No. 12-138

IN THE

Supreme Court of the United States

BG GROUP PLC,

Petitioner,

v.

REPUBLIC OF ARGENTINA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE AMERICAN ARBITRATION ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Arbitration Association ("AAA"), as *amicus curiae*, respectfully submits this brief in support of the Petitioner.[1]

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

The AAA is the world's largest provider of alternative dispute resolution services. Since its founding in 1926, the AAA has administered approximately 3.7 million domestic and international disputes. The AAA has signed 70 cooperative agreements with arbitral institutions in 48 countries and has offices throughout the United States, as well as in Singapore, Mexico, and Bahrain. The number of international arbitrations filed with the AAA's international division, the International Centre for Dispute Resolution ("ICDR"), continues to grow.

Because of its extensive experience administering arbitrations, the AAA is well positioned to provide insight into the practical impact of court decisions that have broad-ranging implications for arbitration.

The national policy favoring arbitration embodied in the Federal Arbitration Act ("FAA") and the increased use of arbitration in the United States can be undermined by unwarranted judicial interference, and the AAA counts as a key objective the development of arbitration law that promotes the effective use of arbitration as a means of resolving disputes.

Toward that end, the AAA was at the forefront of organizations recommending that the United States accede to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3, 21 U.S.T. 2517, T.I.A.S. No. 6997 ("New York Convention"). The New York Convention, which was ratified by the United States in 1970, provides among other things for prompt and effective enforcement of voluntary international agreements to arbitrate. At the request of the State Department, the AAA convened a committee of international arbitration experts to draft proposed implementing legislation. The AAA's proposal formed the basis for what is

now Chapter 2 of the United States Arbitration Act, 9 U.S.C. §§ 201-08 (1982). Also at the request of the State Department, the AAA assisted the United Nations Commission on International Trade Law ("UNCITRAL") in developing a draft Model Law on International Commercial Arbitration.

The AAA endeavors through its activities to ensure that the United States remains receptive to arbitration and at the forefront of global developments in arbitration. The AAA, and hence the United States, is believed to have the world's largest annual international arbitration caseload. That caseload, however, is sensitive to judicial attitudes to arbitration, attitudes reflected in U.S. judicial decisions that are keenly studied by the global arbitration community. Where those decisions deviate from international arbitral norms supportive of arbitration, the United States' reputation as a venue with a legal framework that is supportive of arbitration can be seriously diminished.

In addition, the AAA seeks to ensure that parties who provide that disputes shall be resolved under the rules of the AAA can do so with the expectation that those rules will be enforced in a predictable manner. The AAA is concerned that the D.C. Circuit's decision will limit the effectiveness of provisions of the UNCITRAL Arbitration Rules, whose text mirrors that of certain core AAA arbitration rules, by inviting increased judicial involvement in numerous arbitrations.

The AAA has filed *amicus curiae* briefs in many of the major arbitration cases decided by the Supreme Court of the United States. The AAA does so again here, as this case involves issues of great concern to the development of arbitration law in the United States, the confidence that courts will interpret and enforce the AAA's arbitration rules in a predictable manner, and the future of the United States as a place of arbitration.

INTRODUCTION AND SUMMARY

As this Court acknowledged in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), the FAA establishes an "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce." A key factor in giving effect to this federal policy is limiting judicial intervention into the arbitral process. In arbitration, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* at 628.

In an AAA study of over 250 corporate legal departments, 73% of respondents stated that one of their reasons for using arbitration was that arbitration "saves time," and 71% responded that arbitration "saves money." *See* AM. ARB. ASS'N, DISPUTE-WISE BUSINESS MANAGEMENT: IMPROVING ECONOMIC AND NON-ECONOMIC OUTCOMES IN MANAGING BUSINESS CONFLICTS 25 (2006).[2] These cost and efficiency benefits of arbitration are undermined by judicial intrusion

[2] *Available at* www.adr.org/aaa/ShowPDF?doc=ADRSTG_004326.

into the arbitral process that goes beyond the type of limited court review provided for by the FAA.

The D.C. Circuit's decision to vacate the arbitral award rendered by three eminent international arbitrators under the Bilateral Investment Treaty signed by the United Kingdom and Argentina (the "BIT")[3] represents a dramatic and unprecedented instance of such judicial intrusion. In conflict with the precedent of this Court and other circuits, and despite the express provisions of the governing rules to submit questions of arbitrability to the arbitrators, the D.C. Circuit disregarded the thorough analysis and findings of the arbitrators regarding the satisfaction of a condition precedent to arbitration (the 18-month local litigation requirement in Article 8 of the BIT). *See* Pet. App. 161a-171a.

An affirmance by this Court of the D.C. Circuit's decision would have negative implications for the practice of arbitration in the United States in three ways.

First, the D.C. Circuit's decision to scrutinize compliance with a condition precedent to arbitration introduces wide-ranging opportunities for delay and increased arbitration-related litigation, because clauses requiring disputing parties to submit to dispute resolution processes such as negotiation or mediation before resorting to arbitration are so prevalent in practice.

Second, the D.C. Circuit's decision imposes a novel temporal limitation on common agreements to arbitrate questions of arbitrability found in many arbitration rules, including the rules of the AAA and the

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[3] Agreement for the Promotion and Protection of Investments, Arg.-U.K., Dec. 11, 1990, 1765 U.N.T.S. 33.

ICDR. This new limitation has the potential to affect adversely the many parties who have come to rely on such rules to empower arbitrators to determine issues of arbitrability.

Third, the D.C. Circuit's decision, based entirely on domestic law considerations, to vacate an arbitral award rendered under an investment treaty between two foreign sovereigns with no regard for the detailed international law findings of three eminent arbitrators jeopardizes the standing of the United States as a leading center for international arbitration. The D.C. Circuit's decision has already drawn sharp criticism, and an affirmance would likely have a negative impact on the willingness of foreign parties to arbitrate in the United States.

For these reasons, the judgment below should be reversed.

ARGUMENT

I. The D.C. Circuit's Decision Invites Inefficiencies in the Arbitral Process through Increased Judicial Intervention

The D.C. Circuit, in direct conflict with the decisions of this Court and other circuit courts, held that satisfaction of a condition precedent to arbitration, in the form of the 18-month local litigation requirement in the BIT, is a "question of arbitrability" to be decided by the courts. Pet. App. 13a.

In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964) and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), this Court held that the fulfillment of conditions precedent to arbitration is not an issue of "substantive arbitrability" for the courts to determine, but a procedural question (an issue of "procedural

arbitrability") for the arbitrators to decide. In the wake of *Howsam*, courts have uniformly held that the satisfaction of mandatory contractual dispute resolution steps prior to arbitration, such as negotiation, mediation or third-party review of claims, is a procedural question for the arbitrator to decide.[4]

Arbitration parties and arbitration practitioners now rely on the principle embodied in *John Wiley* and confirmed in *Howsam* as a bright-line rule. The rule has been so widely accepted that the Revised Uniform Arbitration Act ("RUAA"), which to date has been adopted by 17 states and the District of Columbia, incorporates clear direction on the allocation of decision-making responsibilities between courts and arbitrators. Under the RUAA, the arbitrators, not the courts, "shall decide whether a condition precedent to arbitrability has been fulfilled." *See* Revised Unif. Arbitration Act of 2000 § 6(c), 7 U.L.A. 13 (Supp. 2002).[5]

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[4] *See*, *e.g.*, *Dialysis Access Ctr., LLC v. RMS Lifeline, Inc.*, 638 F.3d 367, 375 (1st Cir. 2011) ("[T]he determination as to whether RMS complied with the Arbitration Clause's supposed 'good faith negotiations' pre-condition to arbitration is an issue presumptively for the arbitrator to decide . . . ."); *Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs., Inc.*, 623 F.3d 476, 481 (7th Cir. 2010) (Compliance with pre-arbitration notice and negotiation provisions was "a procedural question . . . for the arbitrator to address."); *Int'l Bhd. of Elec. Workers, Local Union No. 124 v. Smart Cabling Solutions, Inc.*, 476 F.3d 527, 530 (8th Cir. 2007) (determining that the "bona fide[s]" of pre-arbitral negotiations was a condition precedent and thus "a matter for the arbitrator to decide") (internal citations omitted); *El Dorado Sch. Dist. No. 15 v. Cont'l Cas. Co.*, 247 F.3d 843, 846 (8th Cir. 2001) (Compliance with a precondition to arbitration is "a question of procedural . . . arbitrability . . . 'that . . . should be left to the arbitrator to decide.'") (internal citation omitted).

[5] The official comments to the RUAA further explain that "[s]ubsections (b) and (c) of Section 6 are intended to incorporate

This clear allocation of responsibilities between courts and arbitrators has served to preserve key benefits of arbitration. "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results.'" *Preston v. Ferrer*, 552 U.S. 346, 357 (2008). In *John Wiley*, material to this Court's decision to leave to the arbitrators questions of compliance with pre-arbitration dispute resolution steps was the concern that opening the door to litigation over such issues would result in "opportunities for deliberate delay and the possibility of well-intentioned but no less serious delay. . . ." *John Wiley*, 376 U.S. at 558. *Howsam* likewise stated a concern to establish a rule suitable "better to secure a fair and expeditious resolution of the underlying controversy. . . ." *Howsam*, 537 U.S. at 82.

The D.C. Circuit's decision blurs the bright-line rule. While *John Wiley* should have been controlling, the D.C. Circuit limited the scope of that decision, holding that it reflected merely "the policy behind federal labor law." Pet. App. 17a. Reading *Howsam* as warranting a case-specific factual inquiry into the nature of the condition precedent at issue, the D.C. Circuit concluded that "[w]here the contracting parties agree to require dispute resolution in a court prior to arbitration, … a fundamentally different question of arbitrability

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the holdings of the vast majority of state courts and the law that has developed under the FAA that . . . whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide." Revised Unif. Arbitration Act (2000) (U.L.A.) § 6 cmt. n.2 at 26.

arises than that of the ignored informal resolution steps in *John Wiley*." Pet. App. 19a.[6]

The D.C. Circuit's decision to depart from the bright-line rule in *John Wiley* and *Howsam* offers a precedent for parties to delay and disrupt ongoing arbitrations by seeking review in court of compliance with conditions precedent or, worse, to challenge final and binding awards on the sole basis that the arbitrator was not the proper decision-maker to decide whether a condition precedent was satisfied or excused.

The D.C. Circuit's decision is bound to have widespread ramifications for the practice of arbitration, because "tiered" or "stepped" dispute resolution clauses requiring resort to other forms of dispute resolution, such as negotiation or mediation, before arbitration are increasingly prevalent and encouraged in commercial contracts. For the purpose of this proceeding, the AAA has conducted a survey of 663 dispute resolution clauses submitted in connection with international arbitrations filed with the AAA and its international division, the ICDR, between July 1, 2012 and June 30, 2013. A condition precedent to arbitration was included in over a third—34%—of the dispute resolution

[6] It is anticipated that Argentina will argue, as it did at the *certiorari* stage, that the D.C. Circuit's decision did not implicate a condition precedent (and the precedent of this Court regarding the same) because no agreement to arbitrate was ever formed. The argument is unpersuasive because the D.C. Circuit itself framed the issue as one of who—the courts or the arbitrators—is best suited to decide compliance with a condition precedent ("precondition") to arbitration and took pains to distinguish *John Wiley* on its facts. In any event, Argentina had offered a standing agreement to arbitrate in the BIT, which BG later accepted in writing.

clauses that were studied. The breakdown in the types of conditions precedent was as follows:

Type of Condition Precedent	Number of Clauses	% of Total
Negotiation	73	33%
Mediation	47	21%
Executive/Representative Meeting	28	12.5%
Executive/Representative Meeting & Negotiation	24	11%
Negotiation & Mediation	23	10%
Other Combinations of Executive Meeting, Negotiation, Mediation & Other Forms of ADR	28	12.5%
Total	**223**	**100%**

These empirical findings are consistent with the reported experience of practitioners that tiered dispute resolution clauses are increasingly common in practice.[7] They are also confirmed by surveys of arbitration users.

[7] *See*, *e.g.*, 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."); JAN PAULSSON *ET AL.*, THE FRESHFIELDS GUIDE TO ARBITRATION AND ADR 114 (2d ed. 1999) ("It is increasingly common, especially in contracts involving long term projects or commercial relationships, for parties to agree upon varying forms of staged or intermediate dispute resolution procedures, such as expert adjudications or decisions by review boards, which must be followed prior to the commencement of arbitration proceedings.").

According to a 2011 survey conducted by Fulbright & Jaworski LLP, 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.[8] A 2006 survey of corporate arbitration users conducted by PriceWaterhouseCoopers concluded that "[m]ulti-tiered or escalating dispute resolution clauses are increasingly popular."[9]

Such tiered dispute resolution clauses are found not only in commercial contracts, but also in virtually all bilateral investment treaties,[10] including those entered into by the United States.[11]

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[8] FULBRIGHT & JAWORSKI LLP, SECOND ANNUAL LITIGATION TRENDS SURVEY FINDINGS 4 (2011), *available at* www.adr.org/aaa/ShowPDF?doc=ADRSTG_004354.

[9] PRICEWATERHOUSECOOPERS, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 2006 11 (2006), *available at* www.pwc.be/en_BE/be/publications/ ia-study-pwc-06.pdf.

[10] *See, e.g.*, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, June 11, 1975, 1032 U.N.T.S. 32, art. 8(1) (requiring, as a precondition to arbitration, that the parties engage in a three-month settlement period "through pursuit of local remedies, through conciliation or otherwise"). *See generally* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 247 (2008) ("Nearly all consent clauses in treaties provide for certain procedures that must be adhered to. A common condition for the institution of arbitration proceedings is that an amicable settlement has been attempted through consultations or negotiations. This requirement is subject to certain time limits ranging from three to twelve months. If no settlement is reached within that period, the claimant may proceed to arbitration.").

[11] *See, e.g.*, 2012 U.S. Model Bilateral Investment Treaty, arts 23-24, *available at* http://www.ustr.gov/sites/default/files/BIT%

The matter under review involved an agreement to submit a dispute to *judicial* determination prior to arbitration. Such a condition precedent to arbitration is unlikely to be found in commercial agreements, and none of the 663 dispute resolution clauses surveyed by the AAA and ICDR contained such a condition precedent. However, despite these unusual circumstances, the decision below has material consequences for conditions precedent to arbitration generally. The D.C. Circuit's decision to ignore the bright-line rule, its suggestion that *John Wiley* is somehow limited to the labor context, and its reading of *Howsam* as warranting a case-specific factual inquiry into the nature of the condition precedent at issue, all invite litigation over compliance with conditions precedent, with its attendant "opportunities for deliberate delay and the possibility of well intentioned but no less serious delay…." *John Wiley*, 376 U.S. at 558.

The door opened by the D.C. Circuit's decision for parties to delay or otherwise disrupt—whether deliberately or in good faith—the many arbitral proceedings that involve tiered or staged dispute resolution clauses is an outcome that is especially unfortunate, because the principal reason that tiered dispute resolution clauses have become popular among arbitration users is that these clauses have been successful in reducing the costs and delays of resolving disputes by promoting early resolution. *See*, *e.g.*, FULBRIGHT & JAWORSKI LLP, SECOND ANNUAL LITIGATION TRENDS SURVEY FINDINGS 4 (2011) (showing that the experience of most surveyed companies, including 94% of the

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20text%20for%20ACIEP%20Meeting.pdf (providing for an escalated investor-state dispute resolution process, including consultations, a three-month notification period, and a six month cooling-off period).

largest companies, was that such staged processes reduced costs).[12]

An affirmance by this Court of the D.C. Circuit's judgment would herald an unwelcome expansion of the bases on which a party is permitted to litigate whether it should arbitrate. Because of the prevalence of tiered dispute resolution clauses, such expansion threatens the efficacy of arbitration and could increase the burden on the U.S. judiciary.

II. The D.C. Circuit's Ruling that Arbitral Rules Do Not Apply until Conditions Precedent Have Been Satisfied Creates Uncertainty for Arbitration Users

Even if this case presented a question of "substantive arbitrability," which it does not, the D.C. Circuit should have left that question to the arbitrators because the agreed arbitral rules—the UNCITRAL Arbitration Rules—explicitly empowered the arbitrators to decide such questions.

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), this Court held that courts must defer to an arbitrator's arbitrability decision where there is "clear and unmistakable" evidence of the parties' intention to submit such matters to the arbitrator. *Id.* at 944 (internal quotations omitted). The BIT's incorporation of the UNCITRAL Rules satisfied the *First Options* test. Article 21(1) of the UNCITRAL Rules contains a broad and standard agreement to arbitrate questions of arbitrability: "The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to

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[12] *Available at* www.adr.org/aaa/ShowPDF?doc=ADRSTG_004354.

the existence or validity of the arbitration clause or of the separate arbitration agreement." UNCITRAL Arbitration Rules (1976), art. 21(1), G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976).[13]

The intent and purpose of Article 21(1) of the UNCITRAL Rules are precisely to delegate arbitrability questions, including questions regarding the existence and validity of an arbitration agreement, to the arbitrators. This rule (which embodies the principle known in international practice as *Kompetenz-Kompetenz*) is "critical to the efficient conduct of the arbitration" because "without it a party could stall the arbitration at any time merely by raising a jurisdictional objection that could then only be resolved in possibly lengthy court proceedings." DAVID D. CARON & LEE M. CAPLAN, THE UNCITRAL ARBITRATION RULES: A COMMENTARY (2d ed. 2013) 450-451 (discussing Article 23(1) of the 2010 UNCITRAL Rules).

Consistent with the intent and purpose of the UNCITRAL Rules, the Second and Ninth Circuits have held that Article 21(1) constitutes, for the purposes of *First Options*, "clear and unmistakable" evidence of the parties' intent to empower the arbitrators to decide questions of arbitrability. *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 395 (2d Cir. 2011) (ruling that because the relevant BIT "incorporated by reference the UNCITRAL rule delegating questions of arbitrability to the arbitral panel . . . Ecuador cannot now 'disown its agreed-to obligation to arbitrate . . . the question[s] of arbitrability'"); *Schneider*

[13] While the UNCITRAL Rules were revised in 2010, they continue to provide arbitrators with the power to rule on their own jurisdiction. However, the present dispute arose and is governed by the 1976 UNCITRAL Rules.

v. Kingdom of Thailand, 688 F.3d 68, 73-74 (2d Cir. 2012) (holding that the parties' "adoption of the UNCITRAL rules . . . is clear and unmistakable evidence of their intent to arbitrate issues of arbitrability"); *Oracle America, Inc. v. Myriad Group, A.G.*, No. 11-17186, 2013 WL 3839668, at *7 (9th Cir. July 26, 2013) (holding that "incorporation of the [UNCITRAL] arbitration rules into an arbitration provision in a commercial contract constitutes clear and unmistakable evidence that the parties to the contract intended to delegate questions of arbitrability to the arbitrator").[14]

The D.C. Circuit accepted that "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. 14a (citing *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011)). The D.C. Circuit nonetheless declined to give effect to the parties' agreement on the basis that "the [UNCITRAL] Rules are not triggered until after an investor has first, pursuant to Article 8(1) and (2) [of the BIT], sought recourse, for eighteen months, in a court of the

[14] *See also Thai-Lao Lignite Co. Ltd. v. Gov't of the Lao People's Democratic Republic*, 492 Fed. App'x 150, 151 (2d Cir. 2012) ("The [Agreement] specifically provides that any arbitration will be governed by UNCITRAL Rules . . . . There is no question, then, that the arbitral panel was free to decide the scope of its own jurisdiction . . . ."); *Wal-Mart Stores, Inc. v. PT Multipolar Corp.*, Nos. 98-16952, 98-17384, 1999 WL 1079625, at *2 (9th Cir. Nov. 30, 1999) (holding that because the parties incorporated the UNCITRAL Rules into their agreements, the "arbitrator, rather than the district court, should decide whether the parties' disputes are arbitrable").

contracting party where the investment was made." Pet. App. 14a.

This novel "temporal limitation" on the reach and effectiveness of Article 21(1) defeats the intent and purpose of that provision, *i.e.*, to ensure the efficient conduct of the arbitration as a cost- and time-effective alternative to litigation. As the AAA's survey of dispute resolution clauses shows, conditions precedent to arbitration are common in practice, and a similar temporal argument could be made with respect to virtually any type of condition precedent. Consequently, the D.C. Circuit's decision creates opportunities for parties to use court intervention to delay or even derail arbitral proceedings, the very outcome that the drafters of Article 21(1) sought to prevent.

The implications of the D.C. Circuit's decision for the practice of arbitration extend to both domestic and international arbitrations administered by the AAA and the ICDR. Article 21(1) of the UNCITRAL Rules served as the basis for Rule 7(a) of the AAA Commercial Arbitration Rules[15] and Article 15(1) of the ICDR International Dispute Resolution Procedures.[16] Circuit courts have noted the similarity between the AAA and ICDR Rules and Article 21(1) of the UNCITRAL Rules. *See*, *e.g.*, *Oracle America, Inc., v. Myriad Group A.G.*, 2013 WL 3839668 at *4 (9th Cir. July 26, 2013) (noting that "the AAA rules contain a jurisdictional provision

[15] Rule 7(a) provides that "[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."

[16] Article 15(1) provides that "[t]he 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."

similar to Article 21(1) of the 1976 UNCITRAL Rules and almost identical to Article 23(1) of the 2010 UNCITRAL Rules.").

Circuit courts have overwhelmingly held that the AAA and ICDR provisions empower arbitrators, and not courts, to decide issues of arbitrability. *See*, *e.g.*, *Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205, 208-11 (2d Cir. 2005) (holding that the incorporation of the AAA Commercial Arbitration Rules was "clear and unmistakable evidence" of the parties' intent to delegate the question of arbitrability to the arbitrator).[17] In doing so, these courts have upheld the intent of the AAA and of the many parties that incorporate its rules in their contracts. It was precisely to make the parties' intent unmistakable, and with this Court's decision in *First Options* in mind, that the AAA amended its Commercial Arbitration Rules in 1999 to include what is currently Rule 7(a). *See* Am. Arb. Ass'n, *Commentary on the Revisions to the Commercial Arbitration Rules of the American Arbitration Association*, 3 ADR CURRENTS 6, 7 (Dec. 1998) (explaining that then Rule R-8(a) was adopted in the wake of *First Options* to "make more explicit" the parties' agreement to arbitrate issues of arbitrability).

The decision below creates uncertainty for the thousands of arbitration users who incorporate the AAA

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[17] *See also Petrofac, Inc. v. DynMcDermott Petrol. Ops. Co.*, No. 11-20141, 2012 U.S. App. LEXIS 14610 (5th Cir. July 17, 2012); *Green v. Supershuttle Int'l, Inc.*, 653 F.3d 766 (8th Cir. 2011); *Fadal Machining Ctrs., LLC, v. Compumachine, Inc.*, 461 Fed. App'x 630 (9th Cir. 2011); *Awuah v. Coverall N. Am., Inc.*, 554 F.3d 7 (1st Cir. 2009); *Fallo v. High-Tech Inst.*, 559 F.3d 874 (8th Cir. 2009): *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366 (Fed. Cir. 2006); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327 (11th Cir. 2005).

and ICDR rules into their contracts each year, trusting that such incorporation reserves the determination of arbitrability issues to the arbitrators. *See* ICDR, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES: INCLUDING MEDIATION AND ARBITRATION RULES 9 (2009) (assuring potential arbitration users that "[b]y providing for arbitration under these [ICDR] Rules, parties can avoid the uncertainty of having to petition a local court to resolve procedural impasses").

An affirmance by this Court of the D.C. Circuit's judgment would cast doubt over the reach and effectiveness of agreed arbitral rules, in disregard of the intent of the parties who incorporate them into their contracts.

III. The D.C. Circuit's Decision Puts the United States at Odds with the International Arbitration Community and Threatens its Standing as a Seat for International Arbitration

The United States is one of the preferred seats for international arbitration, along with jurisdictions such as England, France, Switzerland, Japan and Singapore. QUEEN MARY UNIV. OF LONDON, 2010 INTERNATIONAL ARBITRATION SURVEY: CHOICES IN INTERNATIONAL ARBITRATION 19 (2010).[18]

In most cases, the seat of an international arbitration is a matter of choice for the parties. Surveys of arbitration users show that parties pay most attention to the legal framework offered by potential seats of arbitration. QUEEN MARY UNIV. OF LONDON, 2010 INTERNATIONAL ARBITRATION SURVEY: CHOICES IN

[18] *Available at* www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf.

INTERNATIONAL ARBITRATION 17 (2010) (identifying the "formal legal infrastructure" as the most important factor in choosing the seat of arbitration for 62% of survey respondents).

A key factor that parties and their counsel consider in determining the desirability of a location as a seat of arbitration is the attitude of the local judiciary towards arbitration and the risk of judicial interference in the arbitral process. *See, e.g.,* GARY BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 64 (3d ed. 2010) ("Nations with interventionist or unreliable local courts should always be avoided as arbitral seats."); JAN PAULSSON, ET AL., THE FRESHFIELDS GUIDE TO ARBITRATION CLAUSES IN INTERNATIONAL CONTRACTS 32 (3d ed. 2010) ("Legal systems allowing extensive judicial interference with arbitral awards should be avoided.").

In keeping with the stated preference of arbitration users, jurisdictions intent on promoting their standing as a seat of international arbitration emphasize the non-interventionist attitude of their judiciary. A prime example is France, which recently enacted a new arbitration law extending the traditional non-interventionist policy of its judiciary. *See* Marie Bellan, *Arbitrage: Paris veut conserver son leadership* [Arbitration: Paris wants to maintain its leadership], LES ÉCHOS, June 14, 2011, at 5 (referring to the new law as "reinforcing the non-interventionist philosophy of the state judge" and quoting the French Minister of Justice as commenting that "Paris is the premier place in the world for arbitration and I wish it to remain so; since our law is so well recognized, it is the responsibility of the public authorities to ensure that it continues to thrive").

Singapore likewise advertises its "unequivocal judicial policy of facilitating and promoting arbitration." *See* Kasiviswanathan Shanmugam, Minister for Law and Second Minister for Home Affairs, Address at the Inaugural Singapore International Arbitration Forum (Jan. 21. 2010).[19] In an effort to attract foreign arbitration users, Bahrain went so far as to allow parties to exclude court intervention altogether. John M. Townsend, *The New Bahrain Arbitration Law and the Bahrain "Free Arbitration Zone"*, 65 DISP. RES. J. 74 (Feb. – Apr. 2010). In this respect, it followed in the steps of Switzerland, whose arbitration law likewise allows foreign parties to an arbitration seated in Switzerland to exclude recourse to the Swiss courts. Swiss Fed. Code on Private Int'l L., Art. 192.

By contrast, and as explained above, the D.C. Circuit's judgment invites increased judicial intervention in the arbitral process. It also demonstrates disregard for the findings of three arbitrators eminently qualified to interpret the BIT in accordance with international law. The president of the arbitral tribunal, Guillermo Aguilar-Alvarez, teaches international investment law at Yale Law School. He served as Principal Legal Counsel to the Government of Mexico for the negotiation and implementation of the North American Free Trade Agreement and free trade agreements with Costa Rica, Bolivia, Colombia, and Venezuela. He has also acted as counsel or arbitrator in numerous cases involving investment treaty interpretation.[20] His co-arbitrators were likewise recognized experts in the field. Professor Albert Jan van

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[19] *Available at* www.news.gov.sg/public/sgpc/en/media_releases/agencies/minlaw/speech/S-20100121-2.html.

[20] Mr. Aguilar-Alvarez has also published and spoken on investment arbitration, and on the relationship between courts and

den Berg teaches international law and arbitration law at Erasmus University in Rotterdam and at the University of Miami Law School. He has arbitrated numerous disputes involving the interpretation of investment treaties and other international law issues, and is a recognized authority on the interpretation of the 1958 New York Convention.[21] Professor Alejandro M. Garro teaches international commercial law, comparative law, and Latin American legal systems at Columbia Law School and is Senior Research Scholar, Parker School of Foreign and Comparative Law, Columbia University. He has acted as arbitrator in investment treaty arbitrations and is a recognized

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tribunals. *See*, *e.g.*, Guillermo Aguilar-Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, 28 YALE J. INT'L L. 365 (2003). Mr. Aguilar-Alvarez is also a member of the AAA's Board of Directors. He has not been consulted or in any manner involved in the drafting of this Brief, nor was he made part of the deliberations regarding the AAA's determination to file this Brief.

[21] This Court itself has cited Professor van den Berg's work to aid its interpretation of the Convention. *See Mitsubishi Motors*, 473 U.S. at 639 n. 21. Professor van den Berg is also the general editor of the *Yearbook: Commercial Arbitration* – which since 1976 has provided annual updates on key developments in international arbitration, including important awards, court decisions on arbitration from around the world, updates on developments in arbitration law and practice, and a digest of investment treaty awards and decisions – as well as the International Council for Commercial Arbitration Conference Series, which has published articles on a broad range of topics, including investor-state arbitration. Professor van den Berg is a former President (2003-2010) and Secretary-General (1980-1988) of the Netherlands Arbitration Institute, a former Vice-President of the London Court of International Arbitration (LCIA) (1998-2002), and a current arbitrator on the Arbitral Tribunal Concerning the Bank for International Settlements.

expert on the interpretation of the Vienna Convention on Contracts for the International Sale of Goods.[22]

In finding that there was but "one possible outcome to the [arbitrability] question" before it and that BG was required to litigate first in the Argentine courts (Pet. App. 19), the D.C. Circuit made no mention of the governing principles of international law under the BIT and failed to engage with the arbitrators' detailed finding—articulated in a 139-page award after over 4 years of pleadings and a full hearing—that these international treaty law principles compelled the opposite conclusion. The United States itself conceded at the *certiorari* stage that "[t]o be sure, the court of appeals' interpretation of the Treaty [was] not free of doubt" in this respect. Br. For U.S. As Amicus 13.

An affirmance by this Court would not only blur the bright-line rule established in *John Wiley* and reaffirmed in *Howsam* (as explained *supra* in Section I), and undermine the effectiveness of the UNCITRAL and other agreed arbitral rules (as explained *supra* in Section II), but it would also send a negative signal about the attitude of the U.S. judiciary towards arbitration. This signal would be all the more resounding as this case, which has already attracted significant attention abroad, is but the second reported instance of a domestic court anywhere setting aside an investment treaty award.

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[22] Professor Garro, in addition to his academic appointments and his experience as an arbitrator, has acted as a consultant for the World Bank on arbitration and has studied and published articles about the jurisdiction of arbitral tribunals. *See*, *e.g.* Alejandro M. Garro, *Enforcement of Arbitration Agreements & Jurisdiction of Arbitral Tribunals in Latin America*, 1 J. INT'L ARB. 293 (1984).

The aftermath of the other reported instance of a national court vacating an investment treaty award—*United Mexican States v. Metalclad Corp.*, 2001 B.C.S.C 664 (May 2, 2001)—is a reminder that vacatur decisions have real-world consequences that extend well beyond the particular case at hand. The Canadian court's decision to vacate in part an award rendered against Mexico under the North American Free Trade Agreement not only drew sharp criticism from commentators,[23] but also had a demonstrable impact on the willingness of parties to select Canada as a seat of international arbitration. In the wake of *Metalclad*, parties to international arbitral proceedings,[24] including the United States,[25] have pointed to

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[23] *See*, *e.g.*, William Dodge, *Mexico v. Metalclad Corporation, 2001 B.C.S.C. 664 (Case Comment)*, 95 AM. J. INT'L L. 910, 916 (2001) ("[T]he case may lead one to wonder whether it is appropriate to allow national courts to review Chapter 11 awards."); Todd Weiler, *Metalclad v. Mexico: A Play in Three Parts*, 9 CTRE. OF ENERGY, PETROLEUM AND MIN. L. AND POL'Y INTERNET J. (2003) (criticizing the British Columbia judge for "decid[ing] that he knew better than an expert tribunal what the 'usual and ordinary meaning' of 'international law' must be" and "stepp[ing] beyond the bounds of his legislative mandate."); David Williams, *Challenging Investment Treaty Arbitration Awards—Issues Concerning the Forum Arising from the Metalclad Case*, 2003 BUS. L. INT'L 156, 166 ("*Metalclad* may be presented as an example of why it is inappropriate for a national court to enter upon matters of international law when reviewing an international arbitral decision.").

[24] *See*, *e.g.*, *United Parcel Servs. v. Canada*, NAFTA (UNCITRAL), Order on the Place of Arbitration, ¶ 8 (Oct. 17, 2001), *available at* www.naftalaw.org/disputes_canada_ ups.htm; *Merrill & Ring Forestry L.P. v. Canada*, NAFTA (UNCITRAL), Decision of the Tribunal on the Place of Arbitration, ¶ 22 (Dec. 13, 2007), *available at* www.naftalaw.org/disputes_canada_ merrill&ring.htm.

[25] *See, e.g.*, *Canfor Corp. v. United States*, NAFTA (UNCITRAL), Decision on the Place of Arbitration, Filing of a

that decision and the arguments advanced by the Canadian government in those proceedings as reasons to resist the selection of Canada as seat of arbitration.

The observation made by Argentina and the United States at the *certiorari* stage that some foreign courts review questions of jurisdiction *de novo* begs the question: is the fulfillment of conditions precedent to arbitration properly characterized as a question of "jurisdiction"? Consistent with the approach of this Court in *Howsam*, the favored view in international practice is that the fulfillment of conditions precedent to arbitration should be regarded not as a question of "jurisdiction," subject to review by the controlling court, but as a question of "admissibility" for the arbitrators to decide. *See, e.g.,* J. Paulsson, *Jurisdiction and Admissibility*, in G. Aksen et al. (Eds.), REFLECTION ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION 603, 614-15 (2005) (endorsing the *John Wiley* and *Howsam* approach); GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 845-47 (2009) (concluding, on the basis of reported cases, that courts in other jurisdictions would likely adopt the *Howsam* approach and leave to the arbitrators the issue of whether preconditions to arbitration are satisfied); *Nihon Plast v. Takata*, Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Mar. 4, 2004, REVUE DE L'ARBITRAGE 2005, 143 (Fr.) (holding that preconditions to an arbitration clause relate to admissibility, not jurisdiction, and are thus outside the scope of art. 1502 of the New French Civil Procedure Code setting forth grounds for annulment). The U.K. Supreme Court's decision that both Argentina and the

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Statement of Defence and Bifurcation of the Proceedings, ¶ 24 (Jan. 23, 2004), *available at* www.naftalaw.org/disputes_us_canfor.htm.

United States referenced, *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov't of Pakistan*, does not detract from that conclusion. The case involved the altogether different question of whether an arbitral tribunal could assert jurisdiction over a non-signatory to an arbitration agreement. [2010] UKSC 46.

The concerns highlighted in the present brief are not academic. The D.C. Circuit's decision has been unanimously condemned by international arbitration users, including some of the most experienced practitioners, who often decide where to seat arbitration proceedings. For example, the decision has been described as a "threat . . . to treaty and commercial arbitration in the United States,"[26] as a precedent that "may significantly affect Washington, D.C.'s standing as a seat of international arbitration,"[27] and as a case "show[ing] that DC may not be optimal as a seat for investor-state disputes from the perspective of investors."[28]

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[26] Paula Hodges, Laurence Shore & Peter Godwin, *Cert. Petition in the BG v. Argentina Case: No Support from the US Solicitor General*, H.S.F. ARBITRATION NOTES (May 17, 2013), *available at* www.hsf-arbitrationnotes.com/2013/05/17/cert-petition-in-the-bg-v-argentina-case-no-support-from-the-us-solicitor-general.

[27] Carolyn B. Lamm & Eckhard R. Hellbeck, *US Court of Appeals Vacates BG Group's Investment Treaty Award Against Argentina for Failure to Litigate in Argentine Court for 18 Months Before Commencing Arbitration*, 15 INT'L ARB. L. REV. N-14, N-18 (2012).

[28] Timothy Nelson & Julie Bedard, *United States: Nixing a Final Award on Jurisdictional Grounds*, GLOBAL ARB. REV. (Jun. 10, 2013), *available at* www.globalarbitrationreview.com/journal/article/31607/united-states-nixing-final-award-jurisdictional-grounds. *See also* Asari A. Aniagolu et al, *US Supreme Court 2013*

In sum, an affirmance by this Court of the D.C. Circuit's judgment is likely to have a negative impact on the willingness of foreign parties to arbitrate in the United States, and thus to threaten the standing of the United States as a leading seat of international arbitration.

Term – Some Key Arbitration Rulings and Decisions, LEXOLOGY (Jul. 10, 2013) (observing that "[d]epending on which way the Court goes, parties seeking to give more autonomy to arbitration panels may find the United States more hospitable or dramatically less so, as an arbitration forum"), *available at* www.lexology.com/library/detail.aspx?g=ae8258a8-61fc-496b-98f9-e1ca52b5f534; Keith Goldberg, *Justices May Shift US Courts' Role in Global Arbitration*, NETWORK FOR JUSTICE IN GLOBAL INVESTMENT (Jun. 11, 2013) (commenting that "[f]aced with the possibility of meddling by U.S. courts, parties may steer clear of the U.S. when they look to settle arbitration disputes"), *available at* www.justinvestment.org/2013/06/justices-may-shift-us-courts-role-in-global-arbitration; Sebastian Perry, *BG Group v Argentina – a Dallah for the US?*, GLOBAL ARB. REV. (Jan. 27, 2012) ("Gary Born . . . says the court's '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.'"), *available at* www.globalarbitrationreview.com/news/article/30124/bg-group-vargentina-8211-dallah-us/.

CONCLUSION

For the foregoing reasons, *Amicus* AAA respectfully requests that this Court reverse the judgment below.

Respectfully submitted,

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