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 FOR RESPONDENT

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QUESTION PRESENTED

Whether a federal court with jurisdiction over an application to vacate an arbitral award may independently decide whether a valid and binding agreement to arbitrate has been created under the terms of a bilateral investment treaty?

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STATEMENT

This case concerns the standard of review applied to a dispute about the existence of an agreement to arbitrate between BG Group Plc ("BG") and the Republic of Argentina ("Argentina"). Under this Court's well-established precedent and consistent international practice, courts independently review such disputes, and their decisions are binding. The court of appeals correctly understood Argentina's position to be that it did not consent to arbitrate because BG failed to comply with the controlling terms of Argentina's offer in the treaty between Argentina and the United Kingdom. And the court properly construed the unambiguous text of the treaty in concluding that there was no consent and, therefore, no arbitral jurisdiction. Under any standard of review, the court of appeals' judgment is correct and should be affirmed.

I. FACTUAL BACKGROUND

A. The U.K.-Argentina Treaty

The arbitral award concerns a dispute under a bilateral investment treaty ("BIT") between Argentina and the United Kingdom. *See* Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments, U.K.-Arg., Dec. 11, 1990, 1765 U.N.T.S. 33 (the "Treaty"). While BITs often provide for dispute resolution between one contracting State and investors from the other contracting State, they do not always provide for arbitration. Among BITs that do so provide, consent to arbitration may be subject to

limitations on form and content, including conditions precedent that the contracting States require. *See, e.g.*, Brief for the United States as Amicus Curiae in Support of Vacatur and Remand (Sept. 3, 2013) at 20-21 ("U.S. Br.") (describing conditions on States' consent under the U.S.-Korea Free Trade Agreement and the North America Free Trade Agreement ("NAFTA")); *see generally* Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* 427-515 (2010).

Article 8 of the Treaty contains the terms under which Argentina and the United Kingdom offer dispute resolution to investors from the other State. Under Article 8(1), they agree that an investor *must* submit its dispute to the local courts:

> (1) Disputes with regard to an investment which arise within the terms of this Agreement between an investor of one Contracting Party and the other Contracting Party, which have not been amicably settled *shall be submitted*, at the request of one of the Parties to the dispute, *to the decision of the competent tribunal of the Contracting Party in whose territory the investment was made*.

Treaty, art. 8(1) (emphases added).

Article 8(2) contains the contracting States' offers to arbitrate with investors from the other contracting State under limited circumstances, and only when specific conditions to that offer are met:

> (2) The aforementioned disputes shall be submitted to international arbitration in the following cases:

> (a) if one of the Parties so requests, in any of the following circumstances:
>
> > (i) where, after a period of eighteen months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision;
> >
> > (ii) where the final decision of the aforementioned tribunal has been made but the Parties are still in dispute;
>
> (b) where the Contracting Party and the investor of the other Contracting Party have so agreed.

Treaty, art. 8(2). Accordingly, the States' offers to arbitrate in Article 8(2)(a) do not arise before an investor litigates under Article 8(1), and the domestic tribunal has either not resolved the dispute within eighteen months or has issued a final decision with which the investor remains unsatisfied, whichever occurs sooner. The Treaty does not require exhaustion of local remedies, but requires that an investor resort to domestic courts before an offer to arbitrate arises. The investor cannot bypass the local remedies requirement and arbitrate directly under the terms of the Treaty; it must instead negotiate a separate agreement to arbitrate. *See* Treaty, art. 8(2)(b).

This regime serves important sovereign interests by giving the contracting States an opportunity to resolve disputes before being exposed to international liability through arbitration, and reflects mutual respect between the sovereigns to "permit[] [each] State to

provide an avenue for redress within its own sovereign legal structure." Brief for the United States as Amicus Curiae Opposing Certiorari (May 10, 2013) at 20. It also serves important efficiency objectives by giving local courts the opportunity to provide valuable insight into the terms of local law, *see* Treaty, art. 8(4), which may simplify any later arbitration.

B. Argentina's Response to a Severe Economic Crisis and BG's Claim in Arbitration

BG is a U.K. company that invested in MetroGAS, a privatized Argentine natural gas distribution company operating in Buenos Aires and vicinity. Pet. App. 93a, 102a, 104a, 110a-111a. Under MetroGAS's license, tariffs would be calculated in U.S. dollars (but paid in Argentine pesos) and would be adjusted every six months to account for inflation, in accordance with the U.S. Producer Price Index. *Id.* 111a-113a. By 1998, BG owned 45.11% of MetroGAS. *Id.* 105a.

In 1998, the Argentine economy began to face increasing pressures from decreased availability of capital, particularly following the 1997 East Asian financial crisis and the 1998 Russian default; the collapse of the Brazilian currency and the rise of the U.S. dollar (to which Argentina's currency was pegged); and more restrictive U.S. monetary policy. *See id.* 118a. By 2001, Argentina was in an economic depression, and the country faced "an acute economic, social and political crisis," among the worst in centuries. *Id.*

Argentina adopted several emergency measures to address the severe consequences of the recession.

Among these measures was the Emergency Law enacted in January 2002, formally ending the currency board that artificially pegged the peso to the U.S. dollar, converting U.S. dollar-linked adjustment clauses to peso-based adjustment clauses in agreements, and converting dollar-linked tariffs into peso-based tariffs at one peso to one U.S. dollar. *See id.* 5a.

BG claimed that the economic consequences of these measures effected an expropriation of its investment in MetroGAS and deprived it of fair and equitable treatment, in violation of the Treaty. Pet. App. 132a. In April 2003, BG invoked a purported right to arbitration without first litigating in Argentine courts. *See id.* 94a. In the absence of an agreement between BG and Argentina, the arbitration, under Article 8(3) of the Treaty, was conducted under the Arbitration Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules"), G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (1976). *Id.* 97a. The seat of arbitration was Washington, D.C. *Id*. 93a.

From the outset, Argentina consistently objected to the jurisdiction of the tribunal to hear BG's claims because of BG's failure to submit to litigation in Argentine courts in compliance with Article 8(1) of the Treaty. *See* Pet. App. 99a, 134a, 143a-144a, 161a-163a. The tribunal declined to hear and decide the jurisdictional objections before deciding the merits. *Id*. 99a.

BG conceded that it did not comply with Article 8(1), but argued that the local recourse requirement was "senseless as there is no chance that in a case of this nature a decision could ever be rendered within

the eighteen-month period." *Id.* 163a. BG also argued that the Most Favored Nation ("MFN") clause of the Treaty permitted BG to bypass the requirement by taking advantage of the "more favorable" dispute resolution terms in the Argentina-U.S. BIT. *Id.* Finally, BG argued that customary international law permitted it to disregard the requirement if judicial resolution would be "unduly slow or unduly expensive in relation to the prospective compensation." *Id.* 163a-164a.

The tribunal agreed with Argentina that the Treaty requires litigation before Argentina consents to arbitration: "as a matter of treaty law investors acting under the Argentina-U.K. BIT must litigate in the host State's courts for 18 months before they can bring their claims to arbitration." Pet. App. 165a. The tribunal also rejected BG's arguments about the potential length of the court process and customary international law, and did not address BG's MFN argument. *Id.* 164a-165a, 171a.

The tribunal nonetheless excused BG's failure to satisfy the litigation requirement on grounds neither party raised. First, the tribunal pointed to presidential Decree 214/02 adopted in March 2002, which supported the Emergency Law by staying for 180 days "compliance with injunctions and execution of final judgments in lawsuits brought on account of the Emergency Law's effect on the financial system." *Id.* 5a. BG's claims, however, had nothing to do with the financial institutions regulated by the Emergency Law or compliance with an injunction or execution of any final judgment, and in any event the stay ended eight months before BG commenced arbitration. *See id.* 6a.

Second, the tribunal noted that Argentina offered to renegotiate tariffs with utility licensees, excluding licensees that were litigating against Argentina. *Id.* 169a. BG's position before the tribunal, however, was that because it was not a licensee, but instead an investor in one, "the renegotiation process is irrelevant . . . . BG has never participated in the renegotiation process and its claims under the BIT are entirely independent of that process." *Id.* 209a-210a. And in fact, licensee MetroGAS participated fully in the renegotiation process. The tribunal concluded that recourse to Argentine courts was "absurd and unreasonable" and took jurisdiction. *Id.* 165a-171a. The tribunal went on to rule in favor of BG on the merits, awarding BG approximately $185 million. *Id.* 297a.

II. THE LEGAL REGIME GOVERNING INTERNATIONAL ARBITRAL AWARDS

Review of the award is subject to both the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (the "New York Convention" or "Convention"), which is the key international regime addressing the balance between arbitral autonomy and judicial control. The Convention provides for judicial control and supervision over international arbitration and resulting awards, including over awards rendered under BITs. The Convention is implemented through FAA Chapter 2, 9 U.S.C. § 201 *et seq.*, and "provides a carefully structured framework for the review and enforcement of international arbitral awards." *Karaha*

Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 287 (5th Cir. 2004).[1]

The Convention framework is premised on the existence of "primary" and "secondary" jurisdictions for the enforcement of awards. The primary jurisdiction is the State in which, or under the arbitral law of which, the award was made, and the secondary jurisdiction is any other jurisdiction in which recognition and enforcement are sought. The Convention "mandates very different regimes for the review of arbitral awards" in primary and secondary jurisdictions. *Yusef Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997).

The Convention establishes exhaustive grounds for denial of recognition and enforcement in a "secondary" jurisdiction, *see* Convention, art. V, but grants "primary" jurisdictions the broader power to annul awards by providing that an award that "has been set aside or suspended by a competent authority" in a primary jurisdiction may be denied enforcement in a secondary jurisdiction, *id.* at art. V(1)(e). Each primary jurisdiction may decide for itself the grounds on which to vacate awards, and under what standard of review – the Convention "contemplates that the reviewing court will generally apply the set-aside law of the country in which (or under the law of which) the award was made." U.S. Br. 10; *see also Alghanim*, 126 F.3d at

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[1] The exception is awards made under Chapter IV of the Convention on the Settlement of Investment Disputes ("ICSID"). *See* 22 U.S.C. § 1650a(a); *Medellin v. Texas*, 552 U.S. 491, 521-22 (2008) (noting that ICSID and non-ICSID awards "enjoy a different status because of implementing legislation enacted by Congress" and that the latter are subject to Chapter 2 of the FAA).

22 ("There is no indication in the Convention of any intention to deprive the rendering state of its supervisory authority over an arbitral award, including its authority to set aside that award under domestic law."); *Karaha Bodas*, 364 F.3d at 288 (noting courts considering petitions to vacate "may apply their own domestic law" rather than simply the terms of the Convention); W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration* 114 (1992) ("Once a venue or a governing law is selected, the convention gives to it a primacy with regard to the validity of an award.").

The Convention also applies to awards made in the United States that, like this award, involve foreign parties. *See* Convention, art. I(1); 9 U.S.C. § 202. As a result, a U.S. district court may have the role of both a primary and a secondary jurisdiction. As the court with primary jurisdiction because it is where the award was made, the court may vacate the award. *See* 9 U.S.C. §§ 10, 208. But in its role as a court of secondary jurisdiction hearing a petition for recognition and enforcement of an award "not considered as domestic," it may decline recognition based on the grounds provided in the Convention. *See id*. § 207.

III. PROCEEDINGS BELOW

A. Proceedings Before the District Court

In 2008, Argentina filed suit in the United States District Court for the District of Columbia, as the court of primary jurisdiction, seeking to vacate the award under FAA section 10(a)(4) on the grounds that the tribunal exceeded its jurisdiction by excusing BG's non-

compliance with the litigation requirement of Article 8(1) of the Treaty. Pet. App. 64a. BG cross-petitioned to confirm the award.[2] BG acknowledged that the tribunal did not accept its jurisdictional arguments. *See* BG's Mem. of P. & A. 8-10, No. 1:08-cv-00485-RBW (D.D.C. May 15, 2008), ECF No. 11-1 ("BG's Mem. of P. & A."). However, its principal argument to the district court regarding the tribunal's jurisdiction, and the other issues addressed in the arbitration, was that the FAA obligates a court to defer to the tribunal. *See* Pet. App. 64a-68a.

The district court understood that Argentina based its jurisdictional defense on its lack of consent to the arbitration, and in particular:

> that because [the local recourse] condition was not met, it therefore did not consent to arbitrate this dispute, and thus enforcement of the Award would contravene the principle that "arbitration of a particular dispute" is to occur only when "the parties agreed to arbitrate *that dispute*." *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, __U.S. __, __, 130 S. Ct. 2847, 2856 (2010); *see also Stolt- Nielsen*, __U.S. at __, 130 S. Ct. at 1773 (recognizing "the basic precept

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[2] Argentina's petition to vacate was based upon five grounds. The district court issued two opinions, one denying Argentina's petition to vacate, 715 F. Supp. 2d 108 (D.D.C. 2010), and one granting BG's cross-petition to confirm, 764 F. Supp. 2d 21 (D.D.C. 2011). The court's reasoning on the jurisdiction issue is similar in both opinions. The court of appeals later vacated the award based on only one of the grounds raised in Argentina's petition to vacate, the tribunal's lack of jurisdiction, which is accordingly the only issue before the Court.

> that arbitration 'is a matter of consent, not coercion'" (quoting *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989))).

Pet. App. 41a. *See also id*. 64a.

The district court acknowledged that "whether the parties in a dispute 'have agreed to submit a particular dispute to arbitration' is one that is 'typically an issue for judicial determination.'" *Id.* 42a n.8 (internal citations omitted). The district court found that Argentina had forfeited such review because Argentina acknowledged that arbitrators can decide their own jurisdiction, which the court took as a "concession" that it was barred from "any extensive judicial review of the panel's interpretation" of the tribunal's jurisdiction under Article 8. *Id.* 42a-43a. The district court therefore declined to undertake an independent review of whether Argentina consented to arbitrate, instead concluding that its task was to "[a]ccept[], as it must, the arbitral panel's construction of the Investment Treaty." Pet. App. 43a. But Argentina's "concession" was followed immediately by its assertion that the Convention requires a judicial determination of "whether the . . . terms of Argentina's consent to arbitration were respected."[3] The court disregarded

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[3] Tr. of Mots. Hr'g 4:2-7, No. 08-cv-485-RBW (D.D.C. Sept. 28, 2010), ECF No. 55. BG also asserts that Argentina conceded that the parties had entered into an "agreement to arbitrate in the present case." Pet. Br. 20 (citing Reply to Mem. of P. & A. 5, No. 08-cv-485-RBW (D.D.C. Feb. 20, 2009), ECF No. 40 ("Reply to Mem. of P. & A."). This suggestion is refuted by the full sentence from which BG quotes selectively, which explicitly states that arbitration is permitted only after compliance with Article 8(1).

Argentina's assertion of the court's responsibility, considered the tribunal's decision "colorable," and on that basis denied Argentina's petition to vacate and subsequently granted BG's petition for recognition and enforcement. *Id.* 41a-43a. At the same time, the court noted that "under a more searching, appellate-style review, the arguments presented by Argentina in its Petition could very well carry the day." *Id.* 88a-89a.

B. Proceedings Before the Court of Appeals

On appeal, Argentina again argued that the tribunal lacked jurisdiction (and thus exceeded its powers) because Argentina had not consented to arbitrate with an investor who failed to comply with Article 8(1), and that this question of jurisdiction is subject to de novo review. BG contended that deferential review was appropriate because use of the UNCITRAL Rules represented clear and unmistakable evidence that the parties intended to refer questions of arbitrability to the tribunal. *See* Final Br. for Resp't-Appellee 12-14, No. 11-7021 (D.C. Cir. Sept. 21, 2011)

See Reply to Mem. of P. & A. 5. The pleadings BG cites for the same proposition, *see* Pet. Br. 20-22, acknowledge only that Argentina entered into an agreement with the United Kingdom. Argentina has consistently argued that BG's claims do not fall within the terms of that agreement. *See, e.g.*, Reply to Mem. of P. & A. 5; Br. for Pet.-App. 28, No. 11-7021 (D.C. Cir., Sept. 21, 2011) ("Argentina D.C. Cir. Br."). BG's selective quotation of the court of appeals to support the proposition likewise fails. *Compare* Pet. Br. 22 ("The D.C. Circuit agreed that the 'parties' agreement establish[es] a precondition to arbitration' through the litigation requirement." (citation omitted)), *with* Pet. App. 2a (identifying the "parties' agreement" as the Treaty, not an agreement with BG).

("BG D.C. Cir. Br.").[4] Although BG purported to argue in the alternative against "the merits of Argentina's jurisdictional argument," *id.* 15, its defense consisted of asserting that "[w]hether the Tribunal's decision was right or wrong – whether it properly interpreted the factual evidence presented, Article 8 of the Treaty, and [the relevant] provisions of domestic and international law – is of no moment," *id.* 16, and instead it was enough if the tribunal "arguably" interpreted the Treaty, *id.* 17.

The court of appeals recognized that the "'gateway' question in this appeal is arbitrability" – whether the United Kingdom and Argentina, "as contracting parties, intend[ed] that an investor under the Treaty could seek arbitration without first fulfilling Article 8(1)'s requirement that recourse initially be sought in a court of the contracting party where the investment was made[.]" Pet. App. 10a.[5] Like the district court, the court of appeals understood Argentina's position to be that BG's failure to comply with the litigation requirement, a condition of the contracting States' consent to arbitration, precluded

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[4] BG did not argue before either the court of appeals or the district court that compliance with Article 8(1) is a matter of "procedural arbitrability" for the arbitrators to decide. BG raised that argument, and its reliance on *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), for the first time in its petition for rehearing.

[5] Contrary to BG's claim that the court of appeals raised arbitrability on its own, Pet. Br. 22, both parties briefed the question of who decides arbitral jurisdiction within the *First Options* framework. *See* Argentina D.C. Cir. Br. 13, 20-21; BG D.C. Cir. Br. 13-15.

consent and hence arbitral jurisdiction. *See id.* 12a-13a. The court held that the district court committed clear error in asserting that Argentina had conceded that the issue had been committed finally to the arbitrators, *id.*, and decided for itself whether the antecedent legal question – "who decides arbitrability" – was for the arbitrators or the courts, *id.* 15a.

In doing so, the court followed this Court's precedent in holding that it could "not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." *Id.* 10a (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S 938, 944 (1995)). It found no such evidence and instead noted that "[t]he Treaty provides a prime example of a situation where the 'parties would likely have expected a court' to decide arbitrability" since "the gateway provision *itself* is resort to a court." Pet. App. 15a (citation omitted). Accordingly, the court held that it need not defer to the arbitrators' finding of jurisdiction. *Id.*

In performing its de novo review, the court of appeals noted that the "Treaty provision at issue is explicit," *id.* 18a, and concluded that under the Treaty, "BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration," *id.* 18a-20a. BG's failure to comply with this requirement deprived the tribunal of jurisdiction. Holding that the tribunal had therefore "ignore[d] the terms of the Treaty" and rendered a decision "without regard to the contracting parties' agreement," the court reversed the district court's judgment and vacated the award, *id.* 2a, 20a, finding that "'there can be only one possible outcome on the

[arbitrability question] before us,' namely, that BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration," *id*. 19a (quoting *Stolt-Nielsen, S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758, 1770 (2010)).

The court of appeals denied BG's petitions for rehearing and rehearing en banc. Pet. App. 307a. This Court granted certiorari. 133 S. Ct. 2795 (2013).

SUMMARY OF THE ARGUMENT

The issue before the Court is straightforward: who decides whether Argentina and BG agreed to arbitrate their dispute? The answer reached by the court of appeals, and supported by this Court's precedent and international practice, is that courts decide. This Court should affirm.

I. Arbitration is a matter of contract. Parties cannot be compelled to arbitrate disputes, or to accept the resultant awards, without their consent. The FAA and the New York Convention support that fundamental proposition by establishing an allocation of competence between courts and arbitrators. In particular, this allocation requires that courts decide, independently, whether a party has agreed to arbitrate. Not surprisingly, that is the consistent position taken by this Court and affirmed by the current draft Restatement of the U.S. Law of International Commercial Arbitration. Deferring to arbitrators on this question would assume the conclusion and destroy the consensual nature of arbitration; when the arbitrators' authority to hear the claim is disputed, their decisions as to any issue, including their own

jurisdiction, carry no weight until the court establishes the existence of party consent.

De novo review of the existence of a binding agreement to arbitrate is common among New York Convention jurisdictions. The rule affirmed by the Supreme Court of the United Kingdom, Argentina's treaty partner and the home jurisdiction of BG, is that courts determine independently the scope of the arbitrators' jurisdiction. This includes cases involving BITs. De novo review of consent to arbitration has also been sustained in BIT cases in other major arbitral centers.

Independent judicial review in such circumstances is also consistent with the longstanding principle of competence-competence: arbitrators may determine their own jurisdiction in the first instance – when a challenge is raised, the arbitration does not have to stop dead in its tracks – but that determination is subject to independent judicial control. Competence-competence is embodied in the UNCITRAL Model Law, which reflects an international consensus regarding judicial supervision of arbitration and gives courts the last word when there is a question regarding the arbitrators' jurisdiction.

II. The Treaty by itself does not constitute Argentina's consent to arbitration. It instead contains the States' unilateral offers to arbitrate with investors from the other State who have first submitted their disputes to the appropriate domestic tribunals. To form an agreement, an eligible investor must accept the offer's terms. By attempting arbitration without first submitting its dispute to Argentine courts, BG at best made a counter-offer, which Argentina rejected.

By compelling arbitration despite the absence of an agreement, the arbitrators contrived terms that neither Argentina nor the United Kingdom offered.

Because this case concerns a question of consent, the court of appeals correctly applied de novo review. The dispute in this case does not concern a claims-processing issue like the issues addressed in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), which become relevant only once the court is satisfied that an agreement to arbitrate exists. Nor can it be analogized to the timing issue in *Howsam*, where the issue was whether a dispute that was arbitrable under an undisputed agreement to arbitrate might cease to be arbitrable due to the passage of time. Here, the local recourse requirement precedes the offer, and necessarily any agreement, to arbitrate. The passage of time alone, without submission of the dispute to local courts, cannot give rise to an offer to arbitrate, much less Argentina's consent.

The Treaty's reference to the UNCITRAL Rules does not displace de novo review. The Rules become relevant once an agreement to arbitrate is formed under the Treaty, which did not happen here; and in any event they do not purport to bind parties beyond their consent. As with the UNCITRAL Model Law, the Rules implement competence-competence, allowing arbitrators to decide their jurisdiction, but subject to judicial control. Only the court can decide with finality whether the parties agreed to arbitrate because, in the absence of an agreement, the parties have committed no power to the arbitrators under any set of arbitral rules, let alone provided "clear and unmistakable evidence" of an intent to displace judicial review.

Again, the current draft Restatement affirms this position.

Both BG and the United States agree that when the issue is consent, courts decide. The court of appeals correctly found no consent here, and found the issue so clear that no other conclusion could be reached, even under an "exceedingly narrow" standard of review. Pet. App. 2a. Its conclusion is plainly correct. By compelling arbitration despite the absence of an agreement, the arbitrators substituted their own policy concerns for the terms negotiated by the States themselves, disregarding the sovereignty and efficiency interests underlying the condition of consent in the Treaty. But whatever the tribunal's policy preferences, it had no power to rewrite the Treaty's terms and manufacture Argentina's purported consent out of whole cloth. Remand is therefore unnecessary, and the judgment should be affirmed.

In reaching this conclusion, the court of appeals followed standard treaty interpretation rules, guided by the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S., 331 ("Vienna Convention"), that treaties should be interpreted in accordance with their ordinary meaning. BG complains that the court found the plain meaning to be dispositive, but the plain meaning requires that disputes be submitted to local courts before being submitted to arbitrators. Its objection that the court did not consider its other arguments is incorrect. The court rejected the notion that compliance with the Treaty's local recourse requirement would lead to an absurd or unreasonable result; rather, it is the result the contracting parties – Argentina and the United Kingdom – intended. They

undoubtedly recognized investors might complain that local recourse would take too long or be "futile," but they did not accept such arguments as a basis to excuse compliance. Instead, they agreed that if compliance does not lead to a satisfactory result within eighteen months, the investor may then – but only then – commence arbitration. As the court found, "the contracting parties specifically *desired* 'the delay attendant upon judicial proceedings preliminary to arbitration,'" Pet. App. 17a (emphasis added) (citation omitted), which courts (and arbitrators) are duty-bound to enforce.

Finally, sound policy supports affirmance. First, the court of appeals' review was consistent with the allocation of power between courts and arbitrators under the New York Convention and international practice, and any lesser standard of review would not only make the United States an outlier, but would frustrate the expectations of the Treaty parties. Second, BIT awards implicate important sovereign interests and corresponding comity concerns. They concern the exercise of sovereign powers, generally involve actions taken in the interests of public welfare, and are payable from the public fisc. Reasons of accountability and the legitimacy of the dispute resolution regime argue strongly against diluting the standard of review.

The merits of the emergency measures BG disputed are of course not before this Court; Argentina seeks affirmance of the independent judicial review correctly afforded by the court of appeals in determining that BG failed to accept Argentina's offer to arbitrate, Argentina therefore did not consent to the arbitration,

and the award is a nullity. The judgment should be affirmed.

ARGUMENT

I. UNDER UNITED STATES AND INTERNATIONAL LAW AND PRACTICE, COURTS, NOT ARBITRATORS, HAVE THE FINAL AUTHORITY TO DETERMINE CHALLENGES TO THE EXISTENCE OF AN AGREEMENT TO ARBITRATE

A. This Court's *First Options* Framework Mandates Independent Review of Whether an Agreement to Arbitrate Exists.

Arbitration is always based on the existence of an agreement. Both the FAA and the New York Convention address "agreements in writing" to arbitrate, and the purpose of judicial interaction with arbitration is "to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms,' and according to the intentions of the parties." *First Options*, 514 U.S. at 947 (internal citations omitted); *see also AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986) ("'[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960))). This principle underlies the FAA, including the provisions governing review of an award for which the United States is the primary jurisdiction.

Parties cannot be compelled to arbitrate or be bound by an arbitral award unless they have so agreed, and even then, the arbitration is constrained by the terms of that agreement. This fundamental principle cannot be overridden "simply because the policy favoring arbitration is implicated." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002). If there is no agreement to arbitrate, the arbitrators have no power, and any act they take, including the assumption of jurisdiction, is a nullity. *See, e.g.*, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964).

The competence of arbitrators versus courts to resolve certain threshold or jurisdictional questions with finality flows directly from this bedrock principle. *See AT&T Techs.*, 475 U.S. at 648-49. To address this allocation of competence, the Court has generally referred to "questions of arbitrability." *Howsam*, 537 U.S. at 83; *see AT&T Techs.*, 475 U.S. at 649. That phrase is flexible, but the Court has been clear about its meaning and consequences when the dispute is about the existence of an agreement to arbitrate.

Under the FAA, when the question is the existence, validity, or scope of an agreement to arbitrate – core issues of "arbitrability" – the default presumption is that a court, not an arbitrator, has the final say. *See Howsam*, 537 U.S. at 84 (courts presumptively decide both "whether the parties are bound by a given arbitration clause" and "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy"); *see also Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2858 (2010) ("'[T]he court' must resolve the disagreement." (citation omitted)). BG and its amici concede as much. *See* Pet.

Br. 35; Professors & Practitioners Amicus Br. 27-28; USCIB Amicus Br. 6 n.4. Conversely, "'procedural' questions which grow out of the dispute and bear on its final disposition" are presumptively for the arbitrators to decide. *John Wiley*, 376 U.S. at 557. This is consistent with the Convention's allocation of competence between arbitrators and courts.

In *First Options*, the Court contemplated the possibility that the presumption of independent judicial review of the existence of an agreement to arbitrate could be overcome, but cautioned lower courts "not [to] assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." 514 U.S. at 944 (citations omitted). Absent such evidence, a court must decide the arbitrability question "independently." *Id.* at 943. *See also Granite Rock*, 130 S. Ct. at 2858 (clarifying that in all prior cases in which the Court compelled arbitration, it did so "only after the Court was persuaded that the parties' arbitration agreement was *validly formed* and that it covered the dispute in question and was legally enforceable" (emphasis added)).

First Options did not break new ground but drew on *AT&T Technologies* and the history that case recited. *See* 514 U.S. at 943-944; *see also AT&T Techs.*, 475 U.S. at 648. Similarly, in *John Wiley*, decided more than thirty years before *First Options*, the Court emphasized the "unanimity of views about who should decide the question of arbitrability" and concluded that "[p]ast cases leave no doubt" that it is the courts, not the arbitrators. *John Wiley*, 376 U.S. at 546-47. For this reason, the *First Options* Court found the question

of who decides arbitrability to be "fairly simple." 514 U.S. at 943.

That the Court requires such a high evidentiary bar before deferring to arbitrators on the very existence of an agreement to arbitrate is not surprising. "After all, a contract cannot give an arbitral body any power, much less the power to determine its own jurisdiction, if the parties never entered into it." *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 288 (3d Cir. 2003); *see also, e.g.*, Reisman, *supra*, at 112 ("A ruling by the arbitrators rejecting allegations based on [lack of agreement, Article V(1)(a)] is not dispositive, nor does it function as res judicata for the reviewing court."); U.S. Br. 19.[6] The current draft Restatement of the Law of International Commercial Arbitration synthesizes the position of U.S. courts and comes down squarely for de novo review in this context. Restatement (Third) of the U.S. Law of Int'l Commercial Arbitration § 4-12(d) (Tentative Draft No. 2, Apr. 16, 2012) ("[A] court determines de novo (1) the existence of the arbitration

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[6] While this Court in *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), deferred to the arbitrators as to the unconscionability of an agreement to arbitrate based on an agreement that gave the arbitrator "exclusive authority" to decide the "validity" of the agreement, *id.* at 2779, there is no such agreement in this case. The *Rent-A-Center* Court was careful to emphasize that "[t]he issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded.'" *Id.* at 2778 n.2. And when the Court first framed the possible exception to independent judicial review where "the parties clearly and unmistakably provide otherwise," it was as to the scope and not the existence of an agreement to arbitrate. *AT&T Techs.*, 475 U.S. at 649.

agreement."); *see also id.* § 4-12, cmt. d; *id.* at reporter's note d. Without independent review, the consensual essence of arbitration would be lost. Arbitrators could arrogate authority not conferred by the parties, and if courts defer to such erroneous decisions, they will have assumed away the question of consent on which arbitration is based.

B. International Practice Also Dictates Independent Judicial Determination of Whether the Parties Have Agreed to Arbitrate, Including in Investment Treaty Cases.

The practice of independent review of the existence of an agreement to arbitrate is common across New York Convention jurisdictions. "[I]nternational law overwhelmingly favors some form of judicial review of an arbitral tribunal's decision that it has jurisdiction over a dispute, at least where the challenging party claims that the contract on which the tribunal rested its jurisdiction was invalid." *China Minmetals*, 334 F.3d at 289; *see also* U.S. Br. 24 ("[C]ourts in several States that commonly serve as seats for investor-state arbitration generally review de novo whether an arbitration agreement exists.").

Significantly in this case, it is well established in the United Kingdom that a court need not defer to the arbitrators as to whether an agreement to arbitrate exists. *See Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov't of Pakistan*, [2010] UKSC 46, [12], [31] (appeal taken from Eng.). *Dallah* was merely a confirmation of existing United Kingdom practice. *See id.* at [24]-[25]. In an earlier case involving a challenge to a BIT award made in

England, the English Court of Appeal affirmed that there is no basis "for suggesting that there is or should be any difficulty about an English Court, in the context of an English award, determining the scope of arbitrators' jurisdiction." *Occidental Exploration & Prod. Co. v. Republic of Ecuador*, [2005] EWCA Civ. 1116, [55].

As in *Occidental*, the international practice of de novo review encompasses disputes relating to the jurisdiction of arbitral tribunals to the same degree whether premised on investment treaties or commercial agreements. This rule is applied in other arbitral centers:

> Canada: The court applies a standard of "correctness, in the sense that the tribunal had to be correct in its determination that it had the ability to make the decision it made." *Mexico v. Cargill, Inc.*, [2011] ONCA 622 para. 42 (Can. Ont. C.A.) (NAFTA decision).
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> France: "When examining the meaning and the scope of the arbitration agreement contained in . . . provisions of the BIT, the court makes an *independent* factual and legal examination of the grounds and arguments of the parties." Cour d'Appel, Paris, 1e ch., 25 September 2008, J.F. Périé (Fr.) 3 (emphasis added).
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> Germany: German courts decide independently of the arbitral tribunal whether the dispute falls within the scope of arbitration permitted by the investment treaty between Germany and Thailand. Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 30, 2013, Case No. III ZB 40/12 paras. 15-17.

> The Netherlands: A tribunal's determination of its own competence under a BIT "has to be fully reviewed by the court." Rb.'s-Gravenhage 2 mei 2012 (Republic of Ecuador / Chevron Corp.) para. 4.5 (Neth.).
>
> Sweden: An arbitral ruling on jurisdiction under a BIT "does not, however, prevent a court . . . from ruling on the jurisdictional issue. The court's decision on the matter will have legal force and be binding on the arbitrators . . . . [A] decision by the arbitrators to the effect that they have jurisdiction to try the case *is not binding* . . . ." [Supreme Court] 2010-11-12, Ö2301-09 (Swed.) para. 5 (emphasis added).[7]

C. The Background Principle of Competence-Competence Prescribes That the Arbitrators' Power to Determine Their Own Jurisdiction Is Subject to Independent Judicial Review.

Contrary to the suggestions of BG and its amici, Pet. Br. 45; USCIB Amicus Br. 12 n.12; AAA Amicus Br. 13-14, the principle of competence-competence simply provides that arbitrators may decide challenges to their own jurisdiction subject to independent judicial

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[7] Copies of the French, German, Dutch, and Swedish judgments cited above, with certified translations, have been lodged with the Clerk. This consistent State practice belies the claim that the court of appeals' decision will undermine the United States' role as an international arbitral center. *See* Pet. Br. 26-27, 46-47; USCIB Amicus Br. 24; AAA Amicus Br. 18-26.

control.[8] In *China Minmetals*, the Third Circuit catalogued and relied on consistent international practice framed by competence-competence in affirming that the arbitrators' power to decide their own jurisdiction does not displace ultimate judicial control in determining the existence of an agreement to arbitrate. The court thus ordered the district court to "make an independent determination of the agreement's validity." 334 F.3d at 289-90.[9] The Third Circuit observed that the UNCITRAL Model Law,

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[8] BG's own sources undermine its proposition. In the sentence immediately succeeding the passage quoted by BG, Pet. Br. 45, Mr. Born confirms that "the competence-competence of arbitral tribunals to consider and decide jurisdictional challenges [is] *subject to subsequent judicial review*." Gary B. Born, *International Commercial Arbitration* 856 (2009) (emphasis added). As another standard text explains:

> In its simplest formulation . . . when one side says the arbitration clause is invalid, there is no need to halt proceedings and refer the question to a judge. However, under this brand of *compétence-compétence* the arbitrators' determination about their power would be subject to judicial review at any time, whether after an award is rendered or when a motion is made to stay court proceedings or to compel arbitration.

W. Lawrence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration* § 28.07(a)(i) (3d ed. 2000). *See also* Zachary Douglas, *The International Law of Investment Claims* 147 (2009) ("[T]he tribunal should not have the final word on the issue of whether or not it is vested with adjudicatory power.").

[9] The concurrence expressly rejected the proposition that "the Convention requires the District Court to assume that the tribunal's determination [as to its own jurisdiction] was correct." *China Minmetals*, 334 F.3d at 293 (Alito, J.).

which provides for "court control" of arbitrators' jurisdictional decisions, supports the conclusion that the independent review mandated by *First Options* is entirely consistent with international practice. *China Minmetals*, 334 F.3d at 289; UNCITRAL Model Law, Explanatory note by the UNCITRAL secretariat para. 25, U.N. Doc. A/40/17 annex 1 (1994).[10]

Indeed, the UNCITRAL Model Law represents "an international consensus on the appropriate role for national courts in performing control functions in international commercial arbitration . . . [and] represents a clear commitment to the national judicial role contemplated in the New York Convention." Reisman, *supra*, at 126-27. The UNCITRAL Model Law follows the principle of competence-competence and is clear that "[t]he arbitral tribunal's competence to rule on its own jurisdiction, i.e. on the very foundation of its mandate and power, is, of course, subject to court control." UNCITRAL Model Law, Explanatory note by the UNCITRAL secretariat para. 25. The Model Law thus provides for judicial review of a tribunal's decision on the existence and validity of an agreement to arbitrate, whether made preliminary to, or joined with, the merits. *See* UNCITRAL Model Law, arts. 16, 34, 36; *see also id*., Explanatory note by the UNCITRAL secretariat paras. 24-25. The English position with respect to competence-competence is

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[10] *See, e.g.*, *TCL Air Conditioner (Zongshan) Co. Ltd. v. Judges of the Fed. Court of Australia*, [2013] HCA 5 para. 12 (Austl.) (Under the Model Law, arbitrators' jurisdiction "is an objective question to be determined by the competent court on the evidence and submissions before it, unaffected by the competence of an arbitral tribunal to rule on its own jurisdiction.").

consistent with the UNCITRAL Model Law: "Arbitrators are entitled, and indeed required, to consider whether they will assume jurisdiction. But that decision does not alter the legal rights of the parties, and the court has the last word." Johan Steyn, *England's Response to the UNCITRAL Model Law of Arbitration*, 10 Arb. Int'l 1, 5 (1994).

In short, well-established U.S. law and consistent international practice confirm that the court, and not the tribunal, has the final say in Argentina's challenge to the existence of an agreement to arbitrate.

II. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE TRIBUNAL LACKED JURISDICTION DUE TO THE ABSENCE OF CONSENT TO ARBITRATE

The court of appeals correctly applied this Court's precedent, consistent with international practice, in concluding that independent review is proper. Its decision that the only possible conclusion is that the arbitral tribunal lacked jurisdiction, because there was no agreement to arbitrate with BG under the plain text of the Treaty, is correct. Moreover, its analysis demonstrates that the award cannot stand even under a more deferential review.

A. The Court of Appeals Correctly Conducted an Independent Review of Argentina's Consent.

1. The Court of Appeals Properly Construed Argentina's Objection Under Article 8 as an Objection to Its Consent to Arbitration.

The court of appeals correctly understood Argentina's position to be that there was no valid agreement to arbitrate between the parties. This is plain from the court's reliance on the *First Options* framework, *see* Pet. App. 10a, as well as from its focus on Argentina's statement that "'[t]he fundamental issue[] here . . . is that [under the terms of the Treaty] Argentina's consent to arbitration had a very important condition. And that condition was that the dispute had to be submitted for 18 months to local courts to an Argentine judge.'" *Id.* 13a.[11]

The district court sidestepped the issue of consent by relying on a supposed concession that Argentina never made. *See supra*, at 11-12. BG thought so little of the "concession" that it did not even mention it before the court of appeals, which expressly overruled the district court's finding as clearly erroneous. Pet. App. 13a. BG's current attempt to renew this "concession," *see, e.g.*, Pet. Br. 57, is unavailing. The court of appeals correctly rejected the "concession," noting that Argentina then stated that "[the court] has

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[11] BG errs in relying on Argentina's participation in the arbitration as a waiver of Argentina's ability to raise this objection in court. Pet. Br. 59. *See, e.g.*, *First Options*, 514 U.S. at 941, 946-47; *China Minmetals*, 334 F.3d at 290.

the right to and the duty to under the New York Convention to assess whether . . . Argentina's consent to arbitration [was] respected," Pet. App. 12a (quoting Tr. of Mots. Hr'g 4:4-7 (Sept. 28, 2010)), and found this to be a straightforward issue of consent.

BG's submission of a notice of arbitration was not made under any existing agreement between Argentina and BG. *See id.* 17a (noting that this case does not concern an agreement to arbitrate between BG and Argentina, but instead "an international investment treaty between two sovereigns"). The only pre-dispute agreement was the Treaty between Argentina and the United Kingdom. *Id.* 2a. As the United States explains, the Treaty, like most other investment treaties, "sets forth a host State's standing offer to arbitrate certain categories of disputes with a class of investors from the other contracting State, and the 'offer includes the various terms and conditions contained in the * * * investment treaty.'" U.S. Br. 16 (citation omitted). A BIT is thus different from typical commercial arbitration agreements between two private parties.

To form a binding agreement, therefore, an eligible investor must accept the offer on the terms it was made. Under the Treaty, an investor's dispute "shall be submitted" for resolution by the domestic tribunals of the respective host State, Treaty, art. 8(1), and the contracting States extend an offer to arbitrate only after that submission has been properly made, *id.* at art. 8(2)(a). Because Article 8(2)(a) "explicitly *requires* judicial proceedings prior to arbitration," Pet. App. 17a, an investor who wishes to commence an arbitration without prior recourse to local courts as provided in

Article 8(1) must negotiate a separate agreement under Article 8(2)(b), which no one suggests occurred here.

The investor therefore cannot accept the offer in Article 8(2)(a) without having submitted the dispute to the host State's tribunals in accordance with Article 8(1). Requesting arbitration without complying with Article 8(1)'s local recourse requirement – as BG attempted here – constitutes not acceptance, but instead a counter-offer. Unless accepted by the counterparty, a counter-offer cannot create a binding agreement between the parties.[12] Here, Argentina rejected the counter-offer and thus never consented to arbitration with BG; because a "tribunal's jurisdiction is limited by the terms of the parties' consent," Vandevelde, *supra*, at 433, the tribunal lacked jurisdiction to hear the dispute.[13]

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[12] *See* Douglas, *supra* note 8, at 76 ("In other words, if the investor claimant, in its notice of arbitration, purports to modify those terms in any respect, then that would constitute a counter-offer and the respondent host state would have to accept those new terms concerning the arbitral tribunal's jurisdiction in a separate legal instrument.").

[13] The court of appeals rightly contrasted Article 9, which provides for arbitration between the contracting States, with Article 8's requirement that parties first litigate. Pet. App. 14a. BG's criticism misses the point. *See* Pet. Br. 53-54. The significance is not the reference to "procedure" in Article 9, but instead that Article 9 (and not Article 8) represents a contemporaneous agreement to arbitrate reached "*between the contracting parties themselves*, the United Kingdom and Argentina," Pet. App. 14a (emphasis added), rather than a unilateral offer to arbitrate, only following litigation, extended to hypothetical future investors.

It is wrong to suggest that "the Argentine courts have no power to issue a binding ruling on any question" and that Article 8(1) can be ignored because the Treaty "does not assign to the judiciary any substantive responsibility." Pet. Br. 40. As a practical matter, an Argentine judicial determination would bind *Argentina* – it is difficult to imagine the State commencing international arbitration to contest the judgment of its own courts. But even if the investor ultimately sought further or different relief through arbitration, the decisions of domestic tribunals could inform the terms of the arbitration – because in addition to the terms of the Treaty, any dispute is also governed by "the law[] of the Contracting Party involved in the dispute," Treaty, art. 8(4), a definitive construction of Argentine law might constrain debate in a follow-on arbitration and contribute to its resolution.

Thus while the Treaty does not *necessarily* give the local courts "final say," *see, e.g.*, Pet. Br. 7, 54, it clearly requires for good reason that local courts be afforded the *first* say in a dispute, before an arbitration may be commenced, *supra*, at 3-4. In any event, whether a domestic tribunal can bind the parties is irrelevant – the United Kingdom and Argentina negotiated for and agreed to require the submission of the dispute to local courts, without which no offer to arbitrate, much less an agreement, comes into being.[14]

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[14] BG argues that Argentina could have submitted the dispute for judicial resolution, *see* Pet. Br. 11, seemingly contradicting its claims regarding access to the Argentine courts. But in any event, Argentina was not the party bringing a dispute; it had no power to submit BG's dispute to domestic tribunals or to satisfy BG's

2. Because Argentina's Objection Was to Its Lack of Consent, the Court of Appeals Properly Applied Independent Review.

Because the issue here is consent to arbitration – the very existence of an agreement to arbitrate – the court of appeals correctly distinguished cases relating to procedural requirements (or "preconditions") contained within an arbitration agreement whose existence is not at issue. It found that this case is unlike *John Wiley*, on which BG now so heavily relies but never cited below. *John Wiley* presented two different issues of "arbitrability." The first is the one

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obligations under the Treaty, and was certainly not required to do so.

BG's additional claim, Pet. Br. 56-57, that Argentina should have applied to courts in the United States to enjoin the arbitration likewise fails. First, BG provides no legal basis why such supervisory power exists at the start of the arbitration but, as BG seems to argue, disappears after it concludes. To the contrary, FAA § 10(a)(4) and New York Convention Art. V(1)(a) explicitly permit judicial review of a jurisdictional determination after the arbitrators err in taking jurisdiction, either through annulment or recognition and enforcement proceedings. *See supra*, at 7-9. Second, there is considerable doubt whether U.S. courts may go beyond that authority to enjoin arbitrations subject to the Convention. *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 391 (2d Cir. 2011) (noting that whether "courts lack the power to stay BIT arbitration" is "an open question in [the Second] Circuit," and declining to decide the issue); *see also* Jennifer L. Gorskie, *US Courts and the Anti-Arbitration Injunction*, 28 Arb. Int'l 296, 300 (2012). BG's reliance on *In re Am. Express Fin. Advisors Sec. Litig.*, 672 F.3d 113 (2d Cir. 2011), is misguided. That case was decided on the basis of "the particular circumstances presented in [that] appeal," and the court expressly declined to decide the question more generally. *Id.* at 141 n.20.

presented here – whether there was an agreement to arbitrate – which the Court held was for the courts, and not the arbitrators, to decide. *See John Wiley*, 376 U.S. at 546-47. The second issue concerned compliance with the terms of the grievance procedure contained within the collective bargaining agreement which, in the first step, the Court had held bound the parties. *See id.* at 554. While BG ignores the first step in favor of the second, the court of appeals properly understood the difference, noting that "[i]n *John Wiley*, the Court drew a distinction between 'substantive' questions of arbitrability and 'procedural' questions of arbitrability, assigning the former to courts and the latter to arbitrators." Pet. App. 16a (citing *John Wiley*, 376 U.S. at 557). The litigation requirement in this case raises "a fundamentally different question of arbitrability [] than that of the ignored informal resolution steps in *John Wiley*," Pet. App. 19a, properly classifying the condition on Argentina's consent as a "'substantive' question[] of arbitrability," *id.* 16a.[15]

The court of appeals therefore properly followed *Howsam*'s guidance that gateway issues for courts to

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[15] The tribunal likewise found that the litigation requirement of Article 8 is a condition of Argentina's consent to arbitrate, *see supra*, at 6, as did another tribunal interpreting Article 8, *see ICS Inspection & Control Servs. Ltd. v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, ¶ 262 (Feb. 10, 2012). Other tribunals interpreting similar provisions in other Argentine BITs have also determined that the eighteen month requirement is a condition of Argentina's consent to arbitrate. *See Daimler Fin. Servs. AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, ¶ 194 (Aug. 22, 2012); *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, ¶ 116 (Dec. 8, 2008).

decide are those that may "'avoid[] the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.'" Pet. App. 11a (quoting *Howsam*, 537 U.S. at 83-84). BG has it backwards by arguing that "the precondition to arbitration in Article 8 of the Treaty closely parallels the NASD time bar at issue in *Howsam*" on the supposed basis that "[t]he only issue [implicated by Article 8] is one of timing." Pet. Br. 35-36. In *Howsam*, there was no dispute that the parties had an agreement to arbitrate and that Howsam's claim was subject to that agreement when it accrued. *See* 537 U.S. at 81. The dispute was whether an admittedly arbitrable claim might cease to be arbitrable because of the passage of time. Here, in contrast, the passage of time alone – in the absence of submission of the dispute to Argentina's domestic tribunals in accordance with Article 8(1) – can do nothing to turn BG's non-arbitrable claim into one that is arbitrable.[16]

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[16] BG seeks to rely upon *Howsam* for the proposition that arbitrators decide not only when a claim has been submitted too late – the issue in that case – but also "whether arbitration was initiated too early." Pet. Br. 35 (citing *Howsam*, 537 U.S. at 85). But *Howsam* makes no such claim. The Court in *Granite Rock*, on the other hand, dealt explicitly with an arbitration that had potentially been initiated "too early" – before the ratification of the agreement to arbitrate – and held that the issue was for the court. 130 S. Ct. at 2860-61; *see also id.* at 2860 ("*[W]hen* a contract [to arbitrate] is formed can be as critical as *whether* it was formed."). And in *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 208-09 (1991), the Court decided for itself whether claims were "too late" because they arose after expiration of the relevant agreement. The distinguishing factor is thus not timeliness, per se, but rather whether the existence of an agreement to arbitrate is in dispute. In any event, the question in this case is not timing, since BG was

If the rule of *Howsam* were as BG seeks to cast it, defining even this issue as one of "procedural arbitrability," the exception would swallow the rule because consent itself is by definition a "condition precedent to an obligation to arbitrate," 537 U.S. at 85, as all arbitration is a creature of consent. But the issues of "procedural arbitrability" that *Howsam* said are for arbitrators – "'prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate,'" *id.* (citation and emphasis omitted) – are all claims-processing "conditions" relevant only once an agreement to arbitrate exists, *i.e.*, only after resolution of the "gateway dispute about whether the parties are bound by a given arbitration clause," *id*. at 84. *Howsam* recognized the bright-line rule that the specific "gateway dispute about *whether the parties are bound by a given arbitration clause* raises a 'question of arbitrability' for a *court* to decide." *Id*. at 84 (emphases added) (quoting *First Options*, 514 U.S. at 946); *see* Pet. App. 15a.[17]

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not required merely to wait for a certain time to pass, but instead to submit the dispute to a court for potential resolution to satisfy a condition to Argentina's offer to arbitrate.

[17] The United States cautions to focus on the substance of the condition, not the label. *See* U.S. Br. 15. The Court likewise has cautioned against insisting on "talismanic words" in treaty provisions. *See Medellin*, 552 U.S. at 521. Because Argentina has consistently contended this is an issue of consent – "a so-called 'question of arbitrability,'" *see Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013) – and as discussed below there is no relevant agreement by which Argentina committed the issue to the arbitrators, the issue is properly preserved for this Court.

3. Independent Judicial Review Is Not Displaced by the Treaty's Reference to the UNCITRAL Rules.

The reference to the UNCITRAL Rules in the Treaty does not provide any evidence, much less the "clear and unmistakable evidence" contemplated by *First Options*, that Argentina and the United Kingdom intended to overturn the well-established presumption of judicial control with respect to issues of consent.

The court of appeals properly observed that the UNCITRAL Rules can have effect "only after an Argentine court first has an opportunity to resolve the dispute," that is, only "once the possibility of [a valid] arbitration is triggered." Pet. App. 13a. BG's argument – which is premised on the prior existence of an "agreement" to arbitrate that incorporates the UNCITRAL Rules, *see, e.g.*, Pet. Br. 49 – is a non-sequitur that fails to acknowledge that BG is not a party to the Treaty or any other relevant agreement with Argentina. Here, the UNCITRAL Rules did not apply "presumptively," Pet. Br. 7, but as a default rule of procedure precisely because there was no agreement to arbitrate between BG and Argentina that incorporated any arbitral rules at all. Treaty, art. 8(3)(b). The Treaty referenced the UNCITRAL Rules simply to supply the procedure for a particular class of arbitration, not to supplant the contracting States' agreement that arbitration – under *any* rules – may be commenced only when the investor has previously submitted its dispute to local tribunals. That never happened here.

In any event, the UNCITRAL Rules do no more than incorporate the principle of competence-

competence, which as discussed above holds that it is the arbitrators who decide first – *not* finally – any jurisdictional objections. *See supra*, at 26-29. That the UNCITRAL Rules do not displace independent judicial review is confirmed by leading commentaries on those Rules. *See, e.g.*, David D. Caron et al., *The UNCITRAL Arbitration Rules* 445-46 (2006) (noting that while "[t]he power of tribunals to determine their own jurisdiction . . . is generally thought to exist as an inherent power of the tribunal . . . any awards of the arbitral panel might be subject to challenge under the applicable law for excess of jurisdiction"); Howard M. Holtzmann & Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 479 (1994) ("The arbitral tribunal's power is neither exclusive nor final. Its decision is subject, first, to immediate review by a court . . . , second, to later court review in a setting aside procedure . . . , and, third to still later review in an action for recognition and enforcement . . . ."). The UNCITRAL Model Law and Rules operate in tandem to allow arbitrators to decide their jurisdiction, but subject to de novo judicial review; without such review "the Model Law would be a monster of incoherence and deception." Richard W. Hulbert, *Institutional Rules and Arbitral Jurisdiction: When Party Intent Is Not 'Clear And Unmistakable'*, 17 Am. Rev. Int'l Arb. 545, 570-71 (2006).[18]

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[18] The same rule – arbitrators may decide their own jurisdiction, but subject to independent judicial control – is well recognized as being operative with respect to institutional arbitral rules as well. *See, e.g.*, Craig, Park, & Paulsson, *supra* note 8, § 28.07 (article 6 of ICC Rules conferring power on arbitrators to determine jurisdiction "does not mean . . . that national courts will be

The court of appeals' statement that "once Article 8(3) of the Treaty is triggered, the Treaty's incorporation of the UNCITRAL Rules provides clear[] and unmistakabl[e] evidence . . . that the parties intended for the arbitrator to decide questions of arbitrability," Pet. App. 14a (citations omitted), is dicta. It is also not supported by the only case it cited in this regard, *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384 (2d Cir. 2011), on which BG also relies. Pet. Br. 51. In *Chevron*, there was no dispute that there was a valid and binding agreement to arbitrate. 638 F.3d at 392-93.[19] It was only within that context of an undisputed agreement that the Second Circuit found that the UNCITRAL Rules were "clear and unmistakable" evidence that the parties agreed to refer to the arbitrators such issues as waiver and estoppel, neither of which go to the question of whether an agreement exists. *Id.* at 394-95; *cf. Howsam*, 537 U.S. at 85 ("time limits . . . [and] estoppel" are for arbitrators (emphasis and internal quotations omitted)).

The other case on which BG heavily relies, *Schneider v. Kingdom of Thailand*, 688 F.3d 68 (2d Cir. 2012), is likewise inapposite. In *Schneider*, the Second Circuit determined that the parties expressly adopted the UNCITRAL Rules in a post-dispute agreement, the

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deprived of power to make jurisdictional determinations when asked to stay litigation, enjoin arbitration, or vacate an award" (footnote omitted)).

[19] Under the BIT that was the subject of that case, quite differently from the Treaty here, the State parties require as a condition of their consent only that the investor provides "written consent" to the arbitration; because Chevron had done so, an agreement to arbitrate had been formed. *See Chevron*, 638 F.3d at 392.

Terms of Reference for the arbitration. *See id*. at 70. The court's acceptance of the UNCITRAL Rules as "clear and unmistakable evidence" arose only within that context of an uncontested agreement between the parties. *Id.* at 72. This case is not *Schneider*, nor is it *Chevron*.[20]

Rather, this case aligns with the Second Circuit's recent position in *VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II L.P.*, No. 12-593-cv, 2013 WL 2372289 (2d Cir. June 3, 2013), a case BG overlooks. In contrast to *Chevron*'s reliance on the UNCITRAL Rules in circumstances in which the existence of an agreement was uncontested, the court in *VRG* pointedly cautioned that "[t]he more basic issue, however, of *whether the parties agreed to arbitrate in the first place is one only a court can answer*, since in the absence of any arbitration agreement at all, 'questions of arbitrability' could hardly have been clearly and unmistakably given over

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[20] The additional cases BG and its amicus USCIB cite in footnotes are largely inapposite. *See* Pet. Br. 49 n.14; USCIB Amicus Br. 13 nn.13-15. Only two of the cases concern the existence of an agreement to arbitrate, *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989), and *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205 (2d Cir. 2005), and they are readily distinguishable in that they concern the continuing validity of a contract which contains an arbitration clause, not whether there was a valid and binding arbitration agreement at all. *See also* William W. Park, *The Arbitrability Dicta in* First Options v. Kaplan*: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 Arb. Int'l 137, 146-47 (1996) ("Park, *Arbitrability Dicta*") (criticizing *Apollo* for "abdicating responsibility for determining the jurisdictional limits of arbitration clauses").

to an arbitrator." 2013 WL 2372286, at *3 n.2 (emphasis added).

This is the only reasonable approach. As noted by the Third Circuit in *China Minmetals*, "incorporation of [a rule providing that arbitrators can decide their jurisdiction] into the contract is relevant only if the parties actually agreed to its incorporation." 334 F.3d at 288; *see also, e.g.*, *Granite Rock*, 130 S. Ct. at 2862 ("[T]he CBA provision requiring arbitration of disputes 'arising under' the CBA is not fairly read to include a dispute about when the CBA came into existence."); Park, *Arbitrability Dicta*, 12 Arb. Int'l at 146 ("In many cases such a principle will assume the very proposition (arbitral jurisdiction) that remains to be proven.").

Indeed, this is the position adopted by the current draft Restatement. In addition to providing for de novo judicial determination of whether the parties have agreed to arbitrate, *supra*, at 23-24, it provides that reference to or adoption of rules conferring power on arbitrators to decide their own jurisdiction does not overcome this rule, *see* Restatement (Third) of the U.S. Law of Int'l Commercial Arbitration § 4-12(d) (incorporating by reference § 4-14, cmt. e, which rejects the argument for displacement of judicial review by the incorporation of arbitral rules authorizing arbitrators to decide jurisdiction).

The argument by BG and its amici is thus a tautology that tells only half the story – that because the UNCITRAL Rules authorize the arbitrators to determine their own jurisdiction, the arbitrators may determine their own jurisdiction. An agreement to use the UNCITRAL Rules to provide the procedure for an arbitration in which consent to arbitrate is disputed

does not and cannot answer the legally and logically anterior question of whether consent has been given in the first place. That question must ultimately be determined by a court.[21]

B. Remand Is Neither Necessary Nor Appropriate, and This Court Should Instead Affirm the Court of Appeals.

BG concedes that courts conduct de novo review when the existence of an agreement to arbitrate is in dispute. Pet. Br. 18. Because the court of appeals properly concluded that this is such a case, it should be affirmed. The United States likewise agrees that courts should conduct de novo review when the issue is consent under an investment treaty, U.S. Br. 15, but suggests that the case be remanded for the court of appeals to conduct further analysis of the Treaty to determine that issue, U.S. Br. 31. But the United States' brief suggests no reason why the court of appeals' determination of the issue was incorrect. And for good reason – the court of appeals appropriately analyzed the terms of the Treaty and concluded that the local recourse requirement is a condition of Argentina's consent. Moreover, the court's analysis

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[21] Under United States law, as under the law of other countries, the parties' agreement that an arbitral award will be "final and binding" does not preclude judicial review. *See Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992); *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 847 (6th Cir. 1996). BG therefore is not helped by the Treaty's use of that language, *see, e.g.*, Pet. Br. 26, 27, 52-53 (referencing Treaty, art. 8(4) ("The arbitration decision shall be final and binding on both Parties.")); Professors & Practitioners Amicus Br. 15, an argument BG never raised below.

demonstrates that its judgment would be the same even under a deferential standard of review. Its judgment should be affirmed.[22]

1. The Court of Appeals Correctly Analyzed the Treaty in Concluding That the Local Recourse Requirement Is a Condition of the State Parties' Consent.

The court of appeals acknowledged that it was rendering its decision in the context of "an international investment treaty between two sovereigns," Pet. App. 17a, and in that context, performed a proper analysis of the relevant Treaty provisions.

Under the Vienna Convention, the starting and in most cases the ending point of analysis is the terms of the treaty itself. *See* Vienna Convention, art. 31. This reflects the position under general international law, as described by the International Court of Justice: "If the relevant words in their natural and ordinary meaning

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[22] Thus, even if "[t]he courts below did not expressly invoke" the standard adopted by this Court, "remand would serve no purpose." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 733 (2013); *see also John Wiley*, 376 U.S. at 544 (affirming "on grounds which may differ from those of the Court of Appeals, whose answer to [the] question [of whether a corporate successor is bound to arbitrate under a collective bargaining agreement] is unclear").

Argentina preserved its challenge to the district court's conclusion that the ultimate power to determine the issue was conferred on the arbitrators, contrary to BG's claim. *See* Pet. Br. 60. BG is also mistaken that affirmance would allow it to raise new issues before the court of appeals. *See id*. 25 n.9. The court of appeals vacated the award. If this Court affirms, that will be the end of the matter.

make sense in their context, that is an end of the matter . . . ." *Competence of the Gen. Assemb. for the Admission of a State to the United Nations, Advisory Op.*, 1950 I.C.J. 5, 8 (Mar. 3). The same is true under United States domestic law, which consistently holds that "[t]he clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 181 (1982) (internal citation omitted).

The court of appeals not only "identif[ied]," Pet. Br. 24, but applied the Vienna Convention's "'[g]eneral rule of interpretation'" that "'[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose,'" Pet App. 7a n.1 (quoting Vienna Convention, art. 31). BG laments the court of appeals' finding that it is "dispositive that the Treaty 'is explicit' in requiring eighteen months of litigation before arbitration." Pet. Br. 24. But under the terms of the Vienna Convention – not to mention ordinary rules for interpreting any contract – when a treaty provision is clear and does not lead to an "absurd or unreasonable" result, Vienna Convention, art. 32(b), no further analysis is required.

BG's claim that the court of appeals failed to consider in its Treaty analysis, among other issues, "whether Argentina's emergency measures altered the result" is factually inaccurate. Pet. Br. 24. Rather, the court of appeals took that claim into account but rejected it and, in particular, that delay would undermine the speed and efficiency expected of

arbitration and frustrate the parties' intentions: "The Treaty explicitly *requires* judicial proceedings prior to arbitration. That is, the contracting parties [*i.e.*, Argentina and the United Kingdom] specifically desired 'the delay attendant upon judicial proceedings preliminary to arbitration.'" Pet. App. 17a (quoting *John Wiley*, 376 U.S. at 558). The court stressed that "a court cannot lose sight of the principle that led to a policy in favor of arbitral resolution of international trade disputes: enforcing the intent of the parties." *Id*. 19a.

If there was any failure to consider "BG's alternative bases for the tribunal's jurisdiction," Pet Br. 24, it is because BG did not present any such arguments to the court of appeals.[23] The court cannot be faulted for not considering an argument of which BG thought so little that it did not raise it. *See United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001) (declining to entertain an argument set forth by petitioner "when those arguments were not pressed in the court whose opinion we are reviewing"); *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." (internal citations omitted)).

More fundamentally, none of these arguments is tied to the Vienna Convention itself or concern any of

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[23] BG did not present an argument based on the MFN clause or on supposed delay in the court of appeals, *see* BG D.C. Cir. Br. 10-17, and only mentioned those matters in the district court in describing the tribunal's decision, not as grounds for the district court's ruling, *see* Mem. of P. & A. 18-19.

the means of construction provided in Article 31. While Article 32 allows resort to supplemental materials if the text is ambiguous or would lead to an "absurd" result, those supplemental materials are things like "the preparatory work of the treaty and the circumstances of its conclusion." Vienna Convention, art. 32. BG makes, and made, no reference to any preparatory works of the Treaty or circumstances of the conclusion of the Treaty in advocating a different interpretation, nor – importantly – did the tribunal itself rely on these sources. *See* Pet. App. 161a-171a. Moreover, no resort to supplemental materials was needed in this case, as the Treaty is clear on its face in requiring recourse to local courts.

The court of appeals was correct, in any event, in not crediting the arguments BG made to the tribunal or the tribunal's own reasoning for disregarding the clear requirement of Argentina and the United Kingdom that their respective courts would have the opportunity to resolve disputes before being brought to arbitration. International law provides that "jurisdiction is based on the consent of the parties and is confined to the extent accepted by them." *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and Admissibility of Application, 2006 I.C.J. 6, 39 (Feb. 3); *see also*, *e.g.*, *Fisheries Jurisdiction Case (Spain v. Canada)*, Jurisdiction of the Court, Judgment, 1998 I.C.J. 432, 453 (Dec. 4) ("Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court." (internal citations omitted)).

The contracting States' purpose – to afford their own tribunals the opportunity to resolve disputes – is not undermined in the least by the arguments on which BG and the tribunal relied. The Treaty requires such recourse, and there is no basis to find futility and thus nothing "absurd" here. Before the arbitral tribunal, BG argued that it was unlikely to obtain a final decision in the Argentine courts in less than six years, which in its view rendered the requirement to pursue such recourse for eighteen months "senseless." Pet. App. 6a, 163a. But futility "requires more than one side simply proffering its best estimate or prediction as to its likely prospects of success, if available recourse had been pursued," but instead requires an absolute bar to recourse. *Apotex Inc. v. United States*, Award on Jurisdiction and Admissibility, ¶ 284 (June 14, 2013); *cf. Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013) ("[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."). BG's argument therefore does not establish "futility" and should be readily rejected – as, indeed, the tribunal itself did, *see* Pet. App. 165a, and the court of appeals noted, *see id.* 6a (noting the tribunal's "reject[ion of] BG Group's arguments").

Nor does BG fare any better under the rationale of the tribunal, which the court of appeals correctly noted was adopted sua sponte. Pet. App. 17a-18a. The tribunal's argument that recourse to Argentine courts would be "absurd and unreasonable" was based on a hypothetical scenario in which the Argentine executive might intervene in a hypothetical litigation BG might have brought so as to negate its results. *Id.* 165a-171a. But this argument is no different in kind and no less

misconceived than the one the tribunal properly rejected; it amounts to a prediction about the possibility that BG might not be successful but by no means establishes that a judicial avenue was not available at the time BG brought its claim to arbitration. Moreover, as discussed *supra*, at 6-7, and as the court of appeals observed, Pet. App. 17a, the provisions to which the tribunal referred had no impact on BG's access to local courts.

While the United Kingdom and Argentina must have been aware of the possibility that some investors wishing to make a legal claim against the host State under the Treaty might claim that domestic remedies would be "futile," they still required resort to those remedies. The Treaty expressly foresees, and requires local recourse in, the very situation that BG argues would make its application futile or absurd by contemplating that the dispute may remain after a final disposition in the local courts or after eighteen months, whichever comes sooner, and, if so, allowing the investor to invoke arbitration. There is nothing absurd, unreasonable, nor futile in requiring the investor to comply with the terms of the Treaty in that event, and the court of appeals correctly so held.[24]

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[24] Thus, as was the case in *Dallah*:

> The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all. This is so . . . whatever the composition of the tribunal – a comment made in view of Dallah's repeated (but no more attractive for that) submission that weight should be given to the tribunal's 'eminence', 'high standing and great experience'.

2. The Court of Appeals' Decision Properly Would Vacate the Award Even Under a Highly Deferential Standard of Review.

Even if the litigation requirement contained in Article 8 of the Treaty constitutes a mere "procedural precondition[]" as BG incorrectly contends, Pet. Br. 41, the award still cannot stand. Under the FAA, an award made under the primary jurisdiction of the United States may be vacated even under a more deferential standard "where the arbitrators exceeded their powers" in making that award. 9 U.S.C. § 10(a)(4).

Deferential review does not mean no review at all, but no review is what the district court performed when it erroneously concluded that "it must" "[a]ccept[] . . . the arbitral panel's construction of the Investment Treaty." *See* Pet. App. 43a. On appeal, BG's argument in support of the district court was that "[b]ecause the Tribunal was, at the very least, 'arguably construing or applying the contract, a court must defer to the arbitrator's judgment.'" BG D.C. Cir. Br. 17 (internal citations omitted). But even applying that minimal standard, the court of appeals correctly concluded that annulment was required as a matter of law:

> Where, as here, the result of the arbitral award was to ignore the terms of the Treaty and shift the risk that the Argentine courts might not resolve BG Group's claim within eighteen months pursuant to Article 8(2) of the Treaty,

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Dallah [2010] UKSC 46, [30]; *cf.* Pet. Br. 25-26, 39 (adverting to credentials of arbitrators).

> the arbitral panel rendered a decision wholly based on outside legal sources and without regard to the contracting parties' agreement establishing a precondition to arbitration.

Pet. App. 2a.[25]

In short, by giving priority to investors' supposed "entitle[ment] to seek enforcement of their treaty rights" through arbitration, *id.* 165a, over the requirement in the Treaty that such disputes "shall be submitted" to local tribunals, *id*. 3a, and by falsely portraying the local recourse requirement as "an absolute impediment to arbitration," *id*. 165a, "the arbitration panel imposed its own policy choice and thus exceeded its powers," *see Stolt-Nielsen*, 130 S. Ct. at 1770. Accordingly, even under an "exceedingly narrow" standard, Pet. App. 2a, the court of appeals correctly "'conclude[d] that there can be only one possible outcome on the [arbitrability question] before us,' namely, that BG Group was required to commence a lawsuit in Argentina's courts and wait eighteen months before filing for arbitration," Pet. App. 19a-20a (quoting *Stolt-Nielsen*, 130 S. Ct. at 1770), and in that circumstance correctly vacated the award.

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[25] BG's amici erroneously criticize the court of appeals as having labeled the Vienna Convention as "outside legal sources," Professors & Practitioners Amicus Br. 22, but that was not the court's referent. Rather, the court was speaking to the Emergency Law provisions on which the tribunal relied to "shift the risk that the Argentine courts might not resolve BG Group's claim within eighteen months." Pet. App. 2a.

3. Strong Policy Reasons of Respect for Sovereignty, As Well As Accountability, Argue Against the Dilution of Judicial Review that BG and Its Amici Advocate.

BG and its amici would have the Court believe that judicial control in the context of investor-State arbitration is less important than in the commercial context, arguing for example that the objectives of the Treaty "would be undermined if the Treaty were read to allow the domestic courts of a third state (whose identity will vary from case to case) to review the arbitral tribunal's decisions *de novo*," Pet. Br. 55; *see also* USCIB Amicus Br. 15.[26] The opposite is the case.

BG's argument disregards the allocation of competence between primary and secondary jurisdictions – and, relatedly, between courts and arbitrators – under the New York Convention, which is the well-established background against which arbitration, including treaty arbitration, has taken place for decades. Considering that this case involves a treaty of the United Kingdom, it is particularly relevant that the English Court of Appeal in *Occidental* rejected the proposition that the standard of review should be diluted in a BIT case. As the *Occidental* court concluded, and contrary to BG's argument, *see*

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[26] More than two decades ago Professor Reisman cautioned courts against the "abdication of responsibility for providing some system of control over international commercial arbitration" prompted by "pressure from small segments of the bar anxious to attract more arbitral business," "asking [for] the privilege of resolving disputes without any control over anything that may be done," and who portray their narrow view as "the interests of the polity as a whole." Reisman, *supra*, at 132.

Pet. Br. 43, inasmuch as the State parties provided for arbitration, they must necessarily have expected to have the benefit of ordinary judicial oversight of the arbitral process, *see* [2005] EWCA Civ. 1116, [47]. It defies credibility to believe that Argentina and the United Kingdom – which between them have concluded dozens of BITs and are both signatories to the Convention, Pet. Br. 6 n.1 – were not aware of just this possibility.

A court's claim of power to bind a sovereign State to arbitration is no less dependent on consent, and no less momentous, than the power to displace courts in favor of commercial arbitration. The exercise of such power also implicates comity concerns, *see* U.S. Br. 22; Pet. App. 19a, which militate against diluting standards for judicial supervision, particularly in the context of investor-State arbitration, where the parties to the agreement at issue are sovereign States, signatories to a treaty. As the United States' brief highlights, "[w]hen present, conditions on the formation of an arbitration agreement – like limitations on a waiver of sovereign immunity to a suit in court – can serve important sovereign functions by limiting the terms under which the sovereign State may be subject to such proceedings against it." U.S. Br. 21. In a case under an investment treaty, no less than in private commercial arbitration, a court should satisfy itself that the parties had a valid and binding agreement to arbitrate.

Investment treaty arbitration, unlike commercial arbitration, implicates important public interests: investor-State disputes usually concern the exercise of State power, which exercise arrives with a presumption

of regularity and having been undertaken for the public good. An adverse award in the investment treaty context has public ramifications that are not present in the commercial context, given the award's potential to undermine significant regulatory measures and the fact that the award requires payment from the national treasury. It could also cause the host State and other States to adopt an unnecessarily cautious approach in the future to the formulation of public policies to avoid the burden, expense, and uncertainty of future treaty claims. Public accountability and legitimacy demand that conditions to a contracting State's consent to arbitrate be reviewed with *at least* as much care as questions of consent in a private commercial context.[27]

BG adds no credit to its position by starting its argument with ad hominem attacks on Argentina based on matters outside the record and unrelated to the question presented here. *See* Pet. Br. 28-31. This case is not a referendum on Argentina's conduct in the face of an historic economic collapse or in legal proceedings that followed. *See* U.S. Br. 5 n.1. The conduct at issue is BG's deliberate decision to ignore the terms of Argentina's consent to arbitrate, and its attempt to bind Argentina to an award rendered without jurisdiction. As to that issue, "there can be

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[27] *See generally, e.g.*, William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Sphere: The Standard of Review in Investor-State Arbitrations*, 35 Yale J. Int'l L. 283 (2010); *cf.* Park, *Arbitrability Dicta*, 12 Arb. Int'l at 147 (deference to arbitrators instead of appropriate judicial review could cause "a loss of confidence by the business community in both the arbitral system and the judiciary that enforces arbitration agreements and awards").

only one possible outcome," Pet. App. 19a, which is to uphold the decision to vacate the award.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

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