No. 12-138

In the Supreme Court of the United States

BG GROUP PLC,

PETITIONER,

v.

REPUBLIC OF ARGENTINA,

RESPONDENT.

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

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS

Although BG Group PLC has consented to the filing of this *amicus curiae* brief by The United States Council for International Business ("USCIB"), Respondent Republic of Argentina has withheld consent. The respective letters have been lodged with the Clerk of this Court. The USCIB therefore moves, pursuant to Supreme Court Rule 37.2(b), for leave to file this *amicus curiae* brief in support of Petitioner in the above captioned matter, for the following reasons:

The USCIB promotes free trade and represents U.S. business interests before international and intergovernmental entities. Among its many roles, the USCIB represents the central values, ideas, and common interests of U.S. international businesses before U.S. policymakers, and officials in the United Nations, the European Union, and other governments and organizations. As an affiliate, the USCIB represents the U.S. international business community 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 in 1923, is the world's leading institution for international commercial arbitration. International arbitration practitioners appointed by the USCIB play key roles in

ICC arbitration proceedings, on the ICC Commission on Arbitration, and other ICC arbitration bodies. U.S. parties are among the principal users of the International Court of Arbitration®. In addition, U.S. cities have been consistently among the top five most frequently selected cities as places of arbitration at the International Court of Arbitration®. Int'l Ct. of Arb. [ICA], Place of Arbitration: Most Frequently Selected Cities (1998 – 2006), March 2007. The USCIB, therefore, believes that it has information and insights that relate directly to the issues of the appeal at hand.

USCIB has rarely submitted an *amicus curiae* brief before this Court; it does so here given the importance of the issues and the damage that the D.C. Circuit's decision will do to arbitration in the U.S. Any remedy and determination will have a vital impact on the manner in which the members of the USCIB may practice their profession in Washington, D.C. and in the United States more generally. This is because the decision has far-reaching and adverse if not potentially disastrous implications for the future of the U.S. as an attractive forum for international arbitration and the freedom of choice to arbitrate, in particular, the freedom of the parties to authorize the arbitrators to rule on their own jurisdiction, including the question of whether predicates to arbitration have been satisfied, as provided for in the ICC Rules of Arbitration and the rules of all other international arbitration institutions. Accordingly, the USCIB and its members have a strong interest in the Court granting plenary review and correcting the erroneous judgment of the court below.

THEREFORE, the *Amicus Curiae* Petitioner requests that this Court grant its Motion for Leave to

File a Brief *Amicus Curiae* and that the Court accept the attached Proposed Brief *Amicus Curiae* in support of the positions of Petitioner BG Group PLC.

Respectfully submitted,

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QUESTION PRESENTED

In disputes involving a multi-staged dispute resolution process, does a court or instead the arbitrator determine whether a precondition to arbitration has been satisfied?

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INTERESTS OF AMICUS CURIAE

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 ("Petitioner").[1]

Founded in 1945, the USCIB promotes free trade and represents U.S. business interests before international and intergovernmental entities. Among its many roles, the USCIB represents the central values, ideas, and common interests of U.S. international businesses before U.S. policymakers, and officials in the United Nations, the European Union, and other governments and organizations. As an affiliate, the USCIB represents the U.S. international business community 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.

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief, and counsel for the Petitioner granted consent. Counsel for the Respondent withheld consent, and *amicus* has accordingly submitted a motion for leave to file.

ICC arbitration proceedings, on the ICC Commission on Arbitration, and other ICC arbitration bodies. U.S. parties are among the principal users of the International Court of Arbitration®. In addition, U.S. cities have been consistently among the top five most frequently selected cities as places of arbitration at the International Court of Arbitration®. Int'l Ct. of Arb. [ICA], Place of Arbitration: Most Frequently Selected Cities (1998 – 2006), March 2007.

Because the decision has far-reaching and adverse if not potentially disastrous implications for the future of the U.S. as an attractive forum for international arbitration and the freedom of choice to arbitrate, in particular, the freedom of the parties to authorize the arbitrators to rule on their own jurisdiction, including the question of whether predicates to arbitration have been satisfied as provided for in the ICC Rules of Arbitration and the rules of all other international arbitration institutions, the USCIB and its members have a strong interest in the Court granting plenary review and correcting the erroneous judgment of the court below.

SUMMARY OF ARGUMENT

The Court's precedent underscores the importance of preserving and promoting a party's right to choose arbitration as a dispute resolution mechanism. 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 ("U.K.-Argentina Treaty" or

the "Treaty")[2] at issue in this case provides that disputes arising out of the Treaty be subject to the decisions of arbitral tribunals.

The D.C. Circuit improperly concluded that it, not the arbitral tribunal, had the authority to decide whether the procedural requirements of the Treaty were fulfilled by the party instituting arbitration. It did so despite the Court's precedent that issues of procedural arbitrability, such as preconditions to arbitration, are for arbitral review. It also did so despite the parties' incorporation of the United Nations Commission on International Trade Law ("UNCITRAL") Rules,[3] evincing "clear and unmistakable evidence" that the parties' intended the arbitral tribunal to rule on objections to its jurisdiction, including the existence or validity of the arbitration agreement.

As a result, the court undermined the underlying purpose and value of international arbitration agreements and acted in direct contravention of federal policy, this Court's established precedent, and the intent of the parties to the Treaty and is inconsistent with the interests of the foreign investors relying on these agreements. The ambiguity in U.S. law with respect to international arbitration created by the court's decision and the potential negative ramifications of it to the U.S. reputation as an

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[2] U.K. Doc. – Argentina No. 1, CM 14449, art. 8 (1991), *available at* http://unctad.org/sections/dite/iia/docs/bits/uk_argentina.pdf.

[3] UNCITRAL Rules, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976); UNCITRAL Rules (1976), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf.

attractive forum of international arbitration are severe, thereby necessitating this Court's review.

ARGUMENT

I. THE DECISION WARRANTS THIS COURT'S REVIEW BECAUSE IT JEOPARDIZES FUNDAMENTAL PRINCIPLES OF INTERNATIONAL ARBITRATION.

A. The D.C. Circuit's Decision Conflicts Flatly With The Freedom To Choose Arbitration As A Dispute Resolution Mechanism.

Congressional policy regarding arbitration agreements is embodied within the Federal Arbitration Act ("FAA"), the principal purpose of which is to ensure enforcement of arbitration agreements "according to their terms." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). The Court has described the FAA as reflecting a "liberal federal policy favoring arbitration." *Id.* at 1749 (citations and internal quotation marks omitted). The U.S. ratification of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), enforced through 9 U.S.C. §201, further promotes this aim. Art. II(1), June 10, 1958, 21 U.S.T. 2517, 2519; *see Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) ("[T]he principal purpose underlying American adoption and implementation of [the Convention] was … to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.").

This Court has further held, "Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the

contractual rights and expectations of the parties.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773-74 (2010) (quoting *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). In the case of arbitration agreements, the parties' intentions control and "are generously construed as to issues of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). In fact, this Court has emphasized that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

The D.C. Circuit erred in departing from these well settled principles by disregarding the applicable arbitral rules, thereby threatening the basic tenet of parties' freedom to agree to arbitrate disputes. That is, as discussed in greater detail in Section I, C, *infra*, the parties to the Treaty incorporated specific arbitration rules with the expectation that those rules would govern disputes arising out of the Treaty. The D.C. Circuit's decision is inconsistent with this Court's precedent, the expressed intention of the parties to the Treaty, and the reasonable expectations of the Petitioner and other investors like it, which are eligible to invoke international investment treaty arbitration as a method of resolving disputes under investment treaties.

B. The Decision Creates Ambiguity With Respect To The Authority Of Tribunals To Determine Their Own Jurisdiction.

1. The Decision Conflicts With The Presumption That Tribunals Have Authority To Determine Procedural Arbitrability.

This Court has held that there is a general presumption favoring the arbitrator deciding issues of arbitrability and judicial review is extremely limited. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942-43 (1995) ("The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. … [T]he court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances."); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). This is even more so where parties specifically agree to arbitrate jurisdictional issues. *First Options*, 514 U.S. at 943.

What follows is that questions of procedural arbitrability affecting jurisdiction are for arbitral determination, while questions of substantive arbitrability are left to the courts unless there is a "clear and unmistakable" agreement to arbitrate the issue. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555-57 (1964); *Howsam*, 537 U.S. at 83-84 (applying *First Options*, 514 U.S. at 944); *see also AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986). Questions of substantive arbitrability for judicial determination arise only "in the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter" and there is no "clear and unmistakable"

agreement to the contrary. *Howsam*, 537 U.S. at 83-84. Where there is such "clear and unmistakable" agreement on the arbitrability of an issue, courts must defer to the tribunal's decision. *Id.*

As discussed below, in this case, there is a strong presumption that the arbitral tribunal had the authority to determine its own jurisdiction. This included issues of procedural arbitrability such as whether preconditions to arbitration affected the arbitral tribunal's jurisdiction. But, in any event, there is, here, "clear and unmistakable" evidence—in the form of the incorporation of the UNCITRAL Rules—demonstrating the parties' intent to arbitrate the issue such that *de novo* judicial review is not warranted. Therefore, the D.C. Circuit's holding that the arbitral rules applied only once the procedural precondition had been met conflicts directly with this Court's precedent, the clear agreement of the parties, and the terms of the UNCITRAL Rules, thereby warranting this Court's review.

2. The Decision Conflicts With The Presumption That A Precondition To Arbitration Is An Issue Of Procedural Arbitrability For Arbitral Review And Would Undermine A Central Benefit Of Arbitration If Left Standing.

The D.C. Circuit's decision that the court rather than the arbitral tribunal should determine whether the preconditions to arbitration had been satisfied is inconsistent with this Court's precedent on how questions of "procedural arbitrability" are resolved. It would open the flood gates to ancillary litigation concerning the satisfaction of contractual preconditions

to arbitration, undermining the finality of the arbitral process.

Many commercial contracts contain preconditions to arbitration that require parties to engage in mediation, conciliation or some other form of "amicable" dispute resolution, which are referred to "step" clauses. Int'l Bar Ass'n, *IBA Guidelines for Drafting International Arbitration Clauses* ¶86 (2010). Similarly, a number of international investment treaties—like the Treaty at issue here—provide for various steps to be taken by the investor or the State. Campbell McLachlan et al., *International Investment Arbitration: Substantive Principles* ¶¶3.01-3.32 (2007).

Consistent with the Court's precedent, the vast majority of U.S. courts that have addressed this issue have ruled that the question of whether these preconditions have been met is for the arbitral tribunal. *See* Gary Born, *International Commercial Arbitration* 844-45 (2009) ("U.S. courts have generally refused to consider claims whether procedural requirements imposed by an arbitration clause were satisfied, reasoning that this issue is for the arbitrators to decide. … A few U.S. decisions are to the contrary, but they are ill-considered and do not represent the correct position under U.S. law."). This is consistent with this Court's rulings that so-called "procedural arbitrability" issues are for arbitrators.

The D.C. Circuit departed from this well established approach. It relegated to a footnote its treatment of this Court's precedent in *Howsam*, seizing on the *Howsam* Court's observation that the NASD tribunal in that case would be "'comparatively … better able'" to interpret the NASD statue-of-limitations rule as a basis for distinguishing it. App.

182 n.6 (quoting *Howsam*, 537 U.S. at 85)). But even assuming this was the primary basis on which this case was resolved—which it was not—there is nothing in *Howsam's* observations concerning the alignment of expertise and decision-making that would make it inapposite here. *Howsam* concerned a consumer arbitration, between a broker and a brokerage house, regarding the suitability of certain investments. It was in this context that the Court noted the advantages of an arbitrator with NASD experience.

The instant case involves a dispute between a sophisticated corporation and a sovereign state under a treaty. Parties such as these can be presumed to, and here in fact did, agree to an arbitral tribunal with substantial expertise in resolving disputes under international investment treaties.[4] Indeed, these sorts of disputes are resolved almost exclusively by specialist arbitrators, like those here, who are skilled in the interpretation of investment treaties and the matrix of international law in which they are interpreted. They are every bit the specialists that the

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[4] The arbitral tribunal was comprised of preeminent academics and practitioners in the field of investment arbitration who, collectively, have sat on no fewer than 35 tribunals interpreting similar investment treaties. *See, e.g.*, Int'l Centre for Settlement of Investment Disputes, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home (last visited Aug. 23, 2012). As in *Howsam*, this dispute is exactly the type the parties' would have expected to be resolved by this sort of expert panel. *See Mitsubishi*, 473 U.S. at 634 ("International arbitrators frequently are drawn from the legal as well as the business community; where the dispute has an important legal component, the parties and the arbitral body with whose assistance they have agreed to settle their dispute can be expected to select arbitrators accordingly.").

arbitrators in *Howsam* were in their sphere. And like the NASD rules in *Howsam*, construing investment treaties between sovereign States, especially when neither State is the United States, is not the daily fare of U.S. district courts.[5] The question of whether the provisions of Article 8 of the Treaty were or could reasonably have been satisfied is akin to an allegation of "'waiver, delay, or a like defense'" that the Court ruled is for the arbitrator. *Howsam*, 537 U.S. at 85 (citation omitted).

Similarly, *Wiley* involved a stepped clause in which the petitioner argued that its duty to arbitrate was extinguished by the respondent's failure to submit the dispute to two different conferences prior to arbitration, as prescribed in the collective bargaining agreement. Although the dispute arose in the labor context, this provision is not conceptually unlike the stepped clauses used in commercial arbitration. The D.C. Circuit's attempt to limit *Wiley* to industrial relations disputes ignores the fact that this Court has invoked *Wiley* in cases such as *Howsam* in addressing general arbitration principles. *See, e.g. Stolt-Nielsen*, 130 S. Ct. at 1775. In so limiting *Wiley*, the D.C. Circuit also failed to give proper weight to the federal policy favoring arbitration which applies with "special force in the field of international commerce." *Mitsubishi*, 473 U.S. at 631.

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[5] Investment treaty tribunals regularly decide challenges to their own jurisdiction. This is attributable in part to the commonly used international arbitration rules, like the UNCITRAL Rules that governed the arbitration here, that recognize the tribunal's authority to determine its own jurisdiction, under the principle of *competence-competence*. *See* UNCITRAL Rules, art. 21(1).

The D.C. Circuit's ruling is an open invitation for disappointed litigants to seek judicial intervention at the inception of an arbitration or to set aside awards by arguing that procedural predicates to arbitration have not been satisfied. Since stepped provisions are used widely in international arbitration, the effects could be far-reaching. Parties in cross-border commercial transactions that chose arbitration or relied on its protections will find themselves in court, the forum they were trying to avoid. Worse still, they could, like the Petitioner here, find that an arbitration that has taken years and substantial legal fees to complete is invalidated despite the fact the arbitrators provided a careful, reasoned decision on jurisdiction.

The D.C. Circuit's holding that preconditions to arbitration are subject to judicial review conflicts directly with *Howsam* and *Wiley* as well as the general principles and policy in favor of arbitration, thereby warranting this Court's review.

3. The Decision Conflicts With Other Circuit Decisions Which Have Held That Preconditions To Arbitration Are Issues Of Procedural Arbitrablity Within The Arbitral Tribunal's Review.

The D.C. Circuit's holding that preconditions to arbitration are for judicial review conflicts with the approach taken by a number of circuit courts that have held that they are issues for the arbitral tribunal's review. *See, e.g. Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Ironworkers, Shopman's Local 493 v. EFCO Corp. & Constr. Prods., Inc.*, 359 F.3d 954, 956-57 (8th Cir. 2004) (whether a party failed to comply with a notice requirement precondition to arbitration was an issue of procedural arbitrability for

determination of the arbitral tribunal); *United Steelworkers of Am., AFL-CIO-CLC v. Saint Gobain Ceramics & Plastics, Inc.*, 505 F.3d 417, 420 (6th Cir. 2007) ("Whether the parties have complied with the procedural requirements for arbitrating the case, by contrast, is generally a question for the arbitrator to decide."); *Lumbermens Mut. Cas. Co. v. Broadspire Mgmt. Servs., Inc.*, 623 F.3d 476, 481 (7th Cir. 2010) (holding that whether a party has met a condition precedent is within the jurisdiction of the arbitral tribunal). *But see Kemiron Atl., Inc. v. Aguakem Int'l Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002) (holding that whether a party complied with a precondition to arbitration was within the scope of judicial review).

These decisions demonstrate that the outcome of this case would have been different had it been decided in these circuits, giving rise to a clear circuit split warranting this Court's review.

C. The D.C. Circuit Misapplied The "Clear And Unmistakable" Intent Test, Thereby Usurping The Tribunal's Authority To Determine Its Jurisdiction.

Even if, *arguendo*, the particular preconditions to arbitration here at issue were issues of substantive arbitrability that the parties would have expected a court to decide, the parties' incorporation of the UNCITRAL Rules evinced their "clear and unmistakable" intent to vest the arbitrators with authority to resolve this issue and determine their own jurisdiction. The D.C. Circuit's conclusion that the UNCITRAL Rules provided for in the Treaty do not lead to this result (App. 13a-14a) misapplies this Court's precedent in *First Options*, discussed above.

First, Argentina agreed to arbitrate disputes with U.K investors that have made investments in Argentina. *See* U.K.-Argentina Treaty. Argentina is a sophisticated sovereign nation that has entered into at least 52 bilateral investment treaties, which provide for arbitration. *See* United Nations Conference on Trade and Development, Country-Specific Lists of Bilateral Investment Treaties.[6]

Second, the parties agreed to arbitrate the question of jurisdiction, including procedural preconditions to arbitration. Both the contracting parties (Argentina and the U.K.) as well as Petitioner, as a U.K. investor that brought a claim against Argentina under Article 8 of the Treaty, agreed to be bound by the UNCITRAL Rules. *See* U.K.-Argentina Treaty, art. 8(3). Like the rules of virtually all major arbitral institutions, including the ICC,[7] Article 21(1)

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[6] *See* http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/Country-specific-Lists-of-BITs.aspx (last visited Aug. 23, 2012).

[7] *See* International Chamber of Commerce Rules of Arbitration, art. 6.5 ("[A]ny decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed, shall then be taken by the arbitral tribunal itself."); London Court of International Arbitration Rules, art. 23.1 (1998), ("The 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."); Am. Arbitration Ass'n, Commercial Arbitration Rules and Mediation Procedures §R-7 (2009) ("The arbitrator 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."); Int'l Centre 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

of the UNCITRAL Rules 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." This evinces the parties "clear and unmistakable" agreement to grant the tribunal authority to determine its jurisdiction, including whether the preconditions to arbitration had been met.

The D.C. Circuit holding that the UNCITRAL Rules were irrelevant because they are not "triggered" until the predicates are satisfied (App. 13a-14a), of course, could prevent the arbitral tribunal from ruling

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with respect to the existence, scope or validity of the arbitration agreement."); Singapore Int'l Arbitration Centre, 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 Economic and 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 Property 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 Nations of Other States, art. 41(2), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 ("Any objection by a party to the dispute that the 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.").

on its own jurisdiction virtually anytime any contractual predicate is allegedly unfulfilled. In addition to the fact that this is inconsistent with the Court's ruling in *First Options*, the result would be to require resort to the courts when any precondition to arbitration was allegedly unsatisfied on the grounds that the arbitration rules do not yet apply.

By failing to defer to the parties' agreement manifested in Article 8 of the Treaty and Article 21(1) of the UNCITRAL Rules, the D.C. Circuit deprived these provisions of their meaning and failed to give proper consideration to that agreement, in conflict with the general policy in favor of arbitration. *See* Section I, A, *supra*. The decision, therefore, warrants the Court's review because it jeopardizes the U.S. courts' position with respect to the policy in favor of international arbitration, including deferring to the parties' incorporation of specific provisions in applicable arbitral rules. *See* Section III, *infra*.

D. The Decision Conflicts With Other Circuit Decisions Which Have Interpreted Incorporation of Arbitral Rules As Evincing The Parties' "Clear and Unmistakable" Agreement That Arbitral Tribunals Have Authority To Determine Preconditions To Arbitration.

The D.C. Circuit's failure even to consider the relevance of the UNCITRAL Rules with respect to the tribunal's authority to determine preconditions to arbitration, conflicts with a number of other circuit court decisions. In *Republic of Ecuador v. Chevron Corp.*, the Second Circuit concluded that even assuming that the procedural issues of waiver and estoppel were subject to judicial review, the parties'

incorporating of the UNCITRAL Rules into the Treaty evinced a "clear and unmistakable" intent that the parties authorized the arbitral tribunal to determine those procedural jurisdictional issues. 638 F.3d 384, 393-94 (2d Cir. 2011); *see also Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 211 (2d Cir. 2005) ("[A]s a signatory to a contract containing an arbitration clause and incorporating by reference the AAA Rules, Remote Solution [could] not … disown its agreed-to obligation to arbitrate *all* disputes, including the question of arbitrability.").

The Second Circuit has affirmed this approach as recently as this month when it held that the incorporation of the UNCITRAL rules and the jurisdictional reference in the Terms of Reference empowering the tribunal to "'consider … objections to jurisdiction,'" constituted "clear and unmistakable evidence that the parties agreed" that the scope of the arbitration agreement would be decided by the arbitrators. *Schneider v. Kingdom of Thailand*, No. 11-1458-cv, 2012 WL 3194228, at *1, *2, *4-5 (2d Cir. Aug. 8, 2012) (alteration in original) (citation omitted). There can be little question that the result of the case at hand would have been completely different had this matter been arbitrated in New York rather than Washington, D.C., significantly undermining uniformity in the interpretation of arbitration agreements and the incorporation of international arbitral institution rules.

Other circuit courts have also found that when an arbitration agreement incorporates arbitral rules by reference and these rules expressly authorize the arbitrator to decide issues of arbitrability, that incorporation evinces "clear and unmistakable" intent

of the parties to arbitrate procedure preconditions. *See, e.g.*, *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009) (holding that incorporation of the AAA Rules "constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator"); *Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473-74 (1st Cir. 1989) ("By contracting to have all disputes resolved according to the Rules of the ICC … [t]hese provisions clearly and unmistakably allow the arbitrator to determine her own jurisdiction when, as here, there exists a *prima facie* agreement to arbitrate whose continued existence and validity is being questioned."); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006) (holding that incorporating the AAA Rules into the agreement "clearly and unmistakably shows the parties' intent to delegate the issue of determining arbitrability to an arbitrator").

The D.C. Circuit's holding that the UNCITRAL Rules apply only once a procedural precondition has been met conflicts directly with this Court's precedent, other circuit court decisions, and the clear agreement of the parties.

II. THE NATURE OF THE DISPUTE RAISES IMPORTANT IMPLICATIONS FOR THE FUTURE OF INTERNATIONAL INVESTMENT ARBITRATION, WARRANTING THIS COURT'S REVIEW.

The Circuit Court's decision expanding judicial review of arbitral jurisdiction is likely to have seriously detrimental consequences for the future of international investment treaty arbitration.

Historically, under customary international law, an international investor pursuing dispute resolution

under international law with a host State in which it has made an investment was required to submit that dispute to the host State's courts. *The Ambatielos Claim (Greece, United Kingdom of Great Britain and Northern Ireland)*, Reports of International Arbitral Awards, Vol. XII, at 120 (1956), *available at* http://untreaty.un.org/cod/riaa/cases/vol_XII/83-153_Ambatielos.pdf ("The rule requires that 'local remedies' shall have been exhausted before an international action can be brought."). Even if the investor was able to persuade its home State to intervene to secure reparation for injury by way of diplomatic protection, the investor ordinarily had to first exhaust local remedies. Int'l Law Comm'n, Draft Articles on Diplomatic Protection, pt. 3, art. 14(1) (2006), *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf ("A State may not present an international claim in respect of any injury to a national … before the injured person has … exhausted all local remedies.").

The limitations of this requirement are significant. It is generally highly unappealing, if not invidious, for international investors to be forced to submit disputes with a host State to that State's own courts.[8] The prospect of a host State's courts resolving international law disputes brought by international investors against

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[8] Under international law, a State is responsible for the actions of its courts, just as it is responsible for the actions of its executive and legislature. International investors are often understandably reluctant to commence proceedings regarding a State's actions before one of the organs of that same State, namely its judiciary. Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, ch. II, art. 4(1) (2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

that very host State raises real questions of suitability, as well as impartiality and appearance of impartiality. First, host States' courts are generally bound to apply that State's law even if it does not protect the international investor under international law. Therefore, international investors are often unable to vindicate their international law rights in a host State's courts. Second, national courts do not necessarily have the technical expertise to be the optimal forum to resolve highly complex international investment disputes. Third, the potential appearance of partiality, if not partiality itself, is likely to hang over such proceedings.

Because of these limitations, in the latter part of the Twentieth Century, the system of international investment treaty arbitration emerged.[9] States began entering into bilateral and multilateral investment treaties which provided qualifying international investors of State parties to those treaties with direct rights to international arbitration against other State parties in which they had invested and with which they had a qualifying international investment dispute. C. McLachlan et al., *supra*, at 17. By contrast to the traditional approach under customary international law, these international investment treaties allowed for the establishment of impartial international arbitral tribunals with specialization in, and a mandate to apply, public international to the resolution of disputes

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[9] Modern international arbitrations are generally considered to have begun with the Jay Treaty of 1794 between the United States and Great Britain. They became considerably more popular and frequently used after the *Alabama Claims of 1872 Between the United States and Great Britain*. *See* Ian Brownlie, *Principles of Public International Law* 34 (7th ed. 2008).

between international investors and host States, and to determine their own jurisdiction.

Here, the Treaty provided for the claimant to pursue local court remedies for a period. While noting this, the arbitral tribunal found that Argentina had prevented the Petitioner from pursuing its claim by suspending all actions brought in Argentinian domestic courts seeking compensation from the State for the emergency measures at issue. App. 166a-68a (¶¶148-51). In addition, any licensee seeking judicial redress was also barred from any possible renegotiation of its license. App. 169a-70a (¶154). The arbitral tribunal held that it had jurisdiction because denying jurisdiction "would lead to the kind of absurd and unreasonable result" proscribed by Article 32 of the Vienna Convention as it would allow the State "to unilaterally elude arbitration," which it described as "the engine" that facilitated the "transition from a politicized system of diplomatic protection to one of direct investor-State adjudication." App. 165a-66a (¶147).

The D.C. Circuit's decision will allow States to insist that investors comply with the local remedies precondition to arbitration while at the same time preventing them from doing so. This will tend to undermine the substantive protections of investment treaties. It will also usurp the role of the neutral international arbitral tribunals established to resolve investor claims. As the arbitrators here rightly noted, the role of these tribunals is at the very heart of the investment treaty regime. The D.C. Circuit's ruling would undermine the design and efficacy of this system.

The decision also has potentially far-reaching consequences for U.S. investors, who invest hundreds of billions of dollars abroad.[10] U.S. investors regularly invoke their rights under investment treaties seeking compensation for breaches of the protections guaranteed by those treaties by States in which they have invested. The implications of the decision, including its regressive approach to international arbitration and the jurisdictional remit of arbitral tribunals, if upheld or allowed to subsist, are highly likely to curtail, and in some cases preclude, U.S. investors' arbitration rights and viable opportunities for remedies from unlawful sovereign interference with their investments around the world.

III. THE D.C. CIRCUIT'S DECISION MAY DETER PARTIES FROM SELECTING THE U.S. AS A PLACE OF ARBITRATION.

The negative consequences of this decision to the U.S.' reputation as an attractive forum of international arbitration are real and potentially severe. As set out above, the decision creates a circuit split on the question of an arbitral tribunal's authority to determine whether procedural preconditions affect its jurisdiction. This split will create ambiguity as to whether other circuits will follow the D.C. Circuit's reasoning and potentially invalidate effective awards or whether they will respect parties' agreement granting tribunals authority to determine their own

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[10] The Congressional Research Service figures show that since 1997, with the exception of one year, U.S. investment abroad has ranged from $100 to $400 billion per year. *See* James K. Jackson, CRS, *U.S. Direct Investment Abroad: Trends and Current Issues* 2 (2011), *available at* http://www.fas.org/sgp/crs/misc/RS21118.pdf.

jurisdiction. The ambiguity could deter parties from selecting not only Washington, D.C., but also the U.S., as a place of arbitration, which could have deleterious effects on U.S. commerce.

Failing to resolve the ambiguity created by the decision would frustrate some of the basic reasons why parties choose to arbitrate, including finality, speed, and costs. Allowing U.S. courts to reconsider questions of jurisdiction where an arbitral tribunal has already ruled on the issue would result in wasteful duplication, unnecessary use of judicial resources, and significant delay. *See Schneider*, 2012 WL 3194228, at *4 ("[R]equiring the district court to decide such questions *de novo* would 'frustrate[] the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings,' and 'would make an award the commencement, not the end, of litigation.'") (alteration in original) (citation omitted); *see also Chevron Corp.*, 638 F.3d at 393 ("'[F]ederal policy favoring arbitration' … 'is even stronger in the context of international business transactions' where 'arbitral agreements promote[] the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation.'" (citations omitted)). The result would be that arbitration in the U.S. would become a more time-consuming and costly process, deterring parties from selecting the U.S. as a place of arbitration.

But the real danger in this decision lies with the fact that it creates uncertainty for parties choosing to arbitrate: even where parties incorporate certain arbitral rules and even where those rules indicate that the tribunal has competence to determine jurisdiction,

under the reasoning of this decision, a U.S. court would have the authority to determine otherwise. This frustrates the important aim of predictability in arbitration. *Scherk*, 417 U.S. at 518-19 ("'The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.'" (citation omitted)).

Like many international investment arbitration tribunals, the tribunal in this case could have selected a seat of arbitration in a variety of jurisdictions based on its assessment of "the circumstances of the arbitration." UNCITRAL Rules, art. 16(1). The D.C. Circuit's decision creates a risk that arbitration agreements, including those in treaties, will be construed according to the laws of a nation that has very little or no relationship to the underlying agreement and whose laws might well have been outside the contemplation of the contracting parties. The potential for unpredictability is aptly illustrated by considering the inverse of what occurred here. Just as a U.S. investor would not expect an arbitral tribunal sitting in the U.K. to resolve its dispute with Argentina under a U.S.-Argentina treaty based solely on domestic U.K. law, the Petitioner has a reasonable expectation that its treaty rights will not be determined solely on the basis of domestic U.S. law, especially when it is out of step with the legal approach taken in many other jurisdictions.[11] The potential risk, therefore, of this

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[11] *See, e.g.* Nigel Blackaby & Constantine Partasides, *Redfern and Hunter on International Arbitration* ¶5.99 (2009) ("The power of an arbitral tribunal to decide upon its own jurisdiction is … an 'inherent' power."); *Nottebohm Case (Liechtenstein v. Guatemala)*, Preliminary Objection, 1953 ICJ 111, 119 (1953),

decision to the future of international arbitration in the U.S. warrants this Court's review.

CONCLUSION

The Petitioner's petition for *certiorari* should be granted, and the judgment should be reversed.

Respectfully submitted,

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available at http://www.icj-cij.org/docket/files/18/2057.pdf ("[I]t has been generally recognized, following earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction. … [This principle] is 'of the very essence of the arbitral function and one of the inherent requirements for the exercise of this function'.").