No. 12-138

IN THE
Supreme Court of the United States

BG GROUP PLC,

Petitioner,

v.

THE REPUBLIC OF ARGENTINA,

Respondent.

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

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

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INTEREST OF *AMICI CURIAE*

Amici are professors of law and lawyers engaged in the field of international arbitration.[1] Their work (as counsel, arbitrators, or scholarly commentators) includes the arbitration of investment disputes under the provisions of a bilateral or multilateral investment treaty.[2]

The primary interest of *amici* is in the orderly operation of a system of international dispute resolution that has become an important component of international relations. *Amici* believe that the decision of the United States Court of Appeals for the District of Columbia Circuit carries with it a risk of disruption of the established system for resolving threshold issues in investment treaty arbitration. By imposing United States contract and arbitration law, rather than international law, on the construction of a treaty between two sovereign states, the Court of Appeals put the United States

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1. The parties have consented to the filing of this brief. Pursuant to Rule 37(6), counsel for *amici* certify that no party or counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

2. Amici are identified in Appendix A. The affiliations of amici are shown for identification only; amici have joined together as individuals to file this brief.

courts on the wrong course for considering awards entered in investment treaty arbitrations. The undersigned *amici curiae* urge the Court to assure that such awards are treated with the respect that sovereign states signing investment treaties have a right to expect.

SUMMARY OF ARGUMENT

The fundamental problem with the Court of Appeals' decision is that it disregards an international arbitral tribunal's interpretation of the bilateral investment treaty between the United Kingdom and the Republic of Argentina under the rules of international law chosen by those states. Instead, the Court of Appeals substituted a parochial interpretation of the treaty derived from case law construing commercial contracts under the Federal Arbitration Act. The parties to that treaty intended and expected the entirety of that instrument, including the investor-state arbitration clause, to be interpreted and applied by an international arbitral tribunal in accordance with international law.

The Court of Appeals' misreading of the intent of the sovereign parties as to whether courts or arbitrators should play the primary role in interpreting and applying the provisions of their investment treaty not only threatens to undermine the effectiveness of the system of investment treaty arbitration, which depends on appropriate judicial deference to arbitral decisions under those treaties, but also threatens the balance defined by this Court for reviewing commercial arbitration awards. The District Court properly deferred to the arbitral tribunal's interpretation and application of the treaty, conducting only a limited review of the arbitral panel's decision.

United States arbitration law would benefit if the Court were to take this opportunity to confirm that international arbitrators' determinations of threshold objections in investment treaty arbitrations are entitled to deference from the courts when the sovereign parties have expressed in a treaty their intention for arbitrators to decide such questions.

INVESTOR-STATE ARBITRATION

Bilateral investment treaties ("BITs") have become a core component of the system of international law underpinning the flow of private investments from one country into another. Sovereigns rely on these treaties to encourage foreign investment, while investors rely on them to obtain legal protections for their investments.

Today, there are nearly 3,000 BITs in effect between pairs of sovereign nations; the United States is a party to no fewer than forty-six.[3] Many multilateral treaties among nations in a particular region (such as the North American Free Trade Agreement, or NAFTA) or among nations concerned about a particular resource (such as the Energy

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3. *See* Country-Specific Lists of Bilateral Investment Treatiess, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/Country-specific-Lists-of-BITs.aspx (last visited August 26, 2013).

Charter Treaty, or ECT) contain similar provisions for the protection of investments. In addition, a worldwide regime for the resolution of investment disputes is embodied in the Washington Convention, which created the International Centre for Settlement of Investment Disputes.[4]

The Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments ("the BIT" or "the Treaty") is an example of a BIT.[5] BITs normally identify the protections that an investor based in one sovereign party to the BIT may expect for investments made in the territory of the other sovereign party. BITs typically protect against expropriation of

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4. An arbitration award made under the Washington Convention is not subject to review by the courts. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, articles 53-54 Mar. 18, 1965, 17 U.S.T. 1270, T575 U.N.T.S. 159 ("Washington Convention"); 22 U.S.C. § 1650a (2012). The arbitration award underlying this action is subject to the New York Convention, rather than the Washington Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(e), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 ("New York Convention"); 9 U.S.C. § 201.

5. Agreement for Promotion and Protection of Investments, U.K.–Arg., Dec. 11, 1990, U.K. Treaty Series No. 41 (1993). The English language text of the Treaty is attached to the Petitioner's brief as an Appendix.

investments (Article 5 of the Treaty), while giving assurances to investors and their investments of fair and equitable treatment (Article 2), treatment no less favorable than that accorded to nationals of the host state ("national treatment") (Article 3), and treatment no less favorable than that accorded to nationals of third countries ("most-favored-nation treatment") (Article 3).

The characteristic mechanism through which BITs provide redress to aggrieved investors is international arbitration. BITs commonly require that an investor provide notice to the host state and wait a specified period of time before commencing an arbitration. Other conditions and preconditions may be specified. But the feature that makes these treaties so essential an element of the international economic system is their guarantee that an investor may assert a claim directly against the foreign sovereign that, in the investor's view, has denied the investor (or its investment) certain protections promised by the treaty.

The right to resort to arbitration relieves investors of the need to persuade their own governments to espouse their claims through diplomatic channels, and relieves states of the complications to diplomatic relations that arise from the espousal of private claims. It also relieves investors of any concern that the courts of host countries will be unable or unwilling to provide justice in a dispute between a foreigner and their own government. By depoliticizing investment

disputes and providing aggrieved investors a neutral forum composed of experts in international investment law in which to bring claims directly against a foreign state, investment treaties have ushered in a new era of investor protection.

Arbitration under an international investment treaty differs in many important respects from arbitration under a commercial contract. One such difference involves how the parties' consent to arbitration is expressed. In commercial arbitration, consent to arbitration is usually expressed in a clause of a contract between the parties to the dispute.

In investor-state arbitration, consent to arbitration is generally not bilateral. Rather, the consent of the state party to the arbitration is often expressed in a BIT. In a typical BIT, each state party to the BIT makes a standing offer to arbitrate disputes with investors from the other state party. As the Second Circuit explained, investors express their acceptance of that standing offer by initiating arbitration:

> In effect, Ecuador's accession to the Treaty constitutes a standing offer to arbitrate disputes covered by the Treaty; a foreign investor's written demand for arbitration completes the

"agreement in writing" to submit the dispute to arbitration.[6]

Some BITs contain preconditions that must be satisfied before the investor may initiate arbitration. Arbitral tribunals constituted under BITs closely scrutinize the terms of the applicable BIT to determine the consequences of an investor's failure to satisfy such a condition. The most significant factor on which that scrutiny focuses is the wording of the particular BIT involved. Some tribunals have read BITs to condition the state's consent to arbitration upon the satisfaction of a condition precedent.[7] In contrast, a large number of tribunals have read other BITs to provide that a failure to

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6. *Republic of Ecuador v. Chevron Corp*., 638 F.3d 384, 392-93 (2d Cir. 2011); *see also* Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. FOREIGN INVESTMENT L.J., 232, 234 (1995).

7. *See, e.g.*, *Daimler Fin. Servs. AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, ¶¶ 174-94 (Aug. 22, 2012) (interpreting the investor-state dispute resolution provisions of the Germany-Argentina BIT to require investors to pursue their claims for 18 months in Argentina's domestic courts as a pre-condition to Argentina's consent to arbitrate because the text of Article 10 of the Germany-Argentina BIT "describes its dispute resolution process in mandatory and necessarily sequential language." The tribunal nevertheless acknowledged that the Claimant would not be required to comply with that mandatory process "if Argentine law permitted no remedy for the Claimant's claims in the domestic courts."). All of the arbitration awards cited in this brief may be found at http://italaw.com/links.htm.

satisfy a condition precedent affects the *admissibility* of the claim, but does not call into question the state's consent to arbitrate disputes with investors.[8] In the language of investment treaty arbitration, an objection to jurisdiction asserts that a particular *tribunal* is not competent to hear the dispute, while an objection to admissibility asserts that a particular *claim* may not be heard by the tribunal.[9]

It is not uncommon – indeed, it verges on the routine – for the sovereign respondent in a BIT arbitration to raise threshold objections to the jurisdiction of a tribunal or to the admissibility of a claim.[10] These objections can range from issues of

8. *See, e.g.*, *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 493-496 (Aug. 4, 2011) ("The Tribunal is of the opinion that the negotiation and 18 months litigation requirements relate to the conditions for implementation of Argentina's consent to ICSID jurisdiction and arbitration, and not the fundamental question of whether Argentina consented to ICSID jurisdiction and arbitration. Thus, any non-compliance with such requirements may not lead to a lack of ICSID jurisdiction, and only – if at all – to a lack of admissibility of the claim. . . .").

9. *See* Jan Paulsson, Jurisdiction and Admissibility, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER (Gerald Aksen et al. eds., 2005).

10. Of 245 investment treaty arbitration awards on public record, 206 have addressed objections either to the admissibility of claims or the jurisdiction of the tribunal.

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policy[11] to compliance with technical treaty requirements concerning the definition of an investment,[12] the nationality of an investor,[13] or satisfaction of conditions precedent to arbitration.[14]

Amici do not, in this brief, seek to posit any general rule on how conditions to arbitration should be applied. Rather, they urge the Court to recognize that the sovereign parties to BITs typically expect,

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See Newly Posted Awards, Decisions, and Materials, INVESTMENT TREATY ARBITRATION, http://italaw.com/links.htm (last visited Aug. 26, 2013); INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, http://icsid.worldbank.org (last visited Aug. 26, 2013). Many BIT arbitrations never become public.

11. *E.g.*, *Methanex Corp. v. United States*, Partial Award, ¶¶ 103-05 (Aug. 7, 2002) (environmental legislation).

12. *E.g.*, *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. AA280, Award, ¶¶ 97-111 (Nov. 26, 2009).

13. *E.g.*, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Award, ¶¶ 25-46 (July 7, 2004).

14. *E.g.*, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, ¶¶ 12-21 (Oct. 24, 2011). The Solicitor General's brief in opposition to certiorari cites two instances of the United States raising objections to the jurisdiction of arbitral tribunals appointed under the NAFTA on the grounds that there was no agreement to arbitrate because the claimant had failed to satisfy the conditions precedent to arbitration. Brief for the United States as *Amicus Curiae*, at 21-22.

and provide in the text of the BIT for, such objections to be ruled upon by arbitral tribunals having expertise in international law. Arbitrators appointed to resolve these cases are accustomed to analyzing threshold objections and to assessing their validity under the law applicable to the treaty. In doing so, they generally give primacy to the text of the particular BIT before them, as interpreted in accordance with the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (the "Vienna Convention").[15]

As this case illustrates, awards entered in BIT arbitrations are being presented to United States courts for review or enforcement.[16] This case

15. The United States has not ratified the Vienna Convention, but "it has recognized since at least 1971 that the Convention is the 'authoritative guide' to treaty law and practice." *Ecuador v. United States*, PCA Case No. 2012-5, United States' Memorial on Objections to Jurisdiction, at 16 n.47 (Apr. 25, 2012) (citing Letter of Submittal from Secretary of State Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties, Oct. 18, 1971, S. Ex. L. 92d Cong., 1st Sess., *reprinted in* 65 DEP'T ST. BULL. No. 1694, Dec. 13, 1971, at 684, 685).

16. *E.g.*, *Blue Ridge Invs. L.L.C. v. Republic of Argentina*, No. 12-4139-cv, 2013 U.S. App. LEXIS 17160 (2d Cir. Aug. 19, 2013); *Schneider v. Kingdom of Thailand*, 688 F.3d 68 (2d Cir. 2012); *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011); *Chevron Corp. v. Republic of Ecuador*, No. 12-1247 (JEB), 2013 U.S. Dist. LEXIS 79535 (D.D.C. June 6, 2013); *Funnekotter v. Republic of Zimbabwe*, No. 09-8168, 2011 WL 666227 (S.D.N.Y. Feb. 10, 2011); *Waguih Elie George SIAG and Clorinda Vecchi v. Arab Republic of*

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provides the Court the opportunity to define the level of respect owed by United States courts to arbitral awards emerging from this internationally accepted system for the resolution of foreign investment disputes.

ARGUMENT

I. ARBITRAL TRIBUNALS, NOT COURTS, SHOULD RESOLVE THRESHOLD ISSUES IN ARBITRATIONS UNDER INVESTMENT TREATIES

The Court of Appeals concluded that the sovereign parties to the Treaty – the United Kingdom and Argentina – intended and expected that a United States court would determine *de novo* threshold questions under the investor-state arbitration provisions of the Treaty, rather than defer to the determination of such questions by arbitrators. That conclusion was not merely a misreading of the Treaty, but also is likely to set United States courts on a collision course with the international regime embodied in thousands of BITs. This Court can avert that collision by making it clear that international arbitral tribunals' interpretations

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Egypt, No. M–82, 2009 WL 1834562 (S.D.N.Y. June 19, 2009).

of international investment treaties are entitled to deference from the courts.

A. THE DISTRICT COURT PROPERLY FOUND THAT THE PARTIES TO THE BIT INTENDED ARBITRATORS TO DECIDE THRESHOLD ISSUES

The District Court, presented with cross petitions to confirm and vacate the arbitral tribunal's award, concluded that its review must be "extremely limited":

> Thus, it is the arbitral panel's interpretation of the Investment Treaty, and not Argentina's (or this Court's), that controls the Court's analysis.[17]

Such deferential review of an arbitral panel's award was, in the District Court's analysis, required by the FAA:

> In fact, careful scrutiny of an arbitrator's decision would frustrate the FAA's "emphatic federal policy in favor of arbitral dispute resolution" – a policy that "applies with special force in the field of international commerce" – by

17. *Republic of Argentina v. BG Grp. PLC*, 764 F. Supp. 2d 21, 33 (D.D.C. 2011) (App. to Pet. for Writ of Cert. 43a) (affirming arbitral award) (citation omitted).

> "undermining the goals of arbitration, namely, settling disputes efficiently and avoiding lengthy and expensive litigation."[18]

The District Court emphasized the arbitral panel's competence to interpret the treaty according to applicable principles of international law.[19]

The District Court's analysis is consistent with the intent of the sovereign parties as expressed in the Treaty. The parties left little room for doubt that they intended for threshold objections to be addressed and resolved by arbitrators appointed pursuant to the Treaty. Article 8 of the Treaty provides, in paragraph (1), that investor-state disputes are to be submitted first to the "competent tribunal of the Contracting Party in whose territory the investment was made." It then provides in paragraph (2) that such disputes "shall be submitted to international arbitration" if 18 months have elapsed after submission of the dispute to the national tribunal, or after the decision of that tribunal if the dispute continues. Paragraph (3) provides for arbitration to be conducted under the

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18. *Id.* at 29 (App. to Pet. for Writ of Cert. 34a-35a) (citations omitted).

19. *Republic of Argentina v. BG Grp. PLC*, 715 F. Supp. 2d 108, 122 (D.D.C. 2010) (App. to Pet. for Writ of Cert. 80a) (denying Argentina's petition to vacate or modify the arbitral award).

UNCITRAL Rules, unless the parties agree to other rules.

Paragraph (4) of the Treaty then specifies that, once a dispute reaches an arbitral tribunal, it should decide the dispute and its decisions will be final and binding:

> **The arbitral tribunal shall decide the dispute** in accordance with the provisions of this Agreement [the Treaty], the laws of the Contracting Party involved in the dispute, including its rules on conflict of laws, the terms of any specific agreement concluded in relation to such an investment and the **applicable principles of international law. The arbitration decision shall be final and binding on both Parties**. (Emphasis added).

International law, as embodied in the Vienna Convention, requires that "[a] treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[20] The ordinary meaning of the terms of Article 8(4) is to express Argentina's and the United Kingdom's intention that an international arbitral

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20. Vienna Convention on the Law of Treaties, art. 31(1), Mar. 23, 1969, 1155 U.N.T.S. 331.

tribunal – not a court – should rule, not only on the merits of the dispute, but also on threshold issues.

Threshold questions that typically arise in an investment-treaty arbitration include questions such as (i) is the claimant an "investor" under the applicable BIT; (ii) does the claimant have a protected "investment" under the BIT; (iii) may the "investor" claim for injury to its subsidiary incorporated in the host country or is it limited to claims alleging an interference with its shareholding; and (iv) does the dispute involve a breach of contract rather than a breach of the applicable investment treaty. Arbitrators appointed to hear BIT cases are accustomed to resolving such questions. Indeed, the award set aside by the Court of Appeals had ruled on each of these questions, as well as on other objections made by Argentina in the arbitration to the jurisdiction of the tribunal and to the admissibility of BG Group's claims.[21] Argentina never sought to enjoin the arbitration or to pursue these objections before a court until the arbitrators handed down their award. Argentina's conduct in

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21. *BG Grp. Plc. v. Republic of Argentina*, Final Award, ¶¶ 107-110 (Dec. 24, 2007) (considering whether BG is an investor); ¶¶ 111-37 (considering whether BG owned a protected investment); ¶¶ 158-85 (considering whether BG's claims were contract claims or treaty claims); ¶¶ 186-215 (consideirng whether the Treaty permitted BG to bring claims under the Treaty for actions taken by Argentina against companies incorporated in Argentina in which BG held an indirect interest).

the arbitration thus confirms what the text of the Treaty makes plain: the United Kingdom and Argentina intended for arbitrators to decide both threshold questions and the merits of the dispute.

Other provisions of Article 8 similarly indicate that the United Kingdom and Argentina did not intend for their courts to exercise primary authority over disputes about an investor's right to proceed under Article 8(2) of the Treaty. Article 8(2)(a)(ii) grants an investor the right to resort to international arbitration if the investor is dissatisfied with a decision reached by a national court under Article 8(1). Thus, Article 8(2) establishes a right to resort to international arbitration regardless of the decision reached by national courts. Any interpretation of Article 8(2) that would vest a court with the principal authority to determine whether an investor had complied with Article 8(1) would be inconsistent with that right.

The parties' intent to submit threshold questions to arbitrators is further evidenced by the Treaty provision making the UNCITRAL Rules the default choice for conducting an investor-state arbitration.[22] Article 21(1) of the UNCITRAL Rules provides that:

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22. Treaty, Art. 8(3)(b). The UNCITRAL Arbitration Rules are a body of rules for the conduct of arbitration adopted by the United Nations Commission on International Trade Law. See UNCITRAL ARBITRATION RULES (1976), *available at*

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> The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

The Court of Appeals for the Second Circuit has concluded that an agreement of the sovereign parties to a BIT to conduct investor-state arbitrations under the UNCITRAL Arbitration Rules constitutes the kind of clear and unmistakable evidence contemplated by this Court's decision in *First Options of Chicago, Inc. v. Kaplan*[23] that the parties to that treaty intended threshold questions, including questions of arbitrability, to be decided by arbitrators.[24]

Amici submit that the common intention of Argentina and the United Kingdom, expressed in Article 8 of the Treaty, was to have an international arbitral tribunal decide disputes between investors

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http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf. The UNCITRAL Arbitration Rules were revised in 2010. The revised rules continue to provide that the arbitral tribunal has the power to rule on its own jurisdiction.

23. 514 U.S. 938 (1995).

24. *Schneider*, 688 F.3d at 73; *Republic of Ecuador v. Chevron Corp.*, 638 F.3d at 393-94.

and states, including any objections that a claimant's failure to proceed initially in domestic courts deprived the tribunal of jurisdiction or rendered its claim inadmissible.

B. THE COURT OF APPEALS IMPROPERLY REVIEWED THE ARBITRAL AWARD *DE NOVO*

The Court of Appeals' *de novo* review of the arbitral award thwarted the intent of the sovereign parties to the Treaty. The Court of Appeals itself recognized that "the Treaty's incorporation of the UNCITRAL Rules" provided the clear and unmistakable evidence, contemplated by the Court in *First Options*, "that the parties intended for the arbitrator to decide questions of arbitrability."[25] The Court of Appeals nevertheless found that the UNCITRAL Rules were "not triggered until after an investor has first, pursuant to Article 8(1) and (2), sought recourse, for eighteen months, in a court of the contracting party where the investment was made."[26]

There are two fundamental flaws in this reliance on what the Court of Appeals called a

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25. *Republic of Argentina v. BG Grp. PLC*, 665 F.3d 1363, 1371 (D.C. Cir. 2012) (citation omitted) (App. to Pet. for Writ of Cert. 14a).

26. *BG Grp.*, 665 F.3d at 1371 (App. to Pet. for Writ of Cert. 14a).

"temporal limitation." First, the Court of Appeals' conclusion that the UNCITRAL Rules were "not triggered" was wrong as a factual matter. It was pursuant to Article 16(1) of the UNCITRAL Rules that the parties chose Washington, D.C. as the place of arbitration. It was thus only because the UNCITRAL Rules *had* been triggered that this case was before the Court of Appeals in the first place. If the parties had chosen to hold the arbitration in another country, or even in another federal circuit, the award would have been presented for confirmation or vacatur to the court in that country or circuit.[27]

Second, the Court of Appeals' reasoning would swallow all disputes about preconditions to arbitrations and require that all threshold disputes be decided by a court, notwithstanding decisions by this Court and other circuits to the contrary.[28] *Any*

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27. Article 16(4) of the UNCITRAL Rules (1976) provides that "The award shall be made at the place of arbitration." Under the New York Convention, courts at the seat of arbitration have primary jurisdiction over applications to confirm or vacate arbitration awards. *See Karaha Bodas Co. L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 364 F.3d 274, 308-310 (5th Cir. 2004), *cert. denied* 125 S. Ct. 59.

28. As detailed in Petitioner's brief in support of its Petition for a Writ of Certiorari, the Courts of Appeals in the First, Sixth, Seventh, and Eighth Circuits have all held that the question of whether a condition precedent to arbitration

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precondition to arbitration will by definition refer to an event or events that should have preceded the arbitration.

The text of the Treaty provides no support for the conclusion that Argentina and the United Kingdom intended for courts at the site of arbitration to make *de novo* rulings on threshold objections to the tribunal's jurisdiction. Indeed, the effectiveness of international arbitration as a means of resolving claims for breaches of an investment treaty would be impaired if national courts were to interpret such treaties as implicitly authorizing them to review *de novo* arbitrators' rulings on threshold issues simply because the parties (or the tribunal) chose to hold the arbitration in their jurisdiction. Instead, courts at the seat of an investment arbitration should give effect to the intention of sovereign parties to BITs to have their treaties interpreted and applied, on threshold issues no less than merits, by international arbitral tribunals.

The wisdom of allowing international arbitrators to rule on objections to a tribunal's jurisdiction, as the state parties to investment treaties generally provide, is illustrated by the Court of Appeals' conclusion that, in relying on the rules of

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has been satisfied is a question of procedural arbitrability for the arbitrators to decide. Pet. for Writ of Cert. 28-31.

interpretation laid down in the Vienna Convention, "the arbitral panel rendered a decision wholly based on outside legal sources and without regard to the contracting parties' agreement establishing a precondition to arbitration."[29]

The Vienna Convention is anything but an outside legal source in relation to the Treaty. The Treaty specifically instructs the arbitrators in Article 8(4) to apply "applicable principles of international law." The principles of international law applicable to the interpretation of treaties are those codified in the Vienna Convention; indeed, the Vienna Convention is an expression of international law governing treaty practice between sovereign states. Both Argentina and the United Kingdom have signed and ratified that Convention.[30] Its principles of treaty interpretation reflect customary international law[31] and are widely relied upon as a guide to interpreting and applying international treaties.[32] Whether or not one agrees with the

29. *BG Grp.*, 665 F.3d at 1366 (App. to Pet. for Writ of Cert. 2a).

30. The United Kingdom ratified the Vienna Convention on June 25, 1971, and Argentina ratified it on December 5, 1972.

31. *See, e.g.*, *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Senegal), 1991 I.C.J. 53, ¶ 48 (Nov. 12).

32. *See e.g.,* Counter-Memorial of Respondent United States of America on Competence and Liability, *ADF Grp. Inc. v.*

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arbitral tribunal's interpretation of the Treaty, the Vienna Convention simply cannot be regarded as an "outside legal source" in relation to disputes under the Treaty.[33]

The arbitral tribunal's decision that the claimant was not required to litigate in Argentina before commencing arbitration was based squarely on the body of international law properly applicable to interpretation of the Treaty. More specifically, the arbitral tribunal held that, "[a]s a matter of treaty interpretation … Article 8(2)(a)(i) cannot be construed as an absolute impediment to arbitration."[34] This was because, in light of Argentina's measures to block access to its courts, "any such interpretation would lead to the kind of absurd and unreasonable result proscribed by Article 32 of the Vienna Convention, allowing the State to

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United States, Case No. ARB(AF)/00/1, at 21 ("The preeminent codification of customary international law on the interpretation of treaties is Articles 31 through 33 of the Vienna Convention on the Law of Treaties[.]").

33. *Id.*

34. *BG Grp. Plc. v. Republic of Argentina*, Final Award (Dec. 24, 2007), ¶¶ 146-47 (App. to Pet. for Writ of Cert. 165a-166a).

unilaterally elude arbitration."[35] The arbitral tribunal concluded that:

> a serious problem would loom if admissibility of Claimant's claims were denied thus allowing Respondent at the same time to: a) restrict the effectiveness of domestic judicial remedies as a means to achieve the full implementation of the Emergency Law and its regulations; [and] b) insist that Claimant go to domestic courts to challenge the very same measures.[36]

The arbitral tribunal reached this result by applying the rules of international law chosen by the parties.

The Court of Appeals replaced the arbitral tribunal's reasoned decision under Article 32 of the Vienna Convention – the law that the Treaty directed the arbitrators to apply – with its own analysis, from which principles of international law were conspicuously absent. In doing so, the Court of Appeals provided a vivid illustration of why the parties to the Treaty assigned the role of deciding disputes arising under it to international arbitrators.

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35. *Id.* at ¶ 147 (App. to Pet. for Writ of Cert. 165a).

36. *Id.* at ¶ 156 (App. to Pet. for Writ of Cert. 171a).

II. REVERSAL WOULD BE CONSISTENT WITH THIS COURT'S DECISIONS UNDER THE FEDERAL ARBITRATION ACT

The Court of Appeals' decision to impose its own interpretation of the Treaty, if not reversed, is likely to cause collateral damage to the application of the FAA to commercial arbitration agreements, because many of them also contain conditions precedent. Reversing that decision will avoid disturbing the distinction the Court has previously articulated between substantive and procedural "arbitrability" in the determination of threshold issues in commercial arbitration.

In *Howsam v. Dean Witter Reynolds, Inc.*, this Court distinguished between substantive and procedural "arbitrability" in the context of commercial arbitration, concluding:

> Thus "'procedural' questions which grow out of the dispute and bear on its final disposition" are presumptively *not* for the judge, but for the arbitrator to decide. So, too, the presumption is that the arbitrator should decide

> "allegation[s] of waiver, delay, or a like defense to arbitrability."[37]

The Court of Appeals' decision below ignores this crucial distinction between substantive and procedural arbitrability.[38] Its tautological observation that "[t]he 'gateway' question in this appeal is arbitrability"[39] shows a failure to appreciate this Court's instruction in *Howsam* that some arbitrability issues have a powerful procedural character that makes them "presumptively *not* for the judge, but for an arbitrator, to decide."[40] The Court of Appeals' reasoning is at cross-purposes with this Court's admonition that "for purposes of applying the interpretive rule, the phrase 'question of arbitrability' has a far more limited scope."[41]

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37. 537 U.S. 79, 84 (2002) (citations omitted) (emphasis in original). *Howsam* turned on whether a court or arbitrator should determine a statute of limitations dispute.

38. As detailed in the Petition for Writ of Certiorari, the Courts of Appeals for the First, Sixth, Seventh, and Eighth Circuits have each applied this Court's guidance in *Howsam* to hold that whether a condition precedent to arbitration has been satisfied is a procedural question for the arbitrators rather than a question for the courts. *See* Pet. for Writ of Cert. 28-31.

39. *BG Grp.*, 665 F.3d at 1369 (App. to Pet. for Writ of Cert. 10a).

40. *Howsam*, 537 U.S. at 84.

41. *Id.* at 83.

The Court of Appeals suggested that, in *Howsam*, "[t]he question of arbitrability . . . was intertwined with the facts underlying the substantive dispute . . . , [whereas h]ere, the question of arbitrability is separate from the underlying dispute."[42] That statement is simply incorrect. The arbitrators' analysis of Article 8 of the Treaty was heavily intertwined with the effects of the Argentine legislation that lay at the heart of the claimant's claim on the merits.[43]

But the question of whether the courts or the arbitrators should rule on a procedural objection, such as a failure to satisfy a condition precedent to arbitration, should not in any event turn on the extent to which the procedural objection is intertwined with the facts underlying the substantive dispute. *Howsam* points to a simpler solution. The key distinction that emerges from *Howsam* and its progeny is whether an objection to arbitration calls into question the existence or validity of an arbitration agreement, on the one hand, or features of the arbitral process, on the other. In the former situation – which this Court has referred to as raising issues of substantive

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42. *BG Grp.*, 665 F.3d at 1372 n.6 (App. to Pet. for Writ of Cert. 18a).

43. *BG Grp. Plc. v. Republic of Argentina*, Final Award (Dec. 24, 2007), ¶¶ 147-57 (App. to Pet. for Writ of Cert. 165a-171a).

arbitrability – the threshold objection strikes at the very heart of the legitimacy of arbitration, namely consent, and is, presumptively, for the courts to decide.[44]

In the latter situation, by contrast, the objection implicates neither the existence nor the validity of the arbitration agreement, nor any other fundamental aspect of consent, but rather involves differences over when and how the arbitral process should unfold. Such an objection is one that the arbitral tribunal should be permitted to decide. A failure to satisfy a condition precedent is not the only example of this category of objection.[45] Other examples include assertions that (i) a claim is time barred, as in *Howsam*;[46] (ii) a claim is barred by *res*

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44. *See* George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1, 29-30 (2012).

45. *See, e.g.*, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). *See also Dialysis Access Ctr., LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 383 (1st Cir. 2011); *Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs.*, 623 F.3d 476, 477 (7th Cir. 2010); *3M Co. v. Amtex Sec., Inc.*, 542 F.3d 1193, 1200 (8th Cir. 2008); *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 392 (6th Cir. 2008).

46. *See, e.g.*, *Howsam*, 537 U.S. 79 (2002). *See also Int'l Union of Operating Eng'rs v. Flair Builders, Inc.*, 406 U.S. 487, 491 (1972).

judicata;[47] (iii) the claimant waived its right to arbitrate;[48] or (iv) the parties did not agree to class arbitration.[49] Reserving these types of objections for arbitrators helps ensure the efficiency of arbitral proceedings in the United States, without detriment to their legitimacy.[50]

Because commercial contracts and BITs share the tendency to specify steps that must be taken before commencing arbitration, the Court of Appeals' decision could have consequences far beyond the field of investment arbitration.[51] According to the

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47. *See, e.g.*, *Shell Oil Co. v. CO_2 Comm., Inc.*, 589 F.3d 1105, 1109-10 (10th Cir. 2009); *Emilio v. Sprint Spectrum, L.P.*, 315 F. App'x 322, 324 (2d Cir. 2009); *Triangle Constr. & Maint. Corp. v. Our V.I. Labor Union*, 425 F.3d 938, 947 (11th Cir. 2005). *But see FleetBoston Fin. Corp. v. Alt*, No. 10-1035, 2011 U.S. App. LEXIS 5853, at *4 (1st Cir. Mar. 23, 2011).

48. *See, e.g.*, *Republic of Ecuador*, 638 F.3d at 393-94; *ProTech Indus., Inc. v. URS Corp.*, 377 F.3d 868, 871-72 (8th Cir. 2004); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1109-10 (11th Cir. 2004).

49. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452-54 (2003) (plurality opinion).

50. *See* Bermann, *supra* note 37, at 40-47.

51. Int'l Bar Ass'n, IBA Guidelines for Drafting International Arbitration Clauses 30 (2010) ("It is common for dispute resolution clauses in international contracts to provide for negotiation, mediation or some other form of alternative dispute resolution as preliminary steps before arbitration.").

American Arbitration Association's *amicus* brief in support of the grant of certiorari, "approximately 51% of the U.S. companies and 60% of the U.K. companies surveyed had resolved disputes through contractually agreed staged processes involving negotiation, mediation and arbitration."[52] Each such staged process specifies some step that must precede arbitration.

The decision of the Court of Appeals, by lumping all questions of arbitrability together, confuses the distinction articulated in *Howsam*, and thus leaves uncertain the respective roles of courts and arbitrators in deciding whether an arbitration should proceed. A reversal of that decision would not only offer the Court an opportunity to provide guidance to lower courts called upon to deal with awards entered in investment arbitrations, but would also allow the Court to correct a likely source of confusion for lower courts dealing with commercial arbitrations.

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52. Brief of American Arbitration Association as *Amicus Curiae* Supporting Petitioner, at 8, *BG Grp. PLC v. Republic of Argentina*, No. 12-138 (S. Ct. Aug. 27, 2012).

CONCLUSION

For the foregoing reasons, the undersigned *amici* urge the Court to vacate the decision of the Court of Appeals and to reinstate the decision of the District Court confirming the award of the arbitrators.

August 30, 2013

Respectfully submitted,

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APPENDIX A

APPENDIX A

Amici Curiae Professors and Practitioners of Arbitration Law

Gerald Aksen is an independent international arbitrator and the 2005 recipient of the American Bar Association Dispute Resolution Section's D'Alemberte/Raven Award for outstanding ADR service. He formerly served as General Counsel of the American Arbitration Association, President of the College of Commercial Arbitrators, Vice-Chairman of the ICC International Court of Arbitration and adjunct professor of law at New York University School of Law.

George A. Bermann is the Walter Gellhorn Professor of Law, the Jean Monnet Professor of European Union Law, and the Director of the Center for International Commercial and Investment Arbitration at Columbia Law School, as well as a faculty member of the Institut d'Études Politiques (Sciences Po) in Paris, France, and the Collège d'Europe in Bruges, Belgium. He is a member of the Board of Directors of the American Arbitration Association and the Chief Reporter for the American Law Institute's *Restatement of the Law Third: The U.S. Law of International Commercial Arbitration*.

Andrea K. Bjorklund is L. Yves Fortier Chair in International Arbitration and International Commercial Law at McGill University Faculty of Law. She was formerly Professor of Law at U.C.

Davis School of Law. Professor Bjorklund is co-rapporteur of the International Law Association's Study Group on the Role of Soft-Law Instruments in International Investment Law and Chair of the Institute for Transnational Arbitration's Academic Council. She is editor of *Investment Treaty Law: Current Issues III* and co-author of *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11*.

Lea Brilmayer is the Howard M. Holtzmann Professor of International Law at Yale Law School. She is the author of *Justifying International Acts* and *American Hegemony: Political Morality in a One-Superpower World*. Professor Brilmayer has served as lead counsel in state-to-state arbitrations dealing with island sovereignty, maritime delimitation, land boundaries, and mass claims for violations of the laws of war.

David D. Caron is Dean and Professor of Law at The Dickson Poon School of Law at King's College, London and the C. William Maxeiner Distinguished Professor of Law (Emeritus) at the University of California at Berkeley. He is the immediate past President of the American Society of International Law, Co-Director of the Law of the Sea Institute, and a member of the Board of Editors of the American Journal of International Law. He is also a barrister with chambers at 20 Essex Street in London.

Appendix A

James H. Carter is Senior Counsel at the firm of Wilmer Cutler Pickering Hale and Dorr LLP in New York, and was formerly a partner in the firm of Sullivan & Cromwell LLP. Mr. Carter is a former Chairman of the Board of Directors of the American Arbitration Association and a former President of the American Society of International Law.

Jack J. Coe, Jr. is Professor of Law at Pepperdine University School of Law. Professor Coe is an author of *Protecting Against the Expropriation Risk in Investing Abroad* and *International Commercial Arbitration – American Principles and Practice in a Global Context*. He is an Associate Reporter for the American Law Institute's *Restatement of the Law Third: The U.S. Law of International Commercial Arbitration*.

Horacio A. Grigera Naon is the Director of the Center on International Commercial Arbitration at the Washington College of Law of The American University. Dr. Grigera Naon is a former Secretary General of the International Court of Arbitration of the International Chamber of Commerce and former Senior Counsel with the International Finance Corporation.

Conrad K. Harper is a retired Partner in the firm of Simpson Thacher & Bartlett LLP in New York. Mr. Harper previously served as Legal Adviser of the United States Department of State and as President of the Association of the Bar of the City of New York. He has also been a member of the

Permanent Court of Arbitration at The Hague, a director of the American Arbitration Association, a member of the Council of the American Law Institute, and a member of the Council on Foreign Relations.

Howard O. Hunter is Professor of Law at Singapore Management University, of which he was for six years the President. He is also Professor of Law Emeritus and former Dean of the School of Law of Emory University and is the author of *Modern Law of Contracts*. Professor Hunter is member of the Board of Directors of the American Arbitration Association.

Judith Kaye is Of Counsel to the firm of Skadden Arps Slate Meagher & Flom LLP in New York. For 15 years up to 2009, Judge Kaye was Chief Judge of the State of New York. She is a member of the Board of Directors of the American Arbitration Association and was formerly President of the Conference of Chief Justices and Chair of the Board of Directors of the National Center for State Courts.

Carolyn Lamm is a partner in the firm of White & Case LLP. She is a former President of the American Bar Association, former President of the D.C. Bar, a member of the Council of the American Law Institute, and a member of the Executive Committee of the Board of Directors of the American Arbitration Association.

Appendix A

Andreas F. Lowenfeld is the Herbert and Rose Rubin Professor of International Law Emeritus at New York University School of Law. He served as Associate Reporter of the American Law Institute's Restatement (Third) of Foreign Relations Law and Co-Reporter of the Institute's Project on Recognition and Enforcement of Foreign Judgments. Before coming to NYU, Professor Lowenfeld served as Deputy Legal Adviser of the United States Department of State.

Lawrence W. Newman is Of Counsel to the firm of Baker & McKenzie LLP in New York He is co-editor of *International Arbitration Checklists* and *The Leading Arbitrators' Guide to International Arbitration*. Mr. Newman is past Chair of the Arbitration Committee of the International Institute for Conflict Prevention & Resolution (CPR), past Chair of the International Disputes Committee of the New York City Bar Association, and the current Chair of the International Legal Practice Committee of that association.

Daniel M. Price is an independent legal practitioner and arbitrator who was formerly a partner in the firm of Sidley Austin LLP. Mr. Price served in government as deputy agent of the United States to the Iran-U.S. Claims Tribunal, Deputy General Counsel in the Office of the U.S. Trade Representative, and Assistant to the President for International Economic Affairs. He is a member of the Board of Directors of the American Arbitration

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Appendix A

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