No. 12-138

In the Supreme Court of the United States

BG GROUP PLC, PETITIONER

v.

REPUBLIC OF ARGENTINA

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

BRIEF FOR THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JOSEFA SICARD-MIRABAL
UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS
1212 Avenue of the Americas 21st Floor
New York, NY 10036-1689

ALLEN B. GREEN
WILLIAM T. O'BRIEN
ELISABETH L. SHU
MCKENNA LONG & ALDRIDGE LLP
1900 K Street NW
Washington, DC 20006

JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

TIMOTHY J. TYLER
J. ERIC PARDUE
VINSON & ELKINS LLP
1001 Fannin Street, Suite 2500
Houston, TX 77002

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37, the United States Council for International Business ("USCIB") respectfully submits this brief as *amicus curiae* in support of petitioner, BG Group PLC.

Founded in 1945, USCIB promotes free trade and represents U.S. business interests before international and intergovernmental entities. Among its many other roles, the USCIB represents the central values, ideas, and common interests of U.S. international businesses before U.S. policymakers as well as officials in the United Nations, the European Union, and other governments and organizations. The USCIB represents the U.S. international business community interests in the International Chamber of Commerce ("ICC"), the world business organization created in 1919 to promote trade and investment, open markets, and the free flow of capital.

Because of the vital role that arbitration plays in international business, the USCIB also represents the interests of the U.S. business community in connection with the ICC's international arbitration functions. The International Court of Arbitration®, established by the ICC in 1923, is the world's leading institution for international commercial arbitration. International arbitration practitioners appointed by

---

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

the USCIB play key roles in ICC arbitration proceedings, on the ICC Commission on Arbitration, and on other ICC arbitration bodies. Moreover, U.S. parties are the principal users of the International Court of Arbitration. In addition, the U.S. is frequently selected as the place of arbitration by the International Court of Arbitration. See ICC Int'l Ct. of Arb. Bulletin, Vol. 21/1 (2010).

The D.C. Circuit's decision has far-reaching and adverse implications for the future of the United States as an attractive forum for international arbitration and for the freedom of choice to arbitrate, in particular the freedom of the parties to delegate to the arbitrators the authority to rule on their own jurisdiction. The arbitration rule at issue in this case—Rule 21 of the United Nations Commission on International Trade Law ("UNCITRAL")—is similar to ICC Rule 6.5 in delegating to the arbitrators questions of arbitrability. The USCIB, as the representative of U.S. international business community interests in the ICC, shares a common interest with other arbitration institutions in how courts interpret the scope of the parties' delegation of authority through that rule to arbitrators to decide questions of arbitrability. The USCIB and its members, then, have a strong interest in correcting the erroneous judgment of the court below.

SUMMARY OF ARGUMENT

This Court has consistently emphasized the central importance of protecting the decision of parties to a contract to resolve their disputes through arbitration. Applying that basic principle, federal courts have repeatedly held that where parties agree

that a dispute should be submitted to arbitration pursuant to one of certain sets of arbitral rules—rules that include provisions delegating to the arbitral tribunal the authority to determine questions as to its own jurisdiction over the dispute—then the parties have agreed that the arbitral tribunal has the authority to resolve disputes as to arbitrability. The D.C. Circuit mistakenly concluded that under the Agreement Between the Government of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (the "Treaty"), the arbitral tribunal here lacked authority to resolve objections to its own jurisdiction, because a particular prerequisite to arbitration—a requirement to litigate the dispute in the local courts for no more than eighteen months—placed a "temporal limitation" on the parties' agreement to arbitrate.

That conclusion was error. By its plain terms, the Treaty incorporated the UNCITRAL Rules, which explicitly vest such decisions in arbitrators. Those rules reflect the wish of parties to international agreements to resolve their disputes through neutral arbitral forums, rather than through the state courts of an adverse party. Interpreting such provisions, consistent with their plain language, to delegate to arbitrators the authority to resolve all disputes (including those involving their own jurisdiction) advances important interests in certainty and efficiency. Parties entering international arbitration agreements have relied on those precedents as a reflection of the settled understanding that U.S. law respects the parties' choice to delegate to the arbitral

tribunal the authority to resolve objections to its jurisdiction.

The D.C. Circuit's decision is likely to have profoundly negative consequences on the state of international arbitration in the United States. By deviating from well established precedent, the court's decision calls into question all delegations of authority to the arbitrators to determine whether preconditions to arbitration have been satisfied, and will encourage ancillary litigation undermining interests in the efficient resolution of disputes. Moreover, the D.C. Circuit's decision may have deleterious implications for the United States' status as a site for international arbitrations.

ARGUMENT

I. The D.C. Circuit's Decision Conflicts with Longstanding Precedent and Ignores the Clear and Unmistakable Evidence that the Parties Agreed to Submit Arbitrability Questions to the Arbitral Tribunal

Arbitration is fundamentally "a matter of contract," and accordingly, "courts must 'rigorously enforce' arbitration agreements according to their terms." *Am. Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013) (quoting *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985)). In policing the parties' agreement and the division of labor between courts and arbitrators, two lines of cases have developed. The D.C. Circuit's decision runs against both.

First, this Court has made clear that not every "potentially dispositive gateway question" of arbitrability is to be decided by a court. *Howsam* v.

Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002).[2] For a broad category of "'procedural questions which grow out of the dispute and bear on its final disposition,'" "parties would likely expect that an arbitrator would decide the gateway matter," and thus the question of arbitrability is presumptively for the arbitrator to resolve.[3] *Id.* at 84.

Second, in *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938 (1995), this Court held that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* at 944. The parties here, by their choice of arbitral rules, did make such an agreement. Pet. App. 94a–97a. The D.C. Circuit's opinion uses a newfound "temporal limitation," Pet. App. 13a, to deprive that agreement of meaning.

The D.C. Circuit's decision disregards both lines of cases, ignoring both that prerequisites to arbitration (like the local-litigation requirement at issue in this case) are procedural issues presumptively reserved

---

[2] See also *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 557 (1964) ("Once it is determined * * * that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.").

3 This type of gateway issue, which the court has called "issues of procedural arbitrability," includes "allegation[s] of waiver, delay, or a like defense to arbitrability," *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983), and "whether prerequisites [to arbitrability] such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met." *Howsam*, 537 U.S. at 85 (emphasis in original).

for the arbitral tribunal's determination and that the parties here clearly and unmistakably delegated to the arbitral tribunal the authority to determine whether prerequisites to arbitration have been satisfied.[4]

A. Incorporation of the UNCITRAL Rules Constitutes Clear and Unmistakable Evidence that the Parties Agreed to Have the Arbitral Tribunal Decide Objections to Arbitral Jurisdiction

Whether the satisfaction of a litigation pre-condition is an issue of "substantive" or "procedural" arbitrability under *Howsam* and *John Wiley* is immaterial when the parties agreed to arbitrate arbitrability. The D.C. Circuit failed to give effect to the parties' agreement that any arbitration would be pursuant to the UNCITRAL Rules and that under those rules, the arbitral tribunal would determine all questions of arbitrability. As explained below, acceptance of the UNCITRAL Rules (or comparable rules of other international and domestic arbitral organizations) provides "clea[r] and unmistakeabl[e]"

---

[4] It is important to note what this case is not. Whether the parties agreed to arbitrate is not in question: there is no allegation that Argentina lacked capacity to enter into the Treaty, that Argentina did not sign the Treaty, or that there was not complete consent to arbitrate. Thus, there is no substantive "question of arbitrability" for a court to determine. And there is no dispute that the parties agreed to submit disputes over foreign investments to arbitration. Argentina's ratification of the Treaty constituted an open offer to arbitrate disputes with certain British investors, and BG Group's submission of this dispute to arbitration was an acceptance of Argentina's open offer to arbitrate. See Pet. Br. 20–21 n.8.

evidence that the parties have agreed to arbitrate questions of arbitrability.

1. Parties Agree to International Arbitration to Avoid the Risk of Appearing in the Courts of the Other Party

When parties from different nations enter into "trans-border" contracts or treaties, "the parties' differing nationalities are an obstacle to their voluntary submission to mutually trusted courts." William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, 63 Tul. L. Rev. 647, 699-705 (1989). The distinct cultures and rules of law of their respective countries often lead "[p]arties to international agreements [to] be concerned that the national courts in the country of a party with whom they are contracting may have an instinctive, or even a manifest, bias." Thomas H. Oehmke, *Arbitrating International Claims – At Home and Abroad*, 81 Am. Jur. *Trials* § 6 (originally published in 2001). To level the playing field, trans-border contracts typically include a voluntary, agreed-upon mechanism for dispute resolution—a binding arbitration clause. Binding international arbitration offers a "neutrality of forum and delocalized procedure [that] provide[s] a means of avoiding the 'hometown justice' of the other party's judicial system," Park, 63 Tul. L. Rev. at 702, and protects parties from the injustice of a hostile forum.[5]

---

[5] See also S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. Pa. J. Int'l L. 1, 81 (2008) ("With arbitration came a

The D.C. Circuit failed to credit the parties' expressed desire to resolve disputes in a neutral forum. To be sure, the condition precedent in the Treaty at issue here requires a party to litigate the dispute for at least 18 months in the host State's courts. But agreeing to a litigation condition precedent is one thing; agreeing to submit the question of whether that condition has been satisfied to a foreign court—something the parties here emphatically did not do and affirmatively sought to avoid—is another.[6] The parties' common intent was to agree on arbitration in order to avoid state courts who they perceive as being potentially predisposed

---

number of collateral benefits for international actors. For example, parties to an arbitration not only avoid the biases of national courts, they also avoid procedural quirks that might give one party a home court advantage."); Oehmke, 81 Am. Jur. *Trials* § 6 (concern about bias "is compounded by distance and the disadvantages one party faces when consenting to resolve a dispute on their opponent's home court. For these reasons, the national courts in the country of one party may be unsuitable to other parties.").

[6] In an analogous situation requiring an evaluation of conditions precedent, it is commonplace that the decision of whether a party sufficiently exhausted administrative remedies is not to be made by the agency providing such remedies, but by the court where the ultimate issue would be decided. Cf. *Jones* v. *Bock*, 549 U.S. 199, 219 (2007) (finding that the lower court on remand should "in the first instance * * * determine the sufficiency of the [petitioner's] exhaustion" in the case); *Patsy* v. *Bd. of Regents of State of Fla.*, 457 U.S. 496, 501 (1982) (noting that it is up to the court to determine whether exhaustion is required in the first place). By extension, the decision of whether a party exhausts litigation conditions precedent should not be made by the court, but by the arbitral tribunal that is vested with the authority to determine the merits of the underlying dispute.

toward local nationals or, in this case, the state itself. At a minimum, the question of arbitrability under such circumstances is one "where parties would likely expect that an arbitrator would decide the gateway matter." *Howsam*, 537 U.S. at 84. It is clear that parties that affirmatively act to incorporate the UNCITRAL Rules (or analogous rules) into their arbitration agreements *expect* that arbitrators will determine arbitrability.

2. The Plain Language of the UNCITRAL Rules, and the Rules of the Major International Arbitral Institutions, Vests Arbitrators with Authority to Decide Jurisdictional Issues

The UNCITRAL Rules, the ICC Rules, and the rules of other major international arbitral organizations, each include provisions that expressly delegate to the arbitral tribunal the authority to determine *any* and *all* jurisdictional challenges.

Article 21(1) of the UNCITRAL Rules—the very provision at issue here—explicitly provides that "[t]he 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."[7]

Like the UNCITRAL Rules and, indeed, all of the major institutional international arbitration rules, the ICC International Court of Arbitration[8] also

---

[7] United Nations Comm'n on Int'l Trade Law Rules, art. 21(1) (2010) (emphasis added).

[8] The ICC International Court of Arbitration is the ICC's international arbitration body and is the world's leading

emphatically recognizes that resolution of jurisdictional disputes by arbitrators is necessary to stabilize international commercial arbitration. The ICC Rules "define and regulate the conduct of cases submitted to the International Court of Arbitration of the ICC. In choosing to follow these rules, parties involved in international business transactions are assured of a neutral framework for the resolution of cross-border disputes."[9] To further that goal, Article 6.5 of the ICC Rules provides that "*any* decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the [ICC] Court decides that the arbitration itself cannot proceed, *shall* be taken by the arbitral tribunal itself."[10] Arbitral rules from other international arbitration bodies contain similar mandates.[11]

---

institution for international commercial arbitration. See, *e.g.*, Dr. Loukas Mistelis, *International Arbitration - Corporate Attitudes and Practices - 12 Perceptions Tested: Myths, Data and Analysis Research Report*, 15 Am. Rev. Int'l Arb. 525, 562 (2004) (survey respondents "ranked the ICC as the most important [international arbitration] institution").

[9] ICC Rules of Arbitration, *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/ (last visited Aug. 27, 2013).

[10] ICC Rules of Arbitration, art. 6.5 (emphasis added).

[11] See, *e.g.*, Am. Arbitration Ass'n, Commercial Arbitration Rules and Mediation Procedures § R-7 (2009) ("[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including *any* objections with respect to the existence, scope or validity of the arbitration agreement.") (emphasis added); Int'l Ctr. for Dispute Resolution, International Dispute Resolution Procedures art. 15.1 (2009) ("The tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."); London Court of Int'l Arbitration Rules art. 23.1

The purpose of these widely adopted provisions is clear:

> The fear of bias in a foreign counter-party's home court can be ameliorated to some extent contractually by inclusion of a well-drafted arbitration clause. Through this mechanism contracting parties may select a neutral and impartial forum so that any dispute will be resolved by a tribunal composed of individuals in whom confidence is vested (see the rules of

---

(1998) ("[t]he Arbitral Tribunal shall have the power to rule on its own jurisdiction including *any* objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement.") (emphasis added); Singapore Int'l Arbitration Ctr., Arbitration Rule 25.2 (2010) ("The Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, termination or validity of the arbitration agreement."); China Int'l Econ. & Trade Arbitration Comm'n, Arbitration Rules, ch. I, art. 6.1 (2012) ("CIETAC shall have the power to determine the existence and validity of an arbitration agreement and its jurisdiction over an arbitration case. CIETAC may, where necessary, delegate such power to the arbitral tribunal."); World Intellectual Prop. Org., WIPO Arbitration Rules art. 36 (2009) ("(a) The Tribunal shall have the power to hear and determine objections to its own jurisdiction, including any objections with respect to form, existence, validity or scope of the Arbitration Agreement examined pursuant to Article 59(c). * * * (e) A plea that the Tribunal lacks jurisdiction shall not preclude the Center from administering the arbitration."); see also Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 41(2), 17 U.S.T. 1270, 575 U.N.T.S. 159 (Mar. 18, 1965) ("Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.").

> arbitration institutions such as International Chamber of Commerce Rules, Article 7(1), London Court of International Arbitration Rules, Articles 5.2 and 6, American Arbitration Association Rules, Article 7 and United Nations Commission on International Trade Law Model Law Article 12).

Michael S. Greco & Ian Meredith, *Getting to Yes Abroad Arbitration as a Tool in Effective Commercial and Political Risk Management,* 16 Bus. L. Today 4, at 23–24 (March/April 2007) (abbreviations omitted). By incorporating UNCITRAL Rule 21, the Treaty clearly vested the arbitral tribunal with the authority to decide its own jurisdiction.[12] The D.C. Circuit erred in failing to recognize the parties' expression of their intent.

3. Well Reasoned Lower Federal Court Decisions Have Held that Parties' Incorporation of the UNCITRAL Rules (or Similar Arbitral Rules) Clearly and Unmistakably Shows the Parties' Intent for the Arbitral Tribunal to Determine Jurisdictional Questions

The parties' decision to incorporate the UNCITRAL Rules into the Treaty satisfies the *First Options* test by manifesting a "clear and

---

[12] The ICC Rules also espouse the internationally accepted doctrine of competence-competence (that the arbitral tribunal has the authority to determine its jurisdiction) and comport with this Court's dictum in *First Options*. See W. Laurence Craig, William W. Park, & Jan Paulsson, *International Chamber of Commerce Arbitration*, 3d ed. § 28.07(iii) (2000). The same is true for the rules of the other major arbitral organizations. See generally note 12, *supra* (quoting rules).

unmistakable" agreement to vest the arbitral tribunal with the authority to determine whether jurisdictional requirements have been met—certainly including whether the claimant has fulfilled conditions precedent to arbitration. By concluding otherwise, the D.C. Circuit's decision conflicts with a large body of cases from other federal courts.

The lower federal courts routinely have held that parties' decision to incorporate the UNCITRAL Rules,[13] the ICC Rules,[14] or the AAA Rules[15] satisfies

---

[13] See, *e.g.*, See *Oracle Am., Inc.* v. *Myriad Grp. A.G.*, ___ F.3d ___, No. 11-17186, 2013 WL 3839668, at *7 (9th Cir. July 26, 2013) ("Incorporation of the UNCITRAL arbitration rules into the parties' commercial contract constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability."); *Schneider* v. *Kingdom of Thailand*, 688 F.3d 68, 72 (2d Cir. 2012) (reaffirming that explicit incorporation of UNCITRAL rules serves as clear and unmistakable evidence); *Thai-Lao Lignite (Thailand) Co.* v. *Gov't of Laos*, 492 F. App'x 150, 151 (2d Cir. 2012) (same), *cert. denied*, 133 S.Ct. 1473 (2013); *Republic of Ecuador* v. *Chevron Corp.*, 638 F.3d 384, 394 (2d Cir. 2011) (explaining that Ecuador's agreement to resolve investment disputes under the UNCITRAL rules constituted clear and unmistakable evidence to have arbitrability issues decided by the arbitral tribunal).

[14] *Shaw Group Inc.* v. *Triplefine Int'l Corp.*, 322 F.3d 115, 124-125 (2d Cir. 2003) (recognizing that agreement providing that all disputes would be arbitrated under ICC rules was clear and unmistakable evidence of "the parties' intent to arbitrate questions of arbitrability"); *Apollo Computer, Inc.* v. *Berg*, 886 F.2d 469, 473 (1st Cir. 1989) (holding, before *First Options*, that by agreeing that arbitration would occur in accordance with the ICC Rules, parties delegated decisions about arbitrability, including "disputes involving the existence and validity of a prima facie agreement to arbitrate," to the arbitrator); *Burnham Enters., LLC* v. *DACC Co. Ltd.*, No. 2:12-CV-111-WKW, 2013 WL 68923, at *4 (M.D. Ala. Jan. 7, 2013) ("Here the language of the arbitration agreement, coupled with the [ICC] rules it

First Options' requirement of "clear[] and unmistakabl[e]" evidence of the parties' intent to submit gateway questions of arbitrability to arbitration. These decisions reflect a clear recognition of the authority of arbitrators to determine their jurisdiction, see generally Section

---

adopts by reference, provide clear and unmistakable evidence that [the parties] agreed to have questions of arbitrability settled in arbitration, not in court."); *Sonera Holding B.V.* v. *Cukurova Holding A.S.*, 895 F. Supp. 2d 513, 521 (S.D.N.Y. 2012) (concluding that parties' agreement to arbitrate pursuant to ICC Rules was clear and unmistakable evidence that questions of arbitrability should be determined by the International Court of Arbitration).

[15] See, *e.g.*, *Petrofac, Inc.* v. *DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012) ("the express adoption of [AAA] rules presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability"); *Fallo* v. *High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) ("The arbitration provision's incorporation of the AAA rules * * * constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator."); *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006) (agreeing with the Second Circuit in *Contec Corp.* v. *Remote Solution, Co.*, 398 F.3d 205, 208 (2d Cir. 2005), that incorporation of the AAA rules provides clear and unmistakable proof of the parties' intent to have the arbitrator determine questions of arbitrability); *Terminix Int'l Co.* v. *Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005) (same); *Contec*, 398 F.3d at 208 ("[W]hen, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator."). But see *Riley Mfg. Co.* v. *Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998) (finding that the parties' reference to AAA rules in arbitration provision did not mean that the parties specifically intended to have the arbitrator determine questions of arbitrability).

I.A.2., *supra* (delineating rules). The D.C. Circuit's decision erroneously cuts against this well reasoned body of jurisprudence.

4. Parties that Rely on International Arbitration Rules Intentionally Submit Questions of Arbitrability to Arbitrators and Not Courts

Parties to investment agreements and trans-border contracts of the sort at issue here typically are large corporations or sovereign states. Such parties are sophisticated and well counseled about the implications of their agreements. When such parties agree to have potentially multimillion-dollar disputes decided in accord with the UNCITRAL Rules, and thus agree that "[t]he 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," Article 21(1), the only logical conclusion is that they intended to submit all jurisdictional disputes to the arbitrators—including whether the parties satisfactorily fulfilled a litigation condition precedent to arbitration.

It is counterintuitive to suppose that such sophisticated parties intended to submit the decision whether litigation preconditions to arbitration have been satisfied to an unknown court in a still-unknown state, while vesting the arbitrators with authority to resolve them substantively. Cabining the "temporal limitation" to litigation preconditions would also create a confusing, dual-track system that treats litigation conditions precedent differently than

other preconditions, including challenges to requirements to negotiate or mediate.

Thus, the D.C. Circuit's opinion drains of meaning both the express language of arbitral rules—including UNCITRAL Rule 21 and ICC Rule 6.5—and the intent of the parties that incorporate those rules into their arbitration agreements.

B. The Settled Understanding that Incorporating the UNCITRAL Rules Delegates Jurisdictional Questions to Arbitrators Serves Important Interests

This well accepted understanding that the incorporation of specific arbitral rules delegates to arbitrators the authority to determine their own jurisdiction—including the authority to determine whether conditions precedent to arbitration have been satisfied—serves essential functions. It clearly and efficiently allocates authority between arbitrators and courts: Parties understand that by choosing to incorporate the UNCITRAL Rules, the ICC Rules, or analogous arbitration rules, they have agreed to the arbitrators' authority to determine questions of arbitrability, even in multi-step arbitration agreements. Arbitral institutions such as the ICC International Court of Arbitration, and their users, rely on the fundamental principle that arbitrators have the ability to determine questions of arbitrability. Continued certainty as to the validity of the parties' agreement to arbitrate arbitrability is important to the business community. Adriana Dulic, *First Options of Chicago, Inc. v. Kaplan and the Kompetenz-Kompetenz Principle*, 2 Pepp. Disp.

Resol. L.J. 77, 96 (2002) ("Certainty is crucial to the vitality of the business community.").

This rule also furthers interests in efficiency by eliminating the need for separate lawsuits and motions to compel arbitration. Vesting the arbitrators with authority to determine their jurisdiction ensures that the arbitrators' determination on arbitrability receives a deferential review by U.S. courts, consistent with the understanding that the parties have chosen to resolve all their disputes by arbitration.[16] Regardless of the D.C. Circuit's view of the demerits of the arbitral tribunal's decision, "the parties 'bargained for the arbitrator[s'] construction of their agreement,'" meaning "an arbitral decision 'even arguably construing or applying the contract' must stand." *Oxford Health Plans LLC* v. *Sutter*, 133 S. Ct. 2064, 2068 (2013) (quoting *E. Associated Coal Corp.* v. *United Mine Workers of Am.*, 531 U.S. 57, 62 (2000)).

II. The D.C. Circuit's Holding that the Treaty's Incorporation of the UNCITRAL Rules Had a "Temporal Limitation" Wreaks Havoc on the Settled Expectation that Use of Specific Arbitral Rules Delegates Jurisdictional Issues to Arbitrators

The D.C. Circuit's "temporal limitation" reasoning is so broad that it introduces uncertainty into *all* conditions precedent to arbitration—not just

[16] See 9 U.S.C. § 10(a); *First Options*, 514 U.S. at 943 (when an arbitrability question is properly submitted to the arbitrator, "the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances").

litigation requirements like the one at issue here. The D.C. Circuit conceded that "once the possibility of arbitration is triggered," the Treaty's "incorporation of the UNCITRAL Rules provides 'clear[] and unmistakabl[e] evidence[]' that the parties intended for the arbitrator to decide questions of arbitrability." Pet. App. 13a-14a (quoting *AT & T Techs., Inc.* v. *Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986), and citing *First Options*, 514 U.S. at 944). But the court nonetheless concluded that the Treaty's incorporation of the UNCITRAL Rules was subject to a "temporal limitation"—"the Rules are not triggered" until petitioner had first sought recourse in Argentine courts for at least eighteen months. *Id.* at 14a. In other words, the prerequisite to arbitration was not part of the agreement to arbitrate disputes, and because the litigation requirement fell outside the scope of the arbitration agreement or the arbitration rules, the court—not the arbitrator—had the authority to determine whether the prerequisite was satisfied such that arbitration was triggered.

Under the foregoing circumstances, to hold that a condition precedent to arbitration is *not* part of the arbitration agreement itself is logically inconsistent. The D.C. Circuit's "temporal limitation" reasoning introduces uncertainty into *all* arbitration agreements that include conditions precedent and threatens the validity of *all* agreements in which the parties contracted to arbitrate threshold jurisdictional questions.

A. The D.C. Circuit's Holding Affects All Prerequisites to Arbitration in All Arbitration Agreements

Many arbitration agreements and international investment treaties, not just bilateral investment treaties, include prerequisites to arbitration other than local litigation requirements. See Int'l Bar Ass'n, IBA Guidelines for Drafting International Arbitration Clauses ¶86 (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."); Campbell McLachlan et al., *International Investment Arbitration: Substantive Principles* ¶¶3.01–3.32 (2007). These multi-step arbitration clauses often include prerequisites that the parties must complete before initiating arbitration. Such prerequisites include requirements that the parties participate in mediation or amicable negotiations, submit the claim to a dispute review board, or observe a mandatory cooling off period before arbitration can begin.[17]

---

[17] See Kathleen M. Scanlon, *Drafting Dispute Resolution Clauses* 2.1.2 (2006) ("Negotiation and mediation are commonly used before the parties resort to arbitration or litigation."); Jack J. Coe, Jr., *International Commercial Arbitration: American Principles and Practice in a Global Context* 2.3.2 (1997) (explaining that dispute resolution boards are gaining acceptance); Christopher F. Dugan, et al., *Investor-State Arbitration* 117 (2008) (noting that many bilateral investment treaties provide for cooling off periods that allow for consultation, amicable negotiation, or pursuing local remedies prior to the dispute being submitted to arbitration).

The D.C. Circuit's decision adversely affects all prerequisites to arbitration. There is no principled distinction between the local-litigation requirement at issue in this case and myriad other prerequisites to arbitration that are commonly used in multi-step arbitration provisions. The local-litigation requirement is nothing more than a particular type of pre-arbitration process submitted through a particular procedure. The precondition to arbitration at issue in *John Wiley*, which involved an arbitration agreement with a similar multi-step process, illustrates the lack of distinction. Pursuant to the collective bargaining agreement at issue in *John Wiley*, the parties had to submit the dispute to two separate conferences before initiating arbitration.[18] That process is conceptually similar to multi-step arbitration clauses used in international commercial agreements in that it required the parties to perform certain actions that could resolve the dispute before resorting to arbitration. In *John Wiley*, the arbitrator decided whether the two prerequisite steps had been satisfied, and this Court upheld the arbitrator's authority to make that determination; there was no indication that a court was required to determine whether those two steps had occurred, on the theory

[18] The fact that *John Wiley* took place in the labor-relations context is irrelevant. The multi-step prerequisites at issue there could just as easily be contained in an international arbitration agreement as a collective bargaining agreement. Moreover, this Court has cited *John Wiley* in the context of commercial arbitration without any indication that its relevance is limited to labor arbitrations. See *Howsam*, 537 U.S. at 592 (explaining that *John Wiley* held "that an arbitrator should decide whether the first two steps of a grievance procedure were completed, where these steps are prerequisites to arbitration").

that arbitration was not "triggered" (Pet. App. 14a) until they had.

Nor can the D.C. Circuit's reasoning be limited to bilateral investment treaty ("BIT") arbitrations. As the Second Circuit noted in *Republic of Ecuador* v. *Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011), whether the party is a party to a BIT or an investor utilizing the dispute framework provided by the BIT is a "distinction without a difference." *Id.* at 392. A "separate binding agreement to arbitrate" exists between the State and the investor because the State signed the BIT submitting disputes to arbitration and the investor consented to arbitrate. *Ibid.* A State's "accession to the Treaty constitutes a standing offer to arbitrate," and "a foreign investor's written demand for arbitration completes the 'agreement in writing' to submit the dispute to arbitration." *Id.* at 392-393. As a result, an arbitration agreement under a BIT is identical to a non-BIT arbitration agreement.

The applicable arbitration rules and their mandate that the arbitral tribunal determine issues of arbitrability are identical in both BIT and non-BIT cases. See Section I.A.2., *supra* (quoting arbitration rules). See generally U.S. Amicus Br. 2-3 (May 10, 2013) (acknowledging that BITs "contemplate dispute resolution according to the rules of other arbitral institutions and before ad hoc arbitral tribunals convened under the [UNCITRAL] Rules."). No authority exists for treating the identical text of the applicable rules differently in BIT and non-BIT contexts. It therefore is impossible to restrict the temporal limitation to BIT disputes. The D.C. Circuit erred in suggesting its holding was applicable only to the BIT agreement before it. See Pet. App. 18a–20a.

B. The D.C. Circuit's Decision Will Increase Judicial Challenges to Arbitration Based on a Party's Alleged Failure to Meet Preconditions to Arbitration

The D.C. Circuit's rationale necessarily applies to any arbitration clause that provides a condition precedent to arbitration.[19] As a result, the decision below creates a weapon to obstruct arbitration through ancillary litigation.

At the inception of arbitration, federal courts could be subject to a rash of actions seeking to enjoin arbitration proceedings on the ground that preconditions for triggering arbitration have not been satisfied. Federal courts also would be forced to entertain judicial challenges at the post-award stage when parties challenge the validity of an arbitral award on the ground that a condition precedent was not met prior to its issuance. The D.C. Court's decision provides dissatisfied parties the ability to have a second bite at the apple, allowing them to see how they fare in arbitration and only then invoking a supposedly unmet condition precedent to challenge an adverse award.

Thus, the D.C. Circuit's ruling significantly increases the potential for dilatory challenges to arbitration and arbitral awards, and it opens the way

---

[19] The D.C. Circuit's reasoning supporting its finding of a "temporal limitation" would permit a party opposing arbitration to argue that the determination of whether *any* precondition to arbitration has been satisfied must be reserved to the courts—after all, any precondition to arbitration is effectively a temporal limitation that pushes back the inception of the actual arbitration process.

for arbitration to become bogged down in years of pre- or post-award litigation by parties seeking to undermine their arbitration agreements. These lawsuits would drive up the costs to the party seeking enforcement and frustrate the purpose of arbitration of providing swift and final resolution of disputes at lower cost.

Such ancillary litigation is contrary to the "emphatic" federal policy favoring international arbitration. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 US 614, 631 (1985). It is also contrary to well established precedent that permits an award to be set aside only in narrow circumstances where arbitral awards violate public policy. When a party seeks to confirm an arbitral award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), "[t]he court *shall* confirm the award unless it finds one of [seven exclusive] grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207. Chapter II of the Federal Arbitration Act ("FAA") incorporates the pro-enforcement New York Convention into law. As such, arbitral awards are enforced by U.S. Courts except in exceedingly narrow circumstances[20]—none of which justifies vacatur of the arbitral award.

---

[20] See, *e.g.*, *Hall St. Assocs., L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 584 (2008) (Section 10 of the FAA provides "exclusive grounds" for expedited vacatur of an arbitral award); *Zeiler* v. *Deitsch*, 500 F.3d 157, 164 (2d Cir. 2007) (noting that the party opposing enforcement of an arbitral award has a heavy burden, "as the showing required to avoid summary confirmance is high"); *Yusuf Ahmed Alghanim & Sons, W.L.L.* v. *Toys "R" Us,*

III. The D.C. Circuit's Decision Threatens to Undermine the United States' Position as a Preferred Forum for International Arbitration

The D.C. Circuit's recognition of a "temporal limitation," Pet. App. 13a, places it outside of the mainstream of other jurisdictions and threatens the nation's reputation as a favored forum for international arbitration. By espousing an unprecedented temporal limitation, the D.C. Circuit's decision contravenes established precedent, see Section I.A.3., *supra*, and thereby tarnishes the United States' reputation as a desirable non-interventionist forum. The decision also contravenes the policies established in *Mitsubishi Motors* and "subvert[s] the spirit of the United States' accession to the [New York] Convention," 473 U.S. at 636, 639 n.21, by impermissibly supplanting the arbitral tribunal's construction of the parties' agreement with that of the D.C. Circuit.

Inc., 126 F.3d 15, 19 (2d Cir. 1997) ("Under the Convention, the district court's role in reviewing a foreign arbitral award is strictly limited."); *M & C Corp.* v. *Erwin Behr GmbH & Co.*, 87 F.3d 844, 848 (6th Cir. 1996) (judicial review of an international arbitral award is "extremely limited" and governed by the New York Convention); see also Kristina L. Morrison, *A Misstep in U.S. Arbitral Law: A Call for Change in the Enforcement of Nondomestic Arbitral Awards*, 46 Tort Trial & Ins. Prac. L.J. 803, 827 (2011).

A. The D.C. Circuit's Decision Will Deter Parties from Selecting the United States as an International Arbitration Forum, Just as *Metalclad* Did for Canada

Since its release, the D.C. Circuit's decision has provoked scrutiny and criticism, with experts positing that the "interpretation of the scope of the arbitral tribunal's competence is out of line with most international authority and a dangerous precedent for both investment and commercial arbitration." Sebastian Perry, *BG Group v Argentina – a Dallah for the US?*, Global Arb. Rev. (Jan. 27, 2012) (quoting Gary Born).[21] See also Carolyn B. Lamm & Eckhard R. Hellbeck, *US Court Vacates BG Group's Investment Treaty Award – Argentina* v. *BG Group Plc*, 15 Int'l Arb. L. Rev. N-14, N-18 (2012) (the D.C. Circuit decision "may significantly affect Washington D.C.'s standing as a seat of international arbitration").

This outcry recalls the scholarly criticism that erupted in response to the Canadian case *United Mexican States* v. *Metalclad Corporation*, 2001 B.C.S.C. 664 (Can. B.C. S.C.). In *Metalclad*, the British Columbia Supreme Court partially vacated an award issued against Mexico under the North American Free Trade Agreement. The *Metalclad* decision precipitated a backlash against Canada as an arbitral forum, with one commentator recognizing that the case provides "an example of why it is inappropriate for a national court to enter upon matters of international law when reviewing an

---

[21] *Available at* http://globalarbitrationreview.com/news/article/30124/bg-group-vargentina-8211-dallah-us.

international arbitral decision."[22] After *Metalclad*, parties engaged in international arbitration resisted Canada as a forum by citing an overly active judiciary.[23]

Metalclad serves as a warning of what likely will come should the D.C. Circuit's decision stand. The immediate criticism of the D.C. Circuit's decision suggests that it starts the United States down the same path that the *Metalclad* decision led Canada—one with a broader effect than stinging academic criticism, and one with a foreseeable impact on U.S. international arbitration. If *Metalclad* is any indication, it follows that the D.C. Circuit's decision, should it stand, will diminish the United States' position as a preeminent destination for international arbitration.

---

[22] David Williams, *Challenging Investment Treaty Arbitration Awards—Issues Concerning the Forum Arising from the Metalclad Case*, 4 Bus. L. Int'l 156, 166, 168 (May 2003).

[23] See, *e.g.*, Decision of the Tribunal on the Place of Arbitration at ¶ 8, *United Parcel Serv.* v. *Canada*, NAFTA (UNCITRAL) (Oct. 17, 2001), *available at* www.naftaclaims.com/disputes_canada_ups.htm; Decision on the Place of Arbitration at ¶22, *Merrill & Ring Forestry L.P.* v. *Canada*, NAFTA (UNCITRAL) (Dec. 13, 2007), *available at* www.naftalaw.org/disputes_canada_merrill&ring.htm; Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings at ¶ 24, *Canfor Corp.* v. *United States*, NAFTA (UNCITRAL) (Jan. 23, 2004), *available at* www.naftalaw.org/disputes_us_canfor.htm.

B. The D.C. Circuit's Decision Runs Contrary to the Doctrine of Non-Parochialism Espoused in *Mitsubishi Motors*

Issues of non-arbitrability must be interpreted narrowly to prevent local parochialism from undermining the validity of international arbitral awards. *Mitsubishi Motors* reinforced the "emphatic federal policy in favor of arbitral dispute resolution," cautioned that "it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration" and mandated enforcement of the "agreement to arbitrate * * * in accord with the explicit provisions of the Arbitration Act." 473 U.S. at 631, 639-640 (citing *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 (1974)).

As this Court noted in *Scherk*, "[a] parochial refusal by the courts of one country to enforce an international arbitration agreement would * * * invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." 417 U.S. at 516-517. Parochialism "would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Id.* at 517. It also would undermine the purpose of the New York Convention "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Id.* at 520 n.15 (citing Convention on the Recognition and En-

forcement of Foreign Arbitral Awards, S. Exec. Doc. E, 90th Cong., 2d Sess. (1968); Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L.J. 1049 (1961)).

The D.C. Circuit's decision reflects a parochial refusal to enforce the arbitral tribunal's well reasoned order that conferred jurisdiction upon itself and settled the dispute between BG Group and Argentina. It should be overturned as contrary to this Court's precedent, the intent of the parties, and the interests of the United States as a leading seat for international arbitration.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted.

JOSEFA SICARD-MIRABAL
UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS
1212 Avenue of the Americas 21st Floor
New York, NY 10036-1689

ALLEN B. GREEN
WILLIAM T. O'BRIEN
ELISABETH L. SHU
MCKENNA LONG & ALDRIDGE LLP
1900 K Street NW
Washington, DC 20006

JOHN P. ELWOOD
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

TIMOTHY J. TYLER
J. ERIC PARDUE
VINSON & ELKINS LLP
1001 Fannin Street, Suite 2500
Houston, TX 77002

Attorneys for Amicus Curiae
United States Council for International Business

SEPTEMBER 2013