No. 12-138

IN THE

Supreme Court of the United States

BG GROUP PLC,
Petitioner,

v.

REPUBLIC OF ARGENTINA,
Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF AWG GROUP LIMITED AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Dated: August 30, 2012

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MOTION FOR LEAVE TO FILE

Pursuant to Rule 37.2(b), AWG Group Limited ("AWG") respectfully moves for leave to file the attached brief *amicus curiae* in support of Petitioner BG Group. Respondent Republic of Argentina denied a timely request for consent to file the brief.

This case presents an important and recurring question regarding international arbitration agreements: In disputes involving a multi-stage dispute resolution process, does a court or instead the arbitrator determine whether a precondition to arbitration has been satisfied?

This issue has wide implications for international commerce and investment. Arbitration is the dispute resolution method of choice for international business. The vast majority of international arbitration agreements are "multi-stage" or "multi-tiered," in the sense that they require some alternative procedure (whether in the form of litigation in local courts, mediation, or other method of dispute resolution) as a precondition to arbitration. Accordingly, the instant case will have a significant impact on many parties, including *amicus* AWG.

On July 30, 2010, an international arbitration tribunal held that AWG and other claimants are entitled to damages from Argentina in connection with a water system in Buenos Aires and surrounding areas. Like Petitioner BG Group, *amicus* AWG was required by treaty (according to Argentina) to litigate in the courts of Argentina for 18 months before commencing arbitration. Like Petitioner BG, *amicus* AWG did not pursue litigation

in Argentina, which would have been a futile gesture. As in the case of BG Group, the arbitrators concluded that AWG was not required to spend 18 months pursuing litigation in the courts of Argentina. Accordingly, the questions presented by the Petition will directly affect AWG.

The decision below, which holds that courts rather than arbitrators should decide whether preconditions to arbitration have been satisfied, adversely affects AWG and, more generally, threatens to disrupt the international consensus that whether preconditions are met is a matter for arbitrators rather than courts to decide.

Therefore, the Motion for Leave to File should be granted.

Respectfully submitted,

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

Amicus AWG Group Limited ("AWG") has a substantial interest in this case because *amicus* faces the same legal issue as Petitioner BG Group, in a similar international arbitration with the Republic of Argentina ("Argentina").

The Petition presents an important and recurring question regarding international arbitration agreements: In disputes involving a multi-stage dispute resolution process, does a court or instead the arbitrator determine whether a precondition to arbitration has been satisfied?

AWG's own case illustrates the important reasons for granting certiorari. On July 30, 2010, an international arbitration tribunal determined that AWG and other claimants are entitled to damages in connection with their former water concessions in and around Buenos Aires. The arbitrators have resolved the jurisdictional and liability issues in favor of *amicus* AWG, and the questions presented by the Petition will directly affect AWG.

Like Petitioner BG Group, *amicus* AWG was required by treaty (according to Argentina) to litigate in the courts of Argentina for 18 months before commencing arbitration. Like BG Group, AWG Group elected not to litigate in Argentina because of the futility of proceeding in an Argentine forum and because Argentina's own conduct vitiated the effectiveness of such a remedy. As in the case of the BG Group, the arbitral tribunal held that AWG was not required to spend 18 months pursuing litigation in the courts of Argentina.

The decision below, which holds that courts rather than arbitrators should decide whether preconditions to arbitration have been satisfied, adversely affects AWG and, more generally, threatens to disrupt the international consensus that whether preconditions are met is a matter for arbitrators rather than courts to decide.

Certiorari is amply warranted to address the important question presented by the Petition.

STATEMENT

The investment dispute involving *amicus* AWG arises out of one of the world's largest water distribution and waste water treatment privatizations, in the city of Buenos Aires and surrounding municipalities. To accomplish the privatization, Argentina granted a concession to an entity, Aguas Argentinas S.A. ("AASA"), organized and managed by other companies with significant interests and experience in the water business (collectively, the "Claimants"). AWG was one of the companies with an interest in AASA.

The Claimants invested $1.7 billion between 1993 and 2001 in a large concession covering metropolitan Buenos Aires and outlying areas. During the period of economic turbulence following the devaluation of the Argentine peso in 2001, Argentina improperly refused to apply previously agreed adjustments to the tariff calculation and adjustment mechanisms. Even after the economic turmoil subsided, Argentina nevertheless refused to apply the regulatory framework it had previously established. The effect of Argentina's actions eventually made the concessions so unprofitable that

the operators were forced to terminate the concession. In 2006, Argentina transferred the water and waste-water services system to a state entity.

In April 2003, AWG filed a Request for Arbitration under United Nations Commission on International Trade Law ("UNCITRAL"). At the same time, other Claimants filed Requests for Arbitration with the International Centre for Settlement of Investment Disputes ("ICSID"), an autonomous international institution established in connection with the World Bank. The Claimants alleged that Argentina's conduct violated its obligations to the investors under applicable Bilateral Investment Treaties (BITs) with Spain, the UK and France. In particular, AWG invoked Argentina's consent to arbitrate investment disputes under the 1990 Bilateral Investment Treaty between the Argentine Republic and the United Kingdom of Great Britain and Northern Ireland (the "Argentina-UK BIT"), which is the same treaty cited in the Petition filed by BG Group in this case. Argentina agreed to allow the AWG case, although subject to UNCITRAL rules, to be administered by ICSID. The ICSID registered the case on July 17, 2003.

Over the course of the ensuing years, the parties engaged in extensive proceedings before the ICSID in Washington, D.C. In September and October 2003, the parties arranged the appointment of the arbitrators. In February 2004, the parties agreed that the same tribunal would hear and decide four separate arbitrations involving water concessions in Argentina. On June 7, 2004, the Tribunal held its first session with the parties at the seat of the Centre in Washington, D.C. During the session, the

parties confirmed their agreement that the Tribunal had been properly constituted in accordance with the relevant provisions of the ICSID Convention and the ICSID Arbitration Rules and that they did not have any objections in this respect. During the session the parties also agreed on a number of procedural matters, including the timetable for written and oral pleadings in the case. In January 2005, five non-governmental organizations (NGOs) sought to participate in the arbitration proceeding as *amici*, with Argentina's support. In February 2006, AASA, one of the original Claimants in the dispute, sought leave to withdraw from the arbitration because of a change in its ownership structure and a need to obtain certain regulatory approvals. On October 12, 2007, shortly before the hearing on the merits was to take place, Argentina sought unsuccessfully to disqualify one of the arbitrators as a member of the tribunal.

The arbitral tribunal conducted a lengthy hearing on the merits from October 28, 2007 through November 8, 2007 at the seat of the Centre in Washington, D.C. Each side in the case presented witnesses for examination by the other side and questions from the tribunal. At the end of the hearing, the tribunal directed the parties to file simultaneous post-hearing briefs in January 2008.

On November 29, 2007, before the time for the filing of the parties' post-hearing submissions had passed, Argentina filed with the tribunal a second request to disqualify one of the arbitrators, on the ground that she was a non-executive director with UBS, the investment firm. After further briefing, the two remaining arbitrators denied the request on

May 12, 2008 and directed the parties to file post-hearing briefs in June 2008.

Tellingly, during all of these procedural skirmishes, Argentina ***never raised in any U.S. court the argument it seeks to press in the instant case***. It ***never*** sought a judicial stay of arbitration on the ground that the Argentina-UK BIT required claimants to litigate in the national courts of Argentina for 18 months before commencing the process of arbitration.

Argentina was certainly aware of this potential argument. In fact, in its jurisdictional objections before the arbitral tribunal, it contended that, under the Argentina-UK BIT, a Claimant was obliged to litigate in the local courts of Argentina for 18 months before instituting arbitration.[1] The tribunal rejected this objection on the ground that a comparable provision in the Argentina-France BIT did not include the 18-month litigation period and that AWG was entitled to similar treatment under the "most favored nation" clause of the Argentina-UK BIT.[2] The tribunal concluded that investor protection was a vital element of the Argentina-UK BIT and that "dispute settlement is as important as other matters governed by the BITs and is an integral part of the investment protection regime that the respective sovereign states have agreed upon."[3]

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[1] *See AWG Group. Ltd. v. Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/03/19 (Aug. 3, 2006) (Salacuse, Kaufmann-Kohler, Nikken), paras. 52-68.

[2] *Id.* at paras. 58-68.

[3] *Id.* at para. 59.

On July 30 2010, the ICSID tribunal issued a decision unanimously holding Argentina liable to the Claimants and finding that Argentina failed to provide the investors fair and equitable treatment ("FET").[4] The tribunal interpreted the FET obligation as requiring states to protect investors' objective and reasonable "legitimate expectations," taking into account all relevant circumstances, such as the nature of the investment, the state's rights and interests to exercise its regulatory authority, and the state's history and political, economic and social conditions. Applying that interpretation, the tribunal concluded that Argentina breached the FET obligation by refusing to adjust the tariff and by engaging in "forceful" treatment of AASA in attempts to renegotiate the terms of the concession contract. The tribunal found that "Argentina through its laws, the treaties it signed, its government statements, and especially the elaborate legal framework which it designed and enacted, deliberately and actively sought to create those expectations in the Claimants and other potential investors in order to obtain the capital and technology that it needed to revitalize and expand the Buenos Aires water and sewage system."[5] "Argentina's persistent refusal to revise the tariff in accordance with the legal framework and the Concession Contract frustrated the expectations of the Claimants."[6] "Where a government through its

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[4] *See AWG Group. Ltd. v. Argentine Republic*, Decision on Liability, ICSID Case No. ARB/03/19 (July 30, 2010) (Salacuse, Kaufmann-Kohler, Nikken).

[5] *Id.* at para. 227.

[6] *Id*. at para. 232.

actions subsequently frustrates or thwarts those legitimate expectations, arbitral tribunals have found that such host government has failed to accord the investments of that investor fair and equitable treatment."[7]

The tribunal also addressed whether the "necessity" defense under customary international law absolved Argentina of liability. It accepted Argentina's argument that the country experienced a severe economic crisis that could in theory justify the defense. Nevertheless, the tribunal concluded that the defense did not protect Argentina, because the government could have taken other actions to respond to the crisis that did not violate the investors' rights. The tribunal also rejected Argentina's argument that a government's human rights obligations to assure its population the right to water trump its obligations to investors under BITs. According to the tribunal, states must respect both its human rights and treaty obligations equally.

However, the arbitrators rejected other contentions by the Claimants, including the arguments that the general legal and regulatory measures enacted by the government expropriated the investors' property and that Argentina's unwillingness to raise the tariffs likewise constituted an expropriation. One of the members of the tribunal, Professor Pedro Nikken, wrote separately to address the tribunal's interpretation of the FET obligation, although he ultimately agreed that Argentina breached the FET obligation.

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[7] *Id*. at para. 223.

The tribunal's decision of July 30, 2010 fully resolves the issue of liability. The arbitrators are now proceeding to determine the amount of damages, fees and expenses Argentina will be required to pay to the Claimants.

REASONS FOR GRANTING THE WRIT

This case presents the question whether courts or arbitrators have the responsibility for deciding whether parties invoking arbitration have complied with the applicable conditions precedent. In the instant case involving BG Group, the D.C. Circuit held that an arbitral tribunal exceeded its authority by failing to enforce a precondition set forth in the Bilateral Investment Treaty between Argentina and the United Kingdom. The tribunal excused BG Group with the obligation to commence litigation before Argentine courts for 18 months prior to initiating international investment arbitration proceedings.

The issue presented by the Petition is an important and recurring question that warrants this Court's review. The issue has wide implications for international commerce and investment. AWG's own experience underscores the important reasons for granting certiorari.

This Court has cited the need for "international comity, respect for the capacity of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes." *Mitsubishi Motors Corp v. Soler Chrysler – Plymouth Inc.*, 473 U.S. 614, 629 (1985). All of those factors strongly militate in favor of certiorari here.

I. THE DECISION BELOW HAS BROAD IMPLICATIONS FOR MANY CASES.

A. Arbitration Provisions Are A Vital Tool Of International Commerce.

This case has important implications for international business and investment. "Arbitration is the dispute resolution mechanism of choice for parties to international contracts."[8] Professor Loukas Mistelis, Director of the School of International Arbitration, Queen Mary, University of London, has observed that "[i]t is well established that International Arbitration is the dispute resolution method of choice for cross-border transactions and disputes relating to foreign direct investment. The bigger the amount in dispute, the more likely it is that the dispute will be referred to arbitration."[9]

In one recent corporate survey, 88% of respondents stated that they had used arbitration to resolve international disputes, and 86% of the participating corporate counsel said they were satisfied with the process.[10] 86% of awards were rendered by arbitration institutions rather than through ad hoc arbitrations.[11] Some 26% of the disputes involved a state or state-owned enterprise,

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[8] Christopher R. Drahozal, *Empirical Perspectives on International Commercial Arbitration*, in TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION 3 (Christopher R. Drahozal & Richard W. Naimark eds., 2005).

[9] INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 2008, at i (2008) (Pricewaterhouse Coopers).

[10] *Id.* at 2.

[11] *Id.* at 4.

and 19% of respondents indicated that they had sought recognition and enforcement of arbitral awards against states and state enterprises.[12]

Since the adoption of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") in 1985, 66 countries have adopted legislation based on the Model Law.[13] The number of requests for arbitrations filed with the four most prestigious international commercial arbitration institutions more than doubled in the decade from 1993 to 2003.[14]

The growth in cases filed before the International Center for Settlement of Investment Disputes ("ICSID") is instructive. The Centre was founded in connection with the World Bank in 1966, and the first ICSID arbitration did not occur until 1972. During the 1970s and 1980s, typically only one or two cases were filed per year. However, beginning in the 1990s, there was a dramatic increase in activity. There are now on average two

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[12] *Id.* at 3.

[13] Status, 1985 – UNCITRAL Model Law on International Commercial Arbitration, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited Aug. 21, 2012).

[14] TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION 341 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) (extracting from a table the data on the American Arbitration Association, the International Chamber of Commerce, the London Court of International Arbitration, and the Stockholm Chamber of Commerce).

new cases per month, with over 100 cases pending in early 2007.[15]

Arbitration is particularly important in the resolution of international commercial disputes because of the differences among national legal systems:

> In international business transactions the question of how and where disputes are resolved is of much greater importance than in purely national transactions. First, there is obviously a greater potential for disputes and misunderstandings. The parties come from different cultural and legal backgrounds resulting often in different expectations as to the conduct and content of their business relationship. In addition they communicate in a language which is at least for one of them not the mother tongue. Second, and even more important, are the differences in the various national approaches to dispute resolution in general. Greatly diverging procedural laws, the

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[15] Rudolf Dolzer & Christoph Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 224 (2008). *See also* Christopher R. Drahozal, Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration, 22 ARBITRATION INTERNATIONAL 291, 299 (2006) ("From 1993 to 2001, annual case filings with 11 leading international arbitration institutions55 almost doubled, from 1,392 cases per year to 2,628 cases per year. Over roughly the same time period, the cumulative number of treaty-based investment arbitrations before the World Bank's International Centre for Settlement of Investment Disputes (ICSID) has increased from only three through 1994 to 106 through November 2004.").

> quality of the court system, national bias and the enforceability of decisions in other countries can pose considerable problems in practice. As a consequence in international transactions ***the mode and the place of dispute resolution is often one of the decisive factors in determining whether a party can enforce its rights or not***.[16]

Accordingly, arbitration agreements play a vital role in international commerce and investment. The question presented by this case has wide significance for many other parties and many other disputes.

B. The Decision Below Flies In The Face Of The International Consensus That Arbitrators Must Decide Whether The Preconditions To Arbitration Are Satisfied.

Increasingly, international commercial agreements contain multiple "tiers" or "steps," requiring parties to satisfy certain procedural preconditions before they may commence arbitration.[17] "So-called 'multi-step' dispute

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[16] Dr. Stefan Kröll, *The Privatization of Dispute Resolution in International Business Transactions*, Int. Assn. of Law Schools (Int. Assn. of Law Schools Conference, 'The Law of International Business Transactions: A Global Perspective," 2008), at 293 available at http://www.ialsnet.org /meetings/business/MasterBookletHamburg2.pdf.

[17] *E.g.*, Herbert Smith, *Multi-Tiered Dispute Resolution Clauses*, Japan Dispute Avoidance Newsletter No. 62 (October 2007) ("[L]eading in-house counsel from around the world were asked about their attitudes to dispute resolution. 73% of the respondents indicated that they preferred to use arbitration as means of dispute resolution. Of these, about two thirds

resolution clauses have become popular additions to domestic and international commercial contracts in the United States and elsewhere. These clauses typically prescribe tiered procedures in the event of a dispute."[18] As another commentator has observed, "[t]here is increased interest in the international legal community in adopting multi-tiered (step) dispute resolution clauses in cross-border contracts."[19] Such "multi-tiered" provisions may

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preferred to use it in combination with another ADR process in a multi-tiered dispute resolution procedure.").

[18] D. Jason File, *United States: Multi-Step Dispute Resolution Clauses*, IBA Legal Practice Division Mediation Committee Newsletter, July 2007, at 33.

[19] S.I. Strong, *International Arbitration And The Republic Of Colombia: Commercial, Comparative And Constitutional Concerns From A U.S. Perspective*, 22 DUKE J. COMPARATIVE & INTERNATIONAL LAW 47, 82 (2011); Dolone Chakravarti, *Handling Potentially Complex Disputes: Multi-Tiered Dispute Resolution Clauses*, International Arbitration Insights (Oct. 20, 2006) ("The increasing globalisation of business has caused many large national construction corporations to search for new opportunities in foreign states. Construction is no longer a local industry and international projects provide construction companies new scope for growth and diversification. However, the growth of international construction projects has given rise to proportionate growth in the number and complexity of matters which require consideration when drafting contractual provisions for resolving disputes which may arise. One solution that has emerged to handle the potentially complicated disputes of the type that often arise in large construction projects is the multi-tiered dispute resolution clause (MTDRC)."); Doug Jones, *Dealing with Multi-Tiered Dispute Resolution Process*, 75 Arbitration 188, 188 (2009) (noting that "[m]ulti-tiered dispute resolution processes are becoming increasingly common, especially in international construction contracts," and that [t]echniques which are commonly incorporated into multi-tiered dispute resolution clauses

mandate such preconditions as negotiation, mediation, or litigation in the local courts of a particular state.

Accordingly, the question of whether a party has complied with the procedural preconditions to arbitration is a recurring issue in many international disputes. Moreover, the question of ***who decides*** whether the preconditions are met is a crucial one. "The answer to this question often decisively affects a dispute's eventual outcome. It can mean the difference between winning and losing, between de minimis damages and a multimillion dollar award."[20]

The international consensus is that the question of whether arbitral preconditions have been satisfied is a matter for the arbitrators:

> Who decides on whether pre-arbitration requirements have been met? There seems to be a ***consensus*** that, if there is a valid arbitration agreement, ***this issue is to be decided by the arbitrators***. This result

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include: negotiation, mediation, expert determination and, finally, arbitration").

[20] Gary B. Born, *Planning for International Dispute Resolution*, 17 J. INT'L ARB. 61, 61 (2000) ("There are many reasons why the same dispute can have materially different outcomes in different forums. Procedural, choice-of-law, substantive, and other legal rules differ from one country to another. The character, competence, and integrity of tribunals also vary substantially among different forums. Other considerations, such as inconvenience or local bias, may make a particular forum much more favourable for one party than another. All these differences are usually more pronounced across international borders than within purely domestic political systems.").

> corresponds to the principle of *Kompetenz-Kompetenz*. The dispute whether pre-arbitration requirements have been met is a dispute arising out of, or in connection with, the agreement containing the arbitration clause, for which reason the issue has to be decided by the arbitrators.[21]

Another commentator has opined, with respect to "[t]he capacity of an arbitral tribunal to decide whether pre-arbitration requirements have been met," "there is a ***general consensus*** that if there is a valid arbitration agreement, this issue is to be decided by the arbitrators."[22]

The decision below runs counter to this international consensus. Under the D.C. Circuit's judgment, a national court – not an arbitral tribunal – has the responsibility for deciding whether the preconditions for arbitration have been met. Certiorari is warranted in light of the serious threat that the decision below poses to the existing international consensus regarding arbitration.

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[21] Alexander Jolles, *Consequences of Multi-Tier Arbitration Clauses: Issues of Enforcement*, 72 ARBITRATION 329, 335 (2006) (emphasis added).

[22] Doug Jones, *Dealing with Multi-Tiered Dispute Resolution Process*, 75 ARBITRATION 188, 190 (2009) (emphasis added).

II. CERTIORARI IS ALSO WARRANTED BECAUSE ARGENTINA'S CONDUCT VITIATED ANY OBLIGATION TO LITIGATE THE RELEVANT DISPUTES IN THE COURTS OF ARGENTINA.

In AWG's proceeding, the arbitral tribunal found that the Argentine government had violated the reasonable, investment-backed expectations of the Claimants and denied them fair and equitable treatment. The tribunal found that Argentina refused to exercise its "regulatory authority and discretion within the rules of the detailed legal framework that Argentina [itself] had established for the Concession."[23] Indeed, even when the economic crisis had abated, Argentina "enacted various measures directing the regulatory authorities not to respect important elements of the legal framework. Such actions were outside the scope of its legitimate right to regulate and in effect constituted an abuse of regulatory discretion."[24] The tribunal described Argentina's decisions as "persistent and rigid refusal[s]" to apply the very regulatory framework it had created for the water concession. [25]

Such abusive and deliberate misconduct, which violated Argentina's own regulatory policies, should vitiate any obligation on the part of Claimants to litigate their dispute in the courts of Argentina. Pursuing litigation in the Argentine courts plainly

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[23] *See AWG Group. Ltd. v. Argentine Republic*, Decision on Liability, ICSID Case No. ARB/03/19 (July 30, 2010) (Salacuse, Kaufmann-Kohler, Nikken), para. 237.

[24] *Id.*

[25] *Id.* at para. 238.

would have been futile. "Many national courts are distressingly inappropriate choices for resolving international commercial disputes. In some states, local courts have little experience with international transactions or disputes; in others, basic standards of judicial integrity and/or competence are lacking."[26] Here, the findings of regulatory abuse demonstrate that a judicial remedy in Argentina would have been nothing more than "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

By analogy, this Court has frequently recognized that exhaustion of available remedies is not required where such a course of action would be futile. *See Palazzolo v. Rhode Island,* 533 U.S. 606, 626 (2001) ("federal ripeness rules do not require the submission of further and futile applications with other agencies"); *McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992) (exhaustion of administrative remedies not required where they would be futile); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 n.21 (1985) (recognizing exceptions to tribal court exhaustion requirement "where exhaustion would be futile").

AWG's case illustrates a further reason that resort to the courts of Argentina should not be required as a precondition to arbitration: Argentina is plainly using the argument as an opportunistic pretext to derail already completed arbitration proceedings. Once the ICSID registered the AWG

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[26] Gary B. Born, *Planning for International Dispute Resolution*, 17 J. INT'L ARB. 61, 67 (2000).

case in Washington, D.C. on July 17, 2003, a U.S. judicial forum was available to Argentina to supervise the arbitration and render appropriate relief. Once the U.S. courts gained jurisdiction to oversee the AWG proceeding, Argentina could have moved in the U.S. District Court for the District of Columbia to stay the arbitration, on the ground that AWG was obliged under the Argentina-UK BIT to seek recourse in the Argentine courts for an 18-month period. Notably, such a motion would have been an application to stay an incipient arbitral proceeding rather than one to vacate an existing award.

Argentina made no such motion. Instead, it engaged in years of procedural delaying tactics before the arbitral forum (for example, twice seeking the removal of one of the arbitrators). Now Argentina seeks another bite at the apple, by dilatorily making an argument now that it could have raised in AWG's proceeding in 2003.

Certiorari is warranted to address such procedural gamesmanship, which the Court of Appeals inadvertently rewarded.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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