
7 to court here. The second thing is if you want to
8 arbitrate, you do this.

9 MR. GOLDSTEIN: Okay. Mr. Chief Justice,
10 but then I would just take you to the next page, sub 4.
11 And we understand what the answer to that ambiguity
12 perhaps is, the last sentence: "The arbitration
13 decision shall be final and binding on both parties."
14 That is the only body under this treaty that can issue a
15 decision that decides the parties' dispute. It's only
16 the arbitrators. Now --

17 CHIEF JUSTICE ROBERTS: If you want to
18 accept the invitation to arbitrate that is in 8(2). If
19 you don't, if you go to 8(1), which doesn't say
20 anything, then presumably the decision of the tribunal
21 will be binding.

22 MR. GOLDSTEIN: Fair enough -- no, that's
23 not quite right, Mr. Chief Justice, because remember,
24 imagine that we went to the Argentine courts and for the
25 first time ever we won. So that an Argentine court told

1 the Argentine state: You know, we actually think you
2 should pay this company \$200 million. What would happen
3 then is that Argentina can take the question to
4 arbitration. But nothing about the local court's
5 decision binds anyone. There is never a point at which
6 you can say that the investor will abide by or be bound
7 by a decision of an Argentine court under this system.
8 That's what's so unusual about it.

9 Perhaps I can explain why it's there,
10 because it is odd, I will tell you, and I will tell you
11 that in deciding this question that Argentina is adding
12 to the case in the context of this local litigation
13 provision, it is a very strange vehicle to do that.
14 There are only 1 percent of bilateral investment
15 treaties have this provision. It's a historic remnant.
16 It's in -- of the first 15 bilateral investment treaties
17 that Argentina agreed to, it's in 9 of them. In the
18 subsequent 40 of them, it doesn't appear at all. Again,
19 a good example of how it isn't really a condition on
20 their consent.

21 And it is a remnant of an era of espousal.
22 It used to be the case that before these treaties that
23 an investor in BG's position would have to go to the
24 Argentine courts, and when Argentina first created the
25 investment treaties, it kind of liked the idea that you

1 had to spend some time in the courts. But no one would
2 agree to the treaty -- this is Justice Alito's question
3 earlier. No one would ever agree to these treaties if
4 they didn't know that the decisionmaker would be the
5 neutral, expert arbitrators, and so it just has this
6 you-have-to-wait-in-court feel to it. But it is
7 absolutely critical that we look at the substance of the
8 provision.

9 It's very much, Mr. Chief Justice, like the
10 John Wiley case, which is structured: One, you will
11 have step one of our grievance process; step two, within
12 five days you have to go to our next step of the
13 grievance process; step three, then you can go on to
14 arbitration. It could have stopped, theoretically, at
15 any of those. If you had given up at step one or two,
16 you would well have been bound by it.

17 But the question you are being asked here,
18 if we could just return to if you are trying to decide
19 this de novo or instead defer to the arbitrators'
20 interpretation of whether this litigation provision is
21 binding, is fundamentally when Argentina went into this
22 treaty did it think that the arbitrators were going to
23 resolve the disputes? Right? Did it expect -- it's a
24 question of consent, Justice Sotomayor -- did it expect
25 that the answers to these questions would come from the

1 arbitrators or instead the courts?

2 And when we are talking about the process
3 for getting it going -- Justice Ginsburg talked about
4 the timing, do you have to do this for 18 months, there
5 is another provision here about 3 months. The natural
6 understanding is that there is an arbitration agreement.
7 Argentina knew that it could only get this treaty if
8 there was a guarantee to the investors that they would
9 be able to arbitrate, and so expects the arbitrators to
10 decide this.

11 Imagine Argentina's world, if you will.
12 Argentina's world is that every timing question, whether
13 something has to be filed on blue paper -- I have no
14 idea what the line they want to draw is. Every
15 procedural step is instead a condition on its consent to
16 arbitrate. And that doesn't seem to make any sense at
17 all. There have to be procedural prerequisites.

18 And Argentina would recharacterize this as,
19 as I said, a unilateral agreement. So it's like
20 Argentina says -- posts a sign on a pole and says if you
21 pay me -- if you find my dog I will give you \$100. And
22 so you have to perform an act. And it says we have to
23 perform an act here. We have to go to the local courts
24 or otherwise there is no agreement at all.

25 Well, a few things about that. Arbitration

1 is not a dog, and Article 8, if we just go back to page
2 8A, does not require us to submit it to the local courts
3 at all. This can't be a step that we are required to
4 take because we are not required to take it.

5 If I could just take you to the last two
6 lines of it. It shall be submitted at the request of
7 one of the parties to the dispute. Argentina was just
8 as entitled as us to put this into the local courts as
9 we were. It can't have been an expectation that we had
10 to do something before it would consent to arbitration.
11 So I do think that this is just on all fours with John
12 Wiley for that, for that reason.

13 The only other thing that has been put on
14 the table in front of you is the question of whether
15 Argentina's sovereignty should make a difference here.
16 And this is kind of the second theme of the brief of the
17 United States.

18 And I would say about that that the Foreign
19 Sovereign Immunities Act, which was discussed of course
20 in the last argument, has an express waiver of sovereign
21 immunity for arbitration awards that's controlled here.
22 And if, when the Solicitor General's representative
23 speaks, if that person were to talk about what the
24 treatment of these issues in other countries is, we are
25 unaware again of any country in the world where the

1 arbitral system of review in the courts changes in the
2 slightest because one party happens to be a signatory to
3 a treaty, and that makes a ton of sense.

4 Again, this is fundamentally a commercial
5 relationship. Argentina knew that it couldn't, in the
6 crisis that gave rise to these investment treaties,
7 Argentina couldn't get the money to come into the
8 country if it hadn't agreed to arbitration.

9 JUSTICE SOTOMAYOR: Counsel, what do you do
10 with Wintershall?

11 MR. GOLDSTEIN: So, Your Honor, I think that
12 there are a variety of cases out there that deal with
13 the question in other jurisdictions of different ways of
14 reviewing arbitration awards. And those are unique to
15 their own arbitral system. We've cited decisions
16 from -- a decision from France, for example, that
17 follows your Howsam line.

18 The important point I would make is that
19 there is -- when the other side points to decisions in
20 which a court reviews de novo a jurisdictional ruling of
21 an arbitral tribunal, none of those decisions are unique
22 in any way to the fact that it was an international
23 arbitration or an international treaty arbitration.
24 Their international rule, the U.K. rule, the rule in
25 lots of other countries, is simply about arbitration.

1 The reason that the other side can say that this case
2 might well be reviewed de novo in the United Kingdom,
3 for example, is that the jurisdictional decision in
4 essentially every arbitration of any kind in the United
5 Kingdom will be reviewed de novo. They just have a
6 different approach to these questions.

7 JUSTICE GINSBURG: Isn't that the same thing
8 in France, which is supposed to be a popular place for
9 international arbitration, that in the first instance
10 the arbitrator decides, but ultimately the court can
11 review everything?

12 MR. GOLDSTEIN: That is not the most current
13 view, Justice Ginsburg. In a case called Nihon Plast,
14 which was the most recent court of appeals decision in
15 France in 2004, the court adopted the
16 procedural-substantive distinction that very much
17 parallels Justice Breyer's opinion in the Howsam case.

18 But even if it were the case, it's because
19 the French have their own approach to arbitration. We
20 have a system that says, look, if you can always run off
21 to court because of any of these procedural
22 objections -- it has to be on blue paper, you didn't
23 write -- wait for the -- wait 30 days. Another great
24 example would be in lots of arbitration provisions you
25 have to submit a sufficiently detailed statement of

1 claim to the arbitrators. Well, that would be --

2 JUSTICE KENNEDY: Do I understand your
3 position that in this case you did not have to go to the
4 Federal -- to the Argentine court by reason of the
5 language in this agreement and not by reason of anything
6 that Argentina did?

7 MR. GOLDSTEIN: The language in the
8 agreement meant that what Argentina did disentitled it
9 from being able to rely on this provision. I will take
10 you quickly, if you don't mind, to the provisions of the
11 treaty so you know what I am talking about. There are
12 two of them.

13 One is the one that the arbitrators relied
14 on, and that is in the arbitration provision 8-4, which
15 is on 10A, says: "The arbitral tribunal shall decide
16 the dispute in accordance with the provisions of this
17 agreement, the laws of the contracting party involved in
18 the dispute, including conflict of laws," and then at
19 the end of the sentence, "the applicable principles of
20 international law."

21 So this exhaustion requirement -- it's not
22 even an exhaustion requirement -- the local litigation
23 requirement is subject to international law. And then
24 earlier -- and so three other tribunals have reached the
25 same conclusion as this one, that you, for that reason

1 of that provision, you can't rely in the particular
2 circumstances on the local litigation. And then Article
3 III --

4 JUSTICE SCALIA: Say that again.

5 MR. GOLDSTEIN: Sorry.

6 JUSTICE SCALIA: By reason of --

7 MR. GOLDSTEIN: There are three other
8 tribunals --

9 JUSTICE SCALIA: Yes.

10 MR. GOLDSTEIN: -- that have reached the
11 same conclusion as this one. And that is Argentina
12 can't rely on the local litigation provision because it
13 effectively closed the courthouse doors. It's own
14 conduct disentitled it.

15 Then ten other tribunals have reached the
16 same conclusion based on Article III, the most favored
17 nation provision, because this requirement doesn't exist
18 in the Argentina-U.S. BIT. There are only three
19 tribunals -- to be clear, only three tribunals out of 16
20 or 17 have agreed to enforce it.

21 If I could reserve the remainder of my time.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Ms. Anders.

24 ORAL ARGUMENT OF GINGER D. ANDERS,
25 FOR UNITED STATES, AS AMICUS CURIAE,

1 SUPPORTING VACATUR AND REMAND

2 MS. ANDERS: Mr. Chief Justice, and may it
3 please the Court:

4 The government's position in this case is
5 based on the fact that this case involves a bilateral
6 investment treaty in which the state parties set forth a
7 standing offer to arbitrate in the treaty itself.
8 Because it's the treaty that determines whether there is
9 an arbitration agreement in this case, principles of
10 treaty interpretation have to be used to assess whether
11 there is an agreement.

12 So therefore, applying the domestic law
13 presumptions that are set forth in *Howsam* to this type
14 of investor-state arbitration we think would not be
15 appropriate. *Howsam* shouldn't apply by its terms
16 because the question here is a question of treaty
17 interpretation, not a question of the likely
18 expectations of parties to a domestic commercial
19 contract.

20 JUSTICE SCALIA: I must say I don't follow
21 that line of argument. I mean, it seems to me the
22 treaty sets the framework for an agreement, but it is
23 ultimately the agreement that governs.

24 MS. ANDERS: Well, there is no agreement
25 unless the investor submits the claim to arbitration in

1 accordance with the terms of the treaty, the conditions
2 on the state's consent. So, for instance, in the United
3 States investment treaties and free trade agreements
4 such as NAFTA the United States says that an investor
5 may submit a claim to arbitration only if it first
6 satisfies certainly procedural conditions.

7 JUSTICE BREYER: I don't -- I can't find --
8 it seems to me this has sprung, full blown, from
9 someone's brain, but is not well embedded in any law
10 that I could yet find. That is the -- this is not meant
11 to be rude. I'm trying to figure out where this idea of
12 the consent thing comes from. After all, it apparently
13 comes from our Korean treaty and maybe one other, but I
14 can't find it in -- I can't find -- the question in the
15 case is, is this particular agreement, namely an
16 agreement to go to the court first -- shall we count it
17 as that kind of matter as to whether this is arbitrable
18 that goes to a judge? Or rather is it that kind of
19 procedural Howsam, Wiley type thing that goes to an
20 arbitrator.

21 Now, we did our best I think to try to
22 explain how to distinguish the one from the other in our
23 precedent. Now, you use different words. You use these
24 words about "consent," which doesn't appear anywhere in
25 this treaty, but I think you are trying to get at the

1 same thing. And if you are not trying to get at the
2 same thing, why? Why not? What are you trying to get
3 at?

4 MS. ANDERS: Well, I think the reason that
5 applying Howsam and its presumption that certain
6 procedural-type requirements like notice requirements
7 would be decided by the arbitrator, the reason that
8 would risk subjecting a state to suit without its
9 consent is that in investment treaties, what the states
10 do is they say we will be subject to arbitration under
11 certain circumstances. But they also place limitations
12 on their consent to that adjudication in order to
13 satisfy important sovereign --

14 JUSTICE SOTOMAYOR: Are you suggesting that
15 they --

16 JUSTICE BREYER: So you suggest it was the
17 State that said, Look, they don't say anything in the
18 treaty, but it turns out, for purposes of counting time
19 limits, filing a brief, they count Saturdays, but they
20 don't count Sundays. All right? And the government
21 says, quite sincerely: If we had known that they were
22 going to do that, we never would have agreed.

23 I am trying to get an example of something
24 that is as purely procedural as I can imagine, something
25 no one in his right mind would think a judge, rather

1 than an arbitrator, should decide. But under your rule,
2 you're going to say the judges decide that and not the
3 arbitrators, and that is what is bothering me about your
4 rule.

5 MS. ANDERS: Well, they decided them because
6 the state sets forth in the treaty itself that these are
7 limitations on their consent.

8 JUSTICE BREYER: By the way, in the treaty
9 itself, you can have dozens of things, as was true of
10 Howsam. We will follow the UNCTAD, whatever that is,
11 the UN or AAA rules, and you look up AAA Rule No.
12 1872(b) and it says just what I said. Okay? So now
13 it's in the treaty itself, and why should that matter?

14 MS. ANDERS: Because, for instance, what the
15 United States has done in negotiating its treaties and
16 free trade agreements for decades, in every one of these
17 agreements is it has said: We need to limit the
18 circumstances in which we.

19 JUSTICE BREYER: I have only found two, by
20 the way. One was Korea and I can't remember the second.

21 MS. ANDERS: Well, we cited in our brief the
22 Korea and --

23 JUSTICE BREYER: But in any case --

24 MS. ANDERS: -- and NAFTA.

25 JUSTICE BREYER: -- you explicitly say,

1 these are our conditions of consent, and you raise the
2 question to me, you don't answer it. Because suppose
3 one of those conditions had to do with blue paper rather
4 than white paper. Suppose that they were just what I
5 said. Nobody still would think the United States was
6 resisting arbitration on such a matter.

7 MS. ANDERS: Well, to give you an example of
8 a condition that we've actually used, NAFTA requires as
9 a condition on the United States' consent to arbitrate
10 that the investors, when they submit the claim to
11 arbitration, they waive their right to pursue other
12 remedies, and that satisfies a very important sovereign
13 interests that we have and not being subject to parallel
14 proceedings --

15 JUSTICE BREYER: So here you are putting
16 yourselves, I gather, that the U.N. rules, the AAA
17 rules, the scholars who file our briefs, the doctrine of
18 competence-competence, whatever that might be, is in
19 fact far broader than what they want. It submits
20 virtually every question of arbitrability to the
21 arbitrator. And the United States is taking a position
22 quite contrary, I guess, to most of the world.

23 MS. ANDERS: I don't think that's correct,
24 Justice Breyer. What we are -- what we are saying is
25 that when a position goes to consent whether it is

1 fulfilled or not goes to whether --

2 JUSTICE GINSBURG: How do we know that? How
3 do we know that? The question is: Is this litigation
4 preliminary, going to the Argentinian court, is the
5 litigation preliminary a condition on the consent to
6 arbitrate a dispute? What is the answer to that
7 question in the view of the United States?

8 MS. ANDERS: That's a question of treaty
9 interpretation and this Court has said that you look to
10 first the text, but you also --

11 JUSTICE GINSBURG: Well, let's say you've
12 done all that. And what does the United States -- the
13 United States is saying: Court, you should look to all
14 these sources, and then answer the question: Is the
15 litigation preliminary a condition on consent to
16 arbitrate the dispute? So after looking at the sources
17 that the United States is telling the Court it should
18 look to, what is the answer of the United States to that
19 question?

20 MS. ANDERS: Well, the United States doesn't
21 feel that it is appropriate for it to express a
22 definitive view on that question now because the parties
23 have not argued this really as a question --

24 JUSTICE KAGAN: I would be more open about
25 that argument, Ms. Anders, if you had at least suggested

1 how we should go about deciding that question?

2 MS. ANDERS: Yes.

3 JUSTICE KAGAN: Because you read this
4 through your brief, and I don't know what a
5 consent-based objection is. In fact, you say
6 consent-based objections can look very, very procedural
7 and it's still consent-based, or it might not be
8 consent-based. So all the techniques that we use in the
9 Howsam-First Options line of cases seem to go out the
10 window and not be replaced with anything else.

11 MS. ANDERS: I don't think that's right. I
12 think what you look to, just looking at the text, you
13 can look to whether the text expressly calls something a
14 condition on consent. So, for instance, in NAFTA, NAFTA
15 says that there are certain conditions --

16 JUSTICE SCALIA: That's no different from
17 the rules we apply when there isn't a treaty, of course.
18 I mean, if the arbitration agreement said that, that
19 the -- you know, the agreement is conditioned on, of
20 course. So what else? What different rules would you
21 apply other than the common sense rules that we use for
22 arbitration agreements?

23 MS. ANDERS: Well, you would also -- you
24 would also look possibly for mandatory language in the
25 treaty; so, for instance, if the treaty says that --

1 JUSTICE SCALIA: We would look to mandatory
2 language in the arbitration agreement.

3 MS. ANDERS: I think that's right, but the
4 problem with applying Howsam is that it's a presumption
5 that is purely based on the nature of the requirement,
6 so the fact that it is a notice requirement, the fact
7 that it is a time limit, that that means that it's
8 procedural and, therefore, the arbitrators would decide
9 unless it is clearly stated --

10 JUSTICE ALITO: What about this -- what
11 about this principle. If something, if some requirement
12 seems to serve virtually no purpose, it's unlikely to be
13 a condition of consent; would you accept that?

14 MS. ANDERS: No, I think that is still --
15 that would be grafting on a default term onto the treaty
16 that may not reflect the treaty parties' intent. I
17 think when states negotiate for these conditions on
18 consent, what they are looking to are --

19 JUSTICE ALITO: Well, there is nothing in
20 the treaty that talks about consent at all, so we have
21 to decide whether some requirement is a consent, is on
22 something which consent is conditioned, or it's just a
23 procedural requirement that would be decided by an
24 arbitrator. Would you not -- would you disagree with
25 the proposition that if something really is trivial, it

1 doesn't seem to accomplish much of anything. It's a
2 historical vestige. It's unlikely to be a condition of
3 consent.

4 MS. ANDERS: I think one of the things the
5 Court could look to is the nature of the requirements,
6 does it serve sovereign functions, but I think in doing
7 that analysis it's important to look to what the state
8 says are the functions that its requirements are
9 serving. So for instance, our notice requirement in our
10 treaties, they serve the purpose of giving us advance
11 notice of particular claims and time to correct problems
12 that may have been caused that we can correct and,
13 therefore, avoid arbitration to begin with.

14 So I think you would look to the nature of
15 the requirement, the text of the treaty, whether it's
16 mandatory or whether it's expressly conditional. You
17 can also look, obviously, to what this Court has called
18 its interpretation, so that would be the
19 postratification understanding.

20 If this were our treaty, we would bring in,
21 you know, the letter of transmittal that the State
22 Department had provided after it had negotiated the
23 treaty. You know, there would be a lot of information
24 like that that a Court could look to. And I think as
25 the Court noted in the Sumitomo case, you can have

1 similar language in similar treaties that have different
2 meaning because there is different negotiating history
3 or the aids to interpretation point different ways.

4 So our point here is that it's a matter of
5 treaty interpretation and that you simply have to look
6 to the --

7 JUSTICE BREYER: What's wrong with the House
8 -- and I'm being a little defensive here -- but I didn't
9 think there was the presumption you are talking. I
10 thought it said there's a presumption about that
11 procedural rule, and I thought important language was
12 the language that the Court has found the phrase, i.e.,
13 for the judge applicable in the narrow circumstance
14 where contracting parties would likely have expected a
15 Court to have decided the gateway matter. Now, that, it
16 seems to me, a little bit easier to work with than this
17 notion of whether a state gave consent or didn't give
18 consent or it doesn't mention it in treaty.

19 CHIEF JUSTICE ROBERTS: Briefly.

20 JUSTICE BREYER: Thank you.

21 MS. ANDERS: I think in the treaty context,
22 the state's parties are not agreeing, and they don't
23 have expectations with respect to the allocation of
24 authority between the court and the arbitrator. What
25 they do agree to are conditions on consent that limit

1 the terms on which the state may be subject to
2 arbitration.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Mr. Blackman?

5 ORAL ARGUMENT OF JONATHAN I. BLACKMAN

6 ON BEHALF OF THE RESPONDENT

7 MR. BLACKMAN: Mr. Chief Justice and May it
8 please the Court: This is a contract formation case and
9 it's a case that is decided properly by the court below
10 whether you apply first options or whether you apply
11 treaty principles.

12 JUSTICE GINSBURG: Mr. Blackman, may I ask
13 you preliminarily, on your view, what happens next. Can
14 this party -- and suppose you're right -- can the BG
15 Group institute an action in Argentina and if it's not
16 resolved within 18 months invoke arbitration?

17 MR. BLACKMAN: Absolutely, yes. And my
18 friend conceded that. There is no barrier.

19 JUSTICE GINSBURG: And if it is resolved,
20 but not to BG's liking then, thereto, BG can invoke
21 arbitration.

22 MR. BLACKMAN: That's absolutely correct,
23 Your Honor.

24 JUSTICE GINSBURG: Well, doesn't that mean
25 that treaty partners agreed that only an arbitration

1 panel can conclusively resolve this dispute?

2 MR. BLACKMAN: What the treaty partners
3 agreed to here, Justice Ginsburg, was a condition, a
4 precondition on their respectively derogating from their
5 sovereignty. Absent the bilateral investment treaty,
6 there is no basis on which an investor could ever compel
7 one of these states to arbitrate its claims, and its
8 only remedy would lie in the courts of that state.

9 JUSTICE GINSBURG: I don't get your answer
10 to my question. Am I wrong in thinking that under this
11 treaty, the ultimate decisionmaker is the arbitrator.
12 There is no provision for the court to be the ultimate
13 arbiter of the controversy?

14 MR. BLACKMAN: It depends on the issue. The
15 arbitrator will decide the merits, assuming the offer to
16 arbitrate has been accepted according to its terms,
17 which was never done here. After that, depending on the
18 issue, there will or will not be judicial review of some
19 kind, and what this court said as a matter of U.S. law
20 in first options and what all the other countries say,
21 and our brief really was not disputed on that point, is
22 that issues of jurisdiction, whether a contract was ever
23 formed, whether there ever was an agreement to arbitrate
24 is ultimately an issue for a court to independently de
25 novo decide.

1 JUSTICE SCALIA: Why are you complaining
2 about the other party not initiating proceedings in the
3 Argentine courts when if you really wanted those
4 proceedings to occur, you could have initiated
5 proceedings in the Argentine courts?

6 MR. BLACKMAN: First of all, as First Option
7 said, we didn't need to do that. First Option was very
8 clear that it did not require someone who was resisting
9 arbitration and objecting to the arbitrator's
10 jurisdiction, because there is no agreement to run to
11 court. Which would also be very bad policy. We don't
12 want people running to court. We want them to try in --
13 in arbitration, but subject to judicial review, if the
14 arbitrators get it wrong on the fundamental
15 jurisdictional question.

16 JUSTICE SCALIA: I must say I
17 don't understand that. When -- when you're appealing to
18 a condition for the thing to occur and you can bring
19 that about as -- as readily as the other side, it's --
20 dog in the manger comes to mind.

21 MR. BLACKMAN: No. We weren't the aggrieved
22 party, Justice Scalia. We were not seeking relief.
23 They're the ones who were complaining. We're -- we're
24 the putative defendant, the respondent. There'd be no
25 reason for us to go to court.

1 What our offer to them was, first of
2 all, you have to go to our courts for 18 months. And
3 then it says in A2, and it refers specifically to "the
4 aforementioned disputes," i.e., those disputes that have
5 been brought to our courts, "those aforementioned
6 disputes can then be arbitrated -- quote -- under the
7 following circumstances." And the first of those, in
8 A2 -- A1 is waiting the 18 months. And then quite
9 importantly, or in A2(b) the parties can separately
10 agree to arbitrate. Well, if they don't separately
11 agree to arbitrate, which did not occur here, you have
12 to go through A2, A1, which is either wait the 18 months
13 so the local court can try to deal with it -- I'll tell
14 you why that's important in a moment -- or the local
15 court does actually adjudicate it and then the party
16 who's unhappy with that does have the right then, and
17 then only, to go to arbitrate. And that's the temporal
18 sequence that the D.C. Court talked about. It's set
19 forth in the structure of the treaty that the Chief
20 Justice talked about. You go one, two, three. They're
21 in order for a reason.

22 JUSTICE GINSBURG: That's the D.C. Circuit
23 treated this as there is no agreement until you go to
24 the local court first.

25 MR. BLACKMAN: That's correct.

1 JUSTICE GINSBURG: The argument is that
2 there is an agreement to arbitrate. That will be the
3 method of dispute resolution. You have to take certain
4 steps before. So, you have to go to the local court.
5 But why isn't the dispute settlement mechanism decided
6 upon by the parties' arbitration, and then what you have
7 to do before that is in the nature of a procedural
8 condition?

9 MR. BLACKMAN: I don't -- I don't think
10 that's the correct analysis, Justice Ginsburg, because
11 the dispute resolution mechanism which is, again, is an
12 offer made by two States to each other to --

13 JUSTICE KAGAN: Mr. Blackman, can I just ask
14 you to assume for a second that that's not so. If you
15 had -- if BG and the Republic of Argentina had itself
16 entered into this agreement, would you agree that this
17 is a typical Howsam kind of provision?

18 MR. BLACKMAN: I would actually not, Your
19 Honor. Howsam -- let's talk about the facts of Howsam.
20 Howsam was -- there was no dispute that there was a
21 contract between the Howsams and the broker/dealer to
22 arbitrate under the NASD rules. Those NASD rules
23 themselves contained an eligibility requirement that the
24 claim can't be more than six years old. And those same
25 rules also said the arbitrators get to decide about the

1 interpretation and application of our rules. So it was
2 a classic situation --

3 JUSTICE SOTOMAYOR: So how do you -- how do
4 you distinguish John Wiley, which I think --

5 MR. BLACKMAN: John Wiley --

6 JUSTICE SOTOMAYOR: -- has two components
7 and the second cuts against you.

8 MR. BLACKMAN: And the first cuts in our
9 favor, Justice Sotomayor. That's exactly right. My
10 friend kept talking about John Wiley as involving only
11 issues of procedural preconditions. But the first part
12 of John Wiley where the Court says quite clearly, you
13 have independent judicial review, has to do with whether
14 there is an agreement to arbitrate at all between the
15 parties.

16 In that case, the parties sought to be
17 pulled into arbitration against its will was a successor
18 and the issue which the Court independently decided was,
19 is that successor a party.

20 JUSTICE BREYER: Everybody's getting to the
21 same question, I think, but I haven't quite heard the
22 answer. Of course, you're right in many countries. The
23 question of arbitrability, that is to say, is there a
24 contract is for the Court. In an investment treaty, I
25 can find a lot of authority that says whether this

1 counts as an investment is a matter for the Court.

2 But the question in front of us, is this
3 that kind of decision? Is it one for the Court? Or is
4 it one for the arbitrator? And to just summarize why it
5 might be for the arbitrator, A, it's procedural but
6 that's not sufficient. B, it refers to UNC -- whatever
7 it is -- UNCITRAL?

8 MR. BLACKMAN: UNCITRAL.

9 JUSTICE BREYER: Yes. It refers to their
10 rules. Their rules provide all matters of competence
11 over the arbitrator. The scholars have done exhaustive
12 work saying most countries think that. The Doctrine of
13 Competence-Competence goes further. And you also have
14 the AAA rules which say the same thing. So those are
15 all against you.

16 For you is the position of the -- the item
17 in the document, first and foremost. All right. I'm
18 trying to summarize what I've got as the arguments for
19 and against. Now, what do you say to make me think
20 there's even more for --

21 MR. BLACKMAN: I agree with you. The text
22 is key and the text controls. However, I strongly
23 disagree, with all respect, to your statements about
24 competence-competence and what other countries do,
25 because we have shown essentially without dispute here,

1 and this in the third restatement and it's in the case
2 law of all these other countries that
3 competence-competence or competence-competence, or if
4 you say it in German with a K, all that means is the
5 arbitrators get the first crack --

6 JUSTICE BREYER: So I agree that's not --

7 MR. BLACKMAN: -- it's not the last word.

8 JUSTICE BREYER: But those are not relevant.
9 I mean, those are relevant. I'm saying they would
10 farther. And I think in what I've seen so far, it gives
11 on certain kinds of procedural gateway questions,
12 deference to the arbitrator, which is what is at issue
13 here.

14 And now -- now I'm back to the same
15 question. What is your evidence from this contract that
16 this is not the kind of gateway question that is for the
17 arbitrator?

18 MR. BLACKMAN: This is -- and, again, my
19 friend conceded this -- this is an offer to a unilateral
20 contract. How does a unilateral contract get formed?
21 Here we're back at our basic contract formation
22 principle.

23 JUSTICE SCALIA: I don't think he conceded
24 it. He conceded that that was your argument.

25 MR. BLACKMAN: I think that I misheard.

1 (Laughter.)

2 JUSTICE SCALIA: There's a subtle difference
3 between the two.

4 (Laughter.)

5 MR. BLACKMAN: I misheard him. I misheard
6 him then, and I apologize, Justice Scalia. But this is,
7 in fact, if you apply ordinary contract formation
8 principles, as the Court says you must do in First
9 Options and in Granite Rock, if you apply those
10 principles, this is classic offer. And the offer, we
11 all know, has to be met by an acceptance on those terms,
12 not on other terms.

13 JUSTICE ALITO: Well, you said a few minutes
14 ago you were going to explain why this litigation
15 requirement is important. And that is important to me
16 because I don't see what it accomplishes. I can
17 understand a waiting period, but this is more than a
18 waiting period. You have a party who doesn't want to
19 litigate in the -- in the courts of Argentina. It
20 doesn't think it's going to get a fair shake there.
21 What is the point of requiring this -- now, I
22 understand, it's a requirement. But if it's not very
23 important, if it isn't going to achieve anything, that
24 seems to me to weigh against the conclusion that it's
25 a -- that it is a condition of consent.

1 MR. BLACKMAN: It is very important. First
2 of all as a factual matter, this type of requirement
3 appears in about 8 percent of bids and it is most
4 prevalent in UK bids. So this is not some weird
5 Argentine thing. The UK thinks this is important. Why?
6 A number of reasons.

7 First of all, a lot of these investment
8 disputes, in fact, the vast majority, involve challenge
9 to some local law, some local regulation. And you want
10 to have the local court have the first look at
11 construing it, just as you would construe a statute
12 before you reach the constitutional question. The local
13 court can illuminate the dispute, the investment treaty
14 dispute by saying what does our law actually mean? Is
15 our law legal under our Constitution? That's one thing.
16 That's very important.

17 JUSTICE ALITO: Let me just interrupt
18 before -- before the time expires. But I don't
19 understand -- I don't know what the procedure is in
20 Argentina. Let's assume their civil procedure is like
21 ours. So you say they have to file a complaint. All
22 right. They file a one-page complaint. They do the
23 minimal necessary to keep the case alive in court.
24 Maybe they don't even do that, because they don't care;
25 they don't want the thing to be -- to be decided. All

1 they're doing is running out the 18 months. What is
2 achieved by that?

3 MR. BLACKMAN: Well, but that's their
4 choice, which they, in fact, made here not to avail
5 themselves of the procedure --

6 JUSTICE ALITO: Well, let's say they avail
7 themselves of the procedure in only the most perfunctory
8 way so as to satisfy the 18-month requirement. But not
9 for the purpose --

10 MR. BLACKMAN: Why should my client be
11 punished because they don't diligently pursue a
12 requirement of our offer. They say actually in their
13 brief in one sentence, we accepted the offer and in the
14 next sentence virtually --

15 JUSTICE ALITO: You're really -- you're not
16 answering --

17 MR. BLACKMAN: -- they say we elected not to
18 follow --

19 JUSTICE SOTOMAYOR: Could you finish your
20 answer.

21 JUSTICE ALITO: You're not answering my
22 question. What is -- if they do not litigate the matter
23 in -- in such a way as to get a decision on any of these
24 local law issues, they just keep it alive perfunctorily
25 for 18 months, what is achieved by that?

1 MR. BLACKMAN: Well, they have -- well,
2 they've complied with it. But more importantly, it's
3 what could be achieved if they wanted to achieve
4 something, which is, as I said before, constructions of
5 local law that would bear on the investment dispute.
6 That's important.

7 Narrowing issues, making determinations
8 which are not binding, but which are nonetheless perhaps
9 instructive and helpful to the arbitrators. That's
10 another issue.

11 Settlement is another issue. We talked
12 about waiting. We have EEOC. You first have to go to
13 the -- to the commission because this sometimes gets
14 settled. If it doesn't get settled, as I say, it can be
15 narrowed. All kinds of things that would be helpful to
16 an ultimate arbitration. And they could win, by the
17 way. They could win.

18 JUSTICE KAGAN: Mr. Blackman, could you sort
19 of indulge an assumption for me? And the assumption is
20 that if this provision were in an agreement between two
21 parties, we would treat it as a Howsam-John Wiley kind
22 of provision; in other words, we would say that this is
23 just a procedural rule. That's the side of the line it
24 falls on.

25 So my question to you is: Why should this

1 be any different? You're treating yourself as though
2 you never made an agreement. But, in fact, you did make
3 an important agreement. You made an agreement with the
4 U.K., the entire point and purpose of which was to allow
5 U.K. citizens to bring certain kinds of disputes before
6 an arbitrator. So once we have a U.K. citizen with the
7 right kind of dispute, it seems to me you're just in the
8 position of any other person who's agreed to this
9 provision. And in -- in my assumption, if it's a John
10 Wiley type provision, it should go to an arbitrator.

11 MR. BLACKMAN: I have a number of responses
12 to that, Justice Kagan. First of all, I don't think it
13 is just a John Wiley sort of --

14 JUSTICE KAGAN: I know. But I said just
15 assume that for me. And tell me why you are in a
16 position where some other result should go into effect.

17 MR. BLACKMAN: Well, it's kind of assuming
18 the conclusion if this is just John Wiley, that's a hard
19 case for us. But the structure of the treaty, with all
20 respect, demonstrates it's not. And that would be true
21 even if this was, in fact, a contract between us and BG.
22 If we had a contract with BG that says you have to sue
23 us first, okay, and then after 18 months, you can
24 arbitrate with us, I don't think we would just assume
25 that that translates into you have to arbitrate with us.

1 They're really suggesting here, Justice Kagan, that this
2 elaborate provision boils down to Argentina promises to
3 arbitrate all investment disputes with BG. That's what
4 it says.

5 CHIEF JUSTICE ROBERTS: Well, the problem
6 is --

7 JUSTICE KAGAN: Please.

8 CHIEF JUSTICE ROBERTS: You're -- it's a
9 point on which I'm regularly confused. You just said if
10 we had this provision in a contract with -- a private
11 contract that said you must sue us, but there you have
12 already a formed separate agreement to arbitrate. And
13 it seems to me clear that those, what do you call them,
14 preconditions or whatever, that that -- the argument
15 that that's for the arbitrator to decide. They may well
16 decide that, you know, you didn't comply so you don't
17 get to arbitrate.

18 But it seems to me, typically, under First
19 Options and Howsam that is for the arbitrator. Now,
20 what makes it distinct in your case? What, is it just
21 the order that they're in or what? Or is it something
22 special about a sovereign's agreement?

23 MR. BLACKMAN: It's -- it's kind of all of
24 the above. It's the text, the fact that it is, in fact,
25 an offer by a sovereign rather than an originally

1 bilateral agreement with the private party. But it's
2 also -- and this is much of what the case hinges on, is
3 this an issue of contract formation. If it's an offer,
4 it has to be accepted on its terms. And those are
5 formation issues that go into construing an existing
6 agreement.

7 CHIEF JUSTICE ROBERTS: It all gets down to
8 the question, how do we tell, you know, the contract
9 formation from the blue paper, right? I mean, if it
10 says, you know, we agree to arbitrate and we use these
11 rules and those rules say you have to have it on blue
12 paper and it's not on blue paper, they say, oh, we
13 didn't agree to have it not on blue paper. How do we
14 distinguish between those two scenarios?

15 MR. BLACKMAN: I -- I think you have to kind
16 of look at the language. And here, with all respect, it
17 was clear to the circuit. I think it's -- we think it's
18 clear that the consent, which remember, absent which
19 there would be no arbitration, this is a sovereign,
20 going back to sovereign immunity in our earlier case.

21 Where consent is expressly put -- the word
22 "consent" is not used -- but the clear language of the
23 text and the implications to be drawn from it clearly
24 show that the sovereign is not willing to arbitrate
25 absent the 18-months' recourse to its courts, you should

1 view that as a condition precedent to a unilateral
2 contract that must be accepted by action. And the
3 action is to bring this suit in the local court and wait
4 18 months. An analogy, which may not be helpful, but I
5 thought of it. So I'll give it to you.

6 If I'm looking for someone to paint my house
7 and I make an offer to him, I say, I'll hire you to do
8 it if you post the bond. That's an offer to the
9 unilateral contract. He has to post the bond. He can't
10 say, you know, I really don't like the bond or you want
11 a \$20,000 bond, which isn't my offer, but I'll give you
12 ten, now we have a contract.

13 But let's assume we now make the contract
14 and I have progress payments in the contract. Now we
15 have a signed agreement between us that says, I'll pay
16 you, you know, \$10,000 per floor. That's the kind of
17 condition precedent within the contract that Howsam,
18 perhaps, addresses. But the first one is the formation
19 issue that First Options addresses, did the Kaplans ever
20 make the contract?

21 JUSTICE GINSBURG: Well, what would
22 happen -- what would happen in this case if there was a
23 judge's strike, so none of the courts were operating in
24 Argentina? What would happen then?

25 MR. BLACKMAN: Well, all you have to do is

1 actually file. So even if the courts weren't operating,
2 which is an extreme hypothetical, all you need to do is
3 file and wait the 18 months.

4 JUSTICE KENNEDY: No, but the clerk's office
5 is closed.

6 MR. BLACKMAN: The clerk's office is closed,
7 too?

8 (Laughter.)

9 MR. BLACKMAN: I suspect that the -- there
10 would be a very strong case to be made to the
11 arbitrators that if the claimant, unlike here, did
12 everything it could to comply, and here remember, the
13 claimant deliberately, quote "elected not to comply,"
14 the arbitrators might well find that the condition was
15 excused and a reviewing --

16 JUSTICE KENNEDY: No, you can't -- no, you
17 can't say that. You can't say that. There is no
18 arbitration agreement under your -- it would still be
19 for the court.

20 MR. BLACKMAN: Well, there could be an
21 arbitration in the first instance.

22 JUSTICE KENNEDY: Your -- your whole
23 argument gives me intellectual whiplash. You have to
24 say --

25 (Laughter.)

1 JUSTICE KENNEDY: -- well, you have to --
2 you have to go first to the court, because that's what
3 the arbitration mechanism provides, but there's no
4 arbitration mechanism.

5 MR. BLACKMAN: No. But in this case what
6 would happen would be what happened in First Options and
7 often happens, one party invokes arbitration and the
8 other party says, I never agreed to arbitrate with you.
9 It would be very imprudent for the defendant in that
10 case to do nothing and default. And you said in First
11 Options specifically, you don't need to do that.

12 So you present the issue to the arbitrators
13 and you would then argue that there's no agreement and
14 the arbitrators would say, well, there is an agreement
15 or a condition was excused. And ultimately, on judicial
16 review, on your facts, undoubtedly a court would be
17 likely to find, well, of course, they did their best.
18 They tried to comply with a condition. But that doesn't
19 affect, to use my friend's terminology, the question
20 presented, which is who decides in the first instance
21 and then finally.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Goldstein, five minutes.

24 REBUTTAL ARGUMENT OF THOMAS GOLDSTEIN

25 ON BEHALF OF THE PETITIONER

1 MR. GOLDSTEIN: Mr. Chief Justice, I do have
2 a rule that distinguishes the A4 paper and that rule
3 should be, and we think it does follow from the analysis
4 of Howsam, which is just a thinking about when people
5 make agreements and what they expect is that an
6 arbitration agreement is formed and a party consents to
7 arbitration when they guarantee that the ultimate
8 decision can be made by an arbitrator and not a court.
9 It's form selection. We're going to have the ultimate
10 decision made by the arbitrator.

11 And that rule is applied in the investment
12 treaty context as follows. And it is, there is consent
13 to arbitration when the investor is guaranteed that
14 their claim can ultimately be decided by a court and the
15 State can't force it to be ultimately -- excuse me -- by
16 an arbitrator, and the State can't force it to
17 ultimately be decided by a court.

18 And I'll show you where that rule, how that
19 line is divided in this treaty. And that is, I gave you
20 the three conditions at the beginning.

21 Those are not A4 paper. You have to be a
22 U.K. investor, you have to have a treaty claim, you have
23 to be suing another party to the treaty. And if those
24 aren't true, then there is no arbitration agreement and
25 Argentina has every reason to say I have no idea why

1 these arbitrators are here, this person's from Ecuador,
2 not from the United Kingdom.

3 But at that point, once we are a U.K.
4 investor and we have invested in Argentina, that's the
5 performance that is required, once we did that, then we
6 are protected by Article 8, the dispute resolution
7 provision. And you look at Article 8 and you, okay,
8 does that guarantee that you have the right to
9 ultimately have it decided by the arbitrators, or can
10 Argentina actually insist that it will be ultimately
11 decided by a court. And it's the former. We made
12 clear, I think, and nobody disagrees, that they can't
13 force us to go into court and wait for that ruling, take
14 that ruling in any way, shape, or form.

15 Now my friend says that, look, this is like
16 a unilateral agreement, and this is like where I say
17 I'll hire you to paint my house if you post a bond.
18 Well, that is a terrible argument for them because this
19 treaty reads as if he was saying, I'll let you paint my
20 house if you post the bond or I post the bond. Because,
21 remember, the thing they want us to perform on,
22 supposedly, is something they can do, too. Who ever
23 heard of unilateral agreement that was conditioned on
24 either party doing something?

25 JUSTICE SCALIA: They say that only the

1 complaining party can bring a lawsuit. Evidently they
2 have no declaratory judgment procedure in Argentina.

3 MR. GOLDSTEIN: That, I don't believe that
4 is correct, Justice Scalia.

5 JUSTICE SCALIA: I was going to ask them
6 that.

7 MR. GOLDSTEIN: I see. I believe the
8 answer, when this was put to them, his answer to your
9 question was I just don't have to do that. His view
10 was, and it's a perfectly fine position to take, and
11 that is he's not going to help me win my case. Fine.
12 But it does describe whether this is a condition of
13 consent, that he could do it too. And if he could do it
14 too, it can't be something that he is waiting for me to
15 perform on at all.

16 I would say that on this question of whether
17 it has any value, that all that you got, Justice Alito,
18 was that if I were to pursue the case in the Argentine
19 courts maybe something would happen, we might learn a
20 little about Argentine law. First thing's first. I
21 don't have to pursue it. Remember, his whole point is,
22 when asked if the courts were closed, said I just have
23 to put the piece of paper down.

24 So if this were a treaty provision that
25 actually involved litigation, involved exhaustion of

1 remedies where we might learn something that might be a
2 different case. But this is a waiting period in an
3 Argentine court. And remember as well, these are treaty
4 claims and it is perfectly clear and undisputed that the
5 local court, even if it decided the treaty claims, their
6 agreement would not bind the arbitrators. And so he
7 says, well, hey, we might win.

8 CHIEF JUSTICE ROBERTS: I'm not so sure you
9 don't have to do anything, you can just submit the
10 paper. It says you have to submit it to the decision of
11 the competent tribunal. And if the submission requires,
12 okay, now you have to file your brief, and you say, I'm
13 not going to, I'm not sure that you've submitted it to a
14 tribunal for its decision.

15 MR. GOLDSTEIN: Well, Mr. Chief Justice, I
16 would then say that's a possible argument. But let's
17 figure out who we would ordinary expect to figure that
18 out. This is a treaty provision. It's the experts
19 involved in treaty interpretation, are the three neutral
20 arbitrators, who really do this every day. It's what
21 they do. They have enormous expertise in interpreting
22 treaties.

23 And so you might say, and it would be a
24 perfectly valid interpretation, well, maybe submitting
25 it to the local court requires some activity. But do we

1 really expect when the U.K. and Argentina ended this
2 treaty, that it would actually be the Supreme Court of
3 the United States that would be deciding that question,
4 or instead, the arbitrators. And if you believe it's
5 the arbitrators then we win, because it's the kind of
6 procedural question that we put to them purposely.

7 CHIEF JUSTICE ROBERTS: That seems that
8 you're not totally circular in begging the question. I
9 don't know that a sovereign would be anxious to submit
10 its sovereignty to three international law experts.

11 MR. GOLDSTEIN: And surely they wouldn't,
12 Mr. Chief Justice, but that's the point of the treaty.
13 Remember my friend said, look, if it weren't for this
14 treaty we could never sue them. That's the reason
15 there's the treaty because if there wasn't the treaty
16 and we couldn't get relief from them, we would have
17 never invested.

18 And so the whole point of this treaty is to
19 put these disputes into arbitration. There is no
20 special substantive rights in this treaty. They are all
21 customary international law. The thing that matters in
22 this treaty, the thing that matters in all the treaties
23 is I don't have to have my case decided by an Argentine
24 court.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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The case is submitted.

(Whereupon, at 12:11 p.m., the case in the above-entitled matter was submitted.)

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